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REPORTS OF CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT OF SOUTH CAROLINA

COVERING

ALL THE CASES (LAW AND EQUITY) FROM THE ORGANIZA-
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AND INCLUDING VOLUME 25 OF THE
SOUTH CAROLINA REPORTS

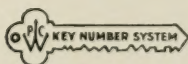
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VOLS. 3, 4 & 5, RICHARDSON'S EQUITY REPORTS



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REPORTS
OF
CASES IN EQUITY

ARGUED AND DETERMINED IN THE
COURT OF APPEALS AND COURT OF ERRORS
OF SOUTH CAROLINA

VOLUME III
FROM NOVEMBER, 1850, TO MAY, 1851
BOTH INCLUSIVE

By J. S. G. RICHARDSON
STATE REPORTER

COLUMBIA, S. C.
PRINTED BY A. S. JOHNSTON
1852

ANNOTATED EDITION
ST. PAUL
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1917

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CHANCELLORS

DURING THE PERIOD COMPRISED IN THIS
VOLUME

HON. JOB JOHNSTON,
“ BENJ. F. DUNKIN,
“ GEORGE W. DARGAN,
“ F. H. WARDLAW.

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CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT COLUMBIA, SOUTH CAROLINA—NOVEMBER AND
DECEMBER TERM, 1850.

CHANCELLORS PRESENT.

HON. JOB JOHNSTON,

" B. F. DUNKIN.

" G. W. DARGAN.

" F. H. WARDLAW. (a)

3 Rich. Eq. *1

*PAUL BOFIL and Wife CAROLINE. MARTHA R. BOFIL, HARRIET E. BOFIL, v. JOHN FISHER, SAMUEL FAIR, ROBERT LATTA, JOHN J. KINSLER, JOHN LOMAS, ELI KILLIAN, JOHN WHEELER, JOHN A. CRAWFORD, EDWIN J. SCOTT, JAMES D. TRADEWELL, JOSEPH E. FRY, BENJAMIN RAWLS, ALEXANDER HERBEMONT, Jr., MARY E. BOFIL.

(Columbia. Nov. and Dec. Term, 1850.)

[*Infants* ⌘33.]

That the Court of Equity has the power to sell the estates, whether vested or contingent, of infant remainder-men, who are parties before the Court, is unquestionable; the Court also has the power to bar, by its decree for sale of the property, the interests of unborn contingent remainder-men, and of contingent remainder-men, residing abroad, whose names and places of residence are unknown, and who of course cannot be made parties before the Court.

[Ed. Note.—Cited in *Williman v. Holmes*, 4 Rich. Eq. 476; *Bouknight v. Brown*, 16 S. C. 170; *Pearson v. Carlton*, 18 S. C. 58; *Leroy v. City Council of Charleston*, 20 S. C. 78; *Moseley v. Hankinson*, 22 S. C. 329; *De Leon v. Barrett*, Id., 422, 423; *Faber v. Faber*, 76 S. C. 161, 162, 56 S. E. 677; *Hunt v. Gower*, 80 S. C. 83, 61 S. E. 218, 128 Am. St. Rep. 862.

For other cases, see *Infants*, Cent. Dig. § 66; Dec. Dig. ⌘33.]

[*Life Estates* ⌘27.]

In such cases, the Court acts upon the property, and, by the sale under its decree, vests a fee-simple title in the purchaser; the rights of

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all the parties in interest are *transferred from the property to the fund arising from the sale.

(a) Elected during the term.

and, so far as it is practicable, are protected; and should the fund be afterwards lost, the original rights of the parties to the property are not thereby revived.

[Ed. Note.—Cited in *Powers v. Bullwinkle*, 33 S. C. 302, 11 S. E. 971; *Mauldin v. Mauldin*, 101 S. C. 7, 85 S. E. 617.

For other cases, see *Life Estates*, Cent. Dig. § 49; Dec. Dig. ⌘27.]

[*Infants* ⌘39.]

To a bill for such a sale, it is sufficient, it seems, if the person holding the life estate, and all other persons in esse, who have an interest and are known, are made parties.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 85-89; Dec. Dig. ⌘39.]

[*Infants* ⌘39.]

The order for sale is a matter of discretion with the Court, and may be confined to a part only of the property.

[Ed. Note.—Cited in *Kolb v. Booth*, 80 S. C. 510, 61 S. E. 942.

For other cases, see *Infants*, Cent. Dig. §§ 85-89; Dec. Dig. ⌘39.]

[This case is also cited in *Kolb v. Booth*, 80 S. C. 511, 61 S. E. 942, that where life tenant is improvident the court may direct investment of principal fund.]

Before Dargan, Ch., at Columbia, June, 1850.

Everything necessary to a full understanding of this case, is stated in the opinion delivered in the Court of Appeals.

W. F. DeSaussure, for the appellant.
Tradewell, contra.

DARGAN, Ch., delivered the opinion of the court.

The late Nicholas Herbemont, by his will, dated the 3rd of September, A. D. 1836, de-

⌘ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

vised and bequeathed his whole estate, real and personal, after the death of his wife, to his grand-son, Paul Bofil, during his life, to be put in his possession when he should attain the age of twenty-one years. The will further provides: "should he (Paul Bofil) die, leaving a wife and children alive at the time of his death, I devise and bequeath one-fourth of said estate to his wife, and the remaining three-fourths to his child or children, including the descendants of any one that may have died before him. Should the said Paul Bofil die, leaving no widow, I devise ~~the~~ whole of my estate to his children living at his death, including the descendants of any that may have died during his life. Should he die, leaving no children or descendants living at his death, I devise and bequeath to his widow one-fourth, and the remaining three-fourths I devise and bequeath as follows: to wit, one-half to my grand-son, Alexander Herbemont, and such other children as my son Alexander, by his present or any future marriage, may have living at that period, and the descendants of any that may have died; and the other half to such of my relations in France, then living, as may be entitled to inherit from me as

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next of kin, *according to the laws of this State, if I had died without lineal descendants. To give effect to this bequest, I direct that the half thus allotted to them be taken from the personal property, as they cannot hold real estate."

"If the said Paul Bofil should die, leaving neither wife nor child, nor other lineal descendants alive at the time of his death, then the provision made for his widow, in the last clause above, I devise and bequeath as the other property mentioned in that clause."

By the seventh clause of the second codicil, the testator directs that the following words be added to the foregoing clause, at the end thereof, to wit: "So that my said grand-son shall take absolutely one-half of my whole estate, and my next of kin in France shall take the other half."

When Paul Bofil attained the age of twenty-one years, he was put in possession of the property, according to the directions of the will. Having become largely indebted, judgments were recovered against him, and executions lodged, by virtue of which, his life estate in the greater portion of the property left to him by his grand-father, has been sold by the sheriff. The sales by the sheriff, and the voluntary sales by Paul Bofil himself, embrace all the real estate; and the personal property has been entirely dissipated. Paul Bofil has contracted matrimony, and has a wife, who is living, and several children, who are infants, all of whom, with the wife, are parties in proper form to these proceedings. Having wasted his entire estate, and having no profession or trade, he is un-

der the necessity of earning a scanty subsistence for himself and family, by his wages as a common laborer. They are reduced to the lowest state of poverty and destitution. And the children, with a comfortable estate in expectancy, contingent upon the death of their father, are, in the mean time, suffering from hunger and nakedness, and are being brought up without education, either mental or moral.

The sales by the sheriff, as well as those made voluntarily by Bofil himself, were at very inadequate prices, when the prices are considered in reference to the fee-simple val-

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ue of the pro*perty. But the real estate consists principally of unimproved lots in the town of Columbia, with several tracts of land in the district of Richland. The purchasers cannot with any safety or prudence improve real estate, the title of which, as to duration, is so uncertain. Under these circumstances, the purchasers of these lots and lands, who are parties to this bill, are willing to surrender their titles, on having the purchase money repaid to them; provided the Court will undertake to sell the fee-simple of the property, and, from the fund thence arising, to repay the purchase money with the cost of the proceedings, and from the residue, create a fund from the interest or dividends, on which a present support may be provided for the support and maintenance of Paul Bofil and family. The Bofils and the purchasers of the property who hold a life estate, concur, and the guardian ad litem of the infant parties deem it advisable and greatly to the interest and comfort of the family, that the prayer of the bill should be granted.

The cause was heard at June Term, 1850. The presiding Chancellor ordered it to be referred to the Commissioner to report upon the facts, and the Commissioner at the same Term submitted his report, in which he states the prices at which the different lots and tracts of land were sold, and their estimated present value, which he arrives at by the examination of testimony. From this report it appears that the present estimated value of the fee in the lots and tracts very far exceeds the prices for which the estate of Bofil in the same has heretofore been sold either by the sheriff or himself. It thus appears, that by the sale of only a portion of the estate in fee, a fund could be raised by which the prices paid by the purchasers, (which they are now willing to take without interest,) could be refunded to them, leaving a balance that might be invested for the benefit of Bofil and his family, yield them a permanent and comfortable support, and at the same time be preserved, to be hereafterwards disposed of according to the directions of the will of Nicholas Herbemont.

Under these circumstances, the Circuit

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Court decreed a sale *in fee of certain lots and portions of the said real estate designated in the decree, aiming to raise the sum of ten thousand dollars, or thereabouts, to be invested for the purposes and in the manner prescribed in the circuit decree, the particulars of which are not necessary to the full understanding and decision of this appeal.

From this decree an appeal has been taken on the part of Mary J. Bofil, one of the defendants, and an infant child of Paul Bofil, who moves to reverse the decree, on the ground "that this Court has not jurisdiction or authority to order the sale of her contingent interest in the estate devised to her by her grand-father, nor of the interest of such other children as Paul Bofil may hereafter have, and who may be living at his death; nor of the interest of the contingent remainder-men in France, who are not parties; and that the purchaser can acquire no valid title in fee to the premises which may be sold under such circumstances."

The appeal brings up a great and important question, which was much discussed, but which was left undecided, in the case of *Van Lew v. Parr*, (2 Rich. Eq. 321.) It is a matter of great surprise, that a question like this, constantly arising or likely to arise out of the daily transactions in the Court of Equity, should have been so long deferred.

If, under the circumstances of this case, an order for sale in Chancery should be insufficient to confer a valid title upon the purchaser, I apprehend the title to an inconceivable amount of property in South Carolina would be put in peril. And were there stronger reasons than do actually exist, to doubt the authority of this jurisdiction in the particular mentioned, the Court would hesitate long before it would announce a judgment which would shake, perhaps, one-fourth of the titles in the State.

The difficulty, if any exists, does not lie in the first branch of the appeal, which relates to the right of the Court to sell the contingent interest of Mary J. Bofil, who is an infant child of Paul Bofil, and a party defendant, by guardian ad litem, to the bill. The right of the Court to sell either the vested

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or contingent estates of infants, who can be and are properly made parties before it, cannot at this day be questioned. But the question is, whether the Court has the power, by its decrees, to alienate the contingent titles of unborn remainder-men, who, from the nature of things, cannot be made parties, or be represented in the proceedings before the Court; or to alienate the contingent titles of persons, who, though in esse, are resident in other States, or in foreign lands, whose residences and even whose names are unknown.

To say that the Court could not under circumstances like these convey away the fee,

would be to assert a doctrine that would render conditional limitations and contingent remainders an intolerable evil to a growing and prosperous community. Thus to shackle estates without the power of relief, unless every person having a contingent and possible interest could be brought before the Court, as a party complainant or defendant, according to the usual forms and ordinary practice of the Court, would be to sacrifice the rights and interests of the present generation to those of posterity, and of citizens to aliens. If the whole property of the country were thus situated, it is obvious that all improvement and advance would be completely checked. And this check upon progress and improvement would be in direct proportion to the extent to which this state of things exists. The case before the Court is an apt illustration. Here are valuable unimproved lots, in a thriving and prosperous town, which the life-tenant cannot with a due regard to his interest improve, and the remainder-men cannot, because their rights are contingent and may never vest. Here also is a suffering family, who may obtain relief by the action of the Court. And they are the first objects of the testator's bounty. Is there no power in the State, by which the titles of estates may be unfettered from the contingent claims of unborn remainder-men, and their rights not extinguished, but transferred from the property itself to a fund arising from the sale of the property? I think there should be; I think there is.

The rules of practice in this Court as to

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parties are rules *adopted for convenience, and are oftentimes matters of discretion. If all persons interested, who can be made parties, are brought before the Court, it is sufficient. The Court will go on and try the cause, though it should appear that persons having more remote interests are not represented.

But will the decree of the Court conclude the rights of parties who are not before it? In some cases it will. In cases like the present it will. The Court by its decree acts on the property and disposes of that; while the fund arising from the sale is to be managed under the direction of the Court, in its administrative department. The rights of all the parties in interest will be transferred from the property to the fund, and will be protected by the Court, so far as that is practicable. Nevertheless, if by maladministration, the faithlessness of the officers of the Court, or by any of the untoward accidents of life, the fund should be lost, the original rights of the parties to the property are not thereby revived, but they are concluded. The compensation to them is their interest in the fund arising from the sale, which the Court always means to preserve, and to administer according to the scheme of settlement.

It is necessary to the best interests of so-

ciety, as I have before intimated, that there should be a power lodged in some judicial tribunal, authorized, in certain exigencies, to unfetter the titles of estates; otherwise they might be shackled to an inconvenient extent. In England, the tenant for life, by suffering fine and recovery, in which he alone is a party, may cut off all contingent limitations and remainders. In that country, Courts of Equity are in the habit, under certain exigencies, of doing the same thing in respect to the title, but with a more just regard to the rights of the remainder-men; for when that Court, by a sale, divests the title of the contingent remainder-men in the property, it preserves for them the fund.

Upon the principle that in an estate tail the tenant for life is the representative of all those who are to succeed him in the enjoyment of the estate, (who take through him derivatively, and by inheritance,) it is held

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sufficient in England, in all ques*tions affecting the title to the estate, to make the tenant for life a party, when no other person in esse is to be found having an interest. In *Giffard v. Hort*, (1 Sch. & Lef. 408.) Lord Redesdale says: "Courts of Equity have determined, on grounds of high expediency, that it is sufficient to bring before the Court the first tenant in tail in being, and if there be no tenant in tail in being, the first person entitled to the inheritance, and if no such person, then the tenant for life." He further says: "It has been repeatedly determined, that if there be tenant for life, remainder to his first son in tail, remainder over, and he is brought before the Court before he has issue, the contingent remainder-men are barred. This is now considered the settled rule of Courts of Equity, and of necessity; and the danger of holding otherwise in the present case, would induce me to hesitate very much, even if I thought that there was less authority on the subject."

In the case now before the Court, there are no persons having any vested interest or title in the property, except the purchasers of Paul Bofil's life estate; and they, with Bofil, and every other person in esse who has a possible future interest in the estate, except the relations in France, (whose names and very existence are unknown,) are made parties to these proceedings in proper form. This is deemed by the Court entirely sufficient to authorize it to act, and make the titles of the purchasers valid under the sale that has been ordered.

The other ground of appeal is, "because the order did not embrace all the lands devised to Paul Bofil by the testator, Nicholas Herbe-mont." The order for the sale was a matter

of discretion for the Court. The object of the Chancellor was to raise a fund, the interest or income of which would be sufficient to yield a present and comfortable support to Paul Bofil and his family. And as the lots, omitted in the order of sale, are at present not valuable, and the difference in the price given for the life estate and the fee simple value not very great, and as the said lots may be much appreciated in value by the time the estate of the remainder-men falls in, this Court thinks that the discretion of the Chancellor was properly exercised in omit-

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ting *said lots in the order for sale. Nevertheless, leave is hereby given to the parties to apply, at the foot of this decree, at any time hereafter, for an order for the sale of said omitted lots; it being incumbent upon the parties so applying, to make out a case proper for the interference of the Court.

The order of sale by the Circuit Court is unconditional. A peremptory sale of the lots and land might be attended with a sacrifice. They might, under these circumstances, be sold for much less than the estimated value. The whole object of the sale might thus be defeated, and the interests of the remaindermen sacrificed and lost, without any adequate compensation for their rights in the property. It is most expedient, therefore, that the property should not be offered at a peremptory sale, but that the Commissioner should offer each lot and tract of land at the estimated price or value named in his report as the first bid, to be knocked off at that sum if there should be no higher bid. The decree must be modified in conformity with these views. And it is so ordered and decreed.

From the great improvidence of Paul Bofil, it appears to this Court that it would be improper to entrust him with the administration and disbursement of the dividends arising from the fund. So much of the circuit decree as directs the mode of investment, and that the dividends be paid on the joint application and receipt of Paul Bofil and wife, must be rescinded; and it is so ordered and decreed. It is further ordered that the Commissioner report a scheme for the investment and preservation of the capital fund, and for the prudent disbursement of the annual income arising therefrom.

It is further ordered and decreed that the appeal be dismissed, and that the circuit decree, with the modifications above declared, be affirmed.

JOHNSTON, DUNKIN, and WARDLAW,
CC., concurred.

Decree modified.

3 Rich. Eq. *10

*THOMAS MOORE and Wife and Others v.
ALEX. McWILLIAMS and Others.

(Columbia, Nov. and Dec. Term, 1850.)

[Wills \S 116, 712, 865.]

Under the Stat. 25 Geo. 2, of force in this State, all devises and bequests to an attesting witness, or to the wife of an attesting witness, to a will, disposing of real and personal property, are null and void; the witness is competent; the other parts of the will stand good; the property embraced in the void devises is distributable as intestate property; and the witness, if he be an heir, is entitled to his distributive share of the same.

[Ed. Note.—Cited in *Noble v. Burnett*, 10 Rich. 520.

For other cases, see Wills, Cent. Dig. \S 287, 1693, 2198; Dec. Dig. \S 116, 712, 865.]

Before Dargan, Ch., at Laurens, June, 1849.

From the circuit decree in this case, some of the parties appealed, and now moved this Court that the decree be reversed.

Sullivan, for the motion.

Irby, contra.

DARGAN, Ch., delivered the opinion of the Court.

This is a bill for the partition of a certain portion of the real estate of Samuel McWilliams, among the devisees named in his will. The will disposes of both real and personal property, but no question arises in this case as to the personality.

The testator gave to his son, Alex. McWilliams, all his real estate lying west of Cane Creek, to have and to hold forever. He then declares as follows: "all the rest of my estate, both real and personal, of what nature and quality soever it may be, not herein before particularly disposed of, I desire may be sold and equally divided among my several children," &c. It was for the partition of the lands embraced under the last quoted clause, that this bill was filed.

The principal question in the case relates to the validity of the will. By some of the parties it is contended that the will is void for the want of the legal attestation, and that the lands described in the bill are to be distributed as intestate property. The facts as to the attestation are these. There were four subscribing witnesses to the will, namely, Joseph Ball, William McGowen, Mary McWilliams and Pleasant Newby. The first

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*is the only witness whose competency is not contested. Pleasant Newby affixed his signature to the will, as a subscribing witness, at the distance of two miles from the presence of the testator. His signature is of course a nullity. Mary McWilliams is the daughter of the testator, and one of the devisees and legatees under the will, and William McGowen is the husband of one of

the testator's other daughters, who is also one of the devisees and legatees. If Mary McWilliams and William McGowen are not incompetent witnesses, the will is valid, and a partition of the land must be ordered under the provisions of the will. The presiding Chancellor decided that the devises and legacies to Mary McWilliams, and the wife of William McGowen, were void under the Statute of the 25 Geo. 2, ch. 6; that they were thus rendered competent as subscribing witnesses, (having no interest under the will,) and that, therefore, the will was valid. He ordered a partition of the lands embraced in the general devise of the will, among all the testator's children, except Mary McWilliams and Mrs. McGowen, whom he excluded. And this is an appeal from that decree, on the ground "that the supposed will of Samuel McWilliams is void for want of execution, according to the provisions of the statute in such case made and provided."

The Statute 25 Geo. 2, ch. 6, has been at various times acknowledged to be of force in South Carolina by Legislative enactments, and in judicial opinions and proceedings. For the history, time and manner of these legislative and judicial recognitions, see *Taylor v. Taylor*, (1 Rich. 531.) in which the statute of Geo. was authoritatively recognized. See also *Workman v. Dominick*, (3 Strob. 589.)

The first enacting clause in the Stat. 25 Geo. 2, is as follows: "that if any person shall attest the execution of any will or codicil which shall be made after the twenty-fourth day of June, in the year of our Lord one thousand seven hundred and fifty-two, to whom any beneficial devise, legacy, estate, interest, gift or appointment, of or affecting any real or personal estate, other than and except charges on lands, tenements and

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hereditaments, *for payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of said Act, (29 Charles the second,) notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will or codicil," (2 Stat. 580.)

Under the provisions of this Act, there can be no doubt as to the validity of Samuel McWilliams's will. The devises and legacies to Mary McWilliams and Mrs. McGowen are void. They are expunged and stricken out of the will. The case is to be considered as if they never had been inserted. The objection as to their incompetency from interest, is thus entirely removed, and there is no other objection against them as subscribing witnesses. All the other parts of the will

stand. That alone is void which attempts to give a benefit to a subscribing witness.

There is a point involved in the case, which has been overlooked in the discussion both in this Court and in the Circuit Court. The decree of the Circuit Court gives the property embraced in the void devises, to be divided among those of the testator's children whose devises were not void. This is erroneous. The lands embraced in the void devises are intestate property, and must be divided as such. In regard to this, all the children are equally entitled, as well those whose devises were void, as those whose devises are valid. And the circuit decree must be modified accordingly.

It is ordered and decreed that the lands embraced in the void devises to Mary McWilliams and Mrs. McGowen, be divided among all the children of Samuel McWilliams, as in cases of intestacy. In all other respects the circuit decree is affirmed, and the appeal dismissed.

JOHNSTON and DUNKIN, CC., concurred.
Decree modified.

3 Rich. Eq. *13

*Ex parte.—THE COMMISSIONER IN EQUITY FOR LANCASTER DISTRICT, In the Matter of DR. G. L. MASSEY, Deceased, Former Guardian of Jane E., Mary R., Sarah A., and Wm. H. Massey.

(Columbia. Nov. and Dec. Term, 1850.)

[*Executors and Administrators* Ⓒ495; *Guardian and Ward* Ⓒ151.]

Where an administrator, having the fund of an infant in his hands, is appointed his guardian, he has the right, as administrator, to charge two and a half per cent. commissions for transferring the fund to himself as guardian, and, as guardian, the right to charge two and a half per cent. for receiving it.

[Ed. Note.—Cited in *Floyd v. Priestner*, 8 Rich. Eq. 252; *Griffin v. Bonham*, 9 Rich. Eq. 83.]

For other cases, see *Executors and Administrators*, Cent. Dig. § 2089; Dec. Dig. Ⓒ495; *Guardian and Ward*, Cent. Dig. § 499; Dec. Dig. Ⓒ151.]

Before Dargan, Ch., at Lancaster, June, 1850.

This case came before the Court on the report of James H. Witherspoon, Commissioner, as follows:

"Dr. G. L. Massey, late of the district, deceased, was the administrator de bonis non of William Massey, the father of the said wards, and afterwards was appointed by this honorable Court the guardian of their persons and estates. Dr. Massey has departed this life, and the guardianship of Jane E. & Mary R. has been committed by this Court to Thos. K. Cureton, Esq., and the guardianship of Sarah A. & Wm. H. Massey, to Wm. J. Cureton, Esq. The only question made in the settlement between the administrator of the deceased guardian, and

the present guardians, is, what commissions the deceased guardian should be allowed; whether he should receive full commissions as administrator, and also full commissions as guardian. The Commissioner not finding any adjudicated case on the question, and understanding that conflicting opinions are given as to the same, respectfully submits the question, and asks the direction and instruction of this honorable Court."

Dargan, Ch. In this case, I am of the opinion that the late G. L. Massey was entitled, as administrator de bonis non, for paying to himself, as guardian, the money of his wards, to charge two and a half per cent. on the amount thereof. And, as guardian, he was entitled to two and a half per cent. on the same sum for receiving it as

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guardian. He is entitled to no *commissions at all for paying it out as guardian, for he has not lived to pay it out in that character; his legal representative pays it to the successor in the guardianship, as a common debt, for which he is not entitled to commissions.

It is so ordered and decreed.

The guardian of Jane E. and Mary R. Massey appealed, on the ground that the administrator and guardian, being the same person, was not entitled to receive two sets of commissions, one as administrator for paying to himself as guardian, and one as guardian for receiving from himself as administrator.

J. Williams, for appellant.

DARGAN, Ch., delivered the opinion of the Court.

This Court is of the opinion that the circuit decree is correct. The Act of 1789, (5 Stat. 112,) which, in this particular, is a re-enactment of the same provision of the Act of 1745, (a) gives to an executor or administrator two and a half per cent. on all sums which he "shall pay away in credits, debts, legacies, or otherwise," during the course of his management or administration. This is intended as a compensation for his care, labor and hazard, in the performance of his duties in his office or trust, as executor or administrator. When the same person is appointed guardian of the legatee, or distributee, (as the case may be,) the fund of his ward is transferred, by operation of law, from him, in his character as executor or

(a) The 11th section of the Act of 1745, is not either in Grimke or in the Statutes at Large, and it is not correct, as is said in both those compilations, that it is re-enacted by the Act of 1789, (vide 3 Stat. 668; P. L. 202; 5 Stat. 112.) The Act of 1745 gives commissions to "every guardian or trustee," as well as to executors and administrators; the Act of 1789 is confined to executors and administrators; see 1 Brev. Dig. 392; *Muckenfuss v. Heath*, (1 Hill. Eq. 183.) R.

administrator, to him, in his new character as guardian. He is henceforward liable in the character of guardian, and is released from his liability as executor or administrator, and his sureties, which he has given in the latter character, are discharged. The payment to the guardian is a payment to the ward; and it is a paying to the legatee, or distributee, of whom he has become the

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guardian, when it is *paid by operation of law, as well as when it is by actual payment. The case is different where a new guardian is appointed and receives from his predecessor the wards' funds. There the money is transferred from one to another in the same office, and the law allows but one commission.

When one who was an executor or administrator becomes the guardian, he assumes an entirely new trust or office, with new and different duties and responsibilities, which office may continue with all its burthens and liabilities for a long period of time.

For the performance of this trust, the law also allows two and a half per cent. for receiving and paying out. If another person had become the guardian, the right of the guardian to charge two and a half per cent. for receiving the fund, and of the executor to charge that commission for paying that fund to the guardian, would have been undisputed. Here there is but one person, but two distinct offices, or trusts, and the law allows the same compensation in both. The principle is the same where one person performs both trusts. The appeal is dismissed and the decree affirmed.

JOHNSTON and WARDLAW, CC., concurred.

Appeal dismissed.

3 Rich. Eq. 15

H. C. BRIGGS v. A. W. HOLCOMBE,
Adm'r, et al.

(Columbia. Nov. and Dec. Term, 1850.)

[*Executors and Administrators* 496.]

An administrator is entitled to ten per cent. commissions on interest, only where the interest is made by letting out money and receiving it in annually, by which it is made an accumulating fund, or where he suffers it to accumulate in like manner in his own hands; where he retains the money himself, and is charged only with simple interest, he is entitled only to the usual commissions of two and a half per cent. for receiving, and two and a half per cent. for paying it away, or, in other words, to five per cent. on the interest.

[Ed. Note.—Cited in *Bobo v. Poole*, 12 Rich. Eq. 227.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2112; Dec. Dig. 496.]

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*Before Johnston, Ch., at Pickens, June, 1850.

The accounts of the administrator had

been referred to the Commissioner, who reported a balance due by him, in 1844, charged him with simple interest only, and allowed him ten per cent. on the interest as commissions. The complainant excepted to the allowance of ten per cent. on the interest. His Honor overruled the exception, and the complainant appealed.

Townes, for the appellant.

Perry, contra.

JOHNSTON, Ch., delivered the opinion of the Court.

The decree appealed from, was made by myself on a report by the Commissioner upon the accounts of an administrator, and exceptions thereto. By the report, the administrator was charged with the funds in his hands, allowing proper credits, and calculating simple interest in the ordinary mode, without annual rests.

The decree allowed the administrator ten per cent. commissions on the interest part of the account, and the appeal alleges that this allowance was erroneous.

The statute upon the subject is that of 1789, (P. L. 495; 5 Stat. 112.) the 29th section of which is as follows: "every executor or administrator shall, for his" "trouble and attendance in the execution of" his "duties, take," "or retain in his" "hands, a sum not exceeding the sum of 50 shillings for every 100 pounds which he" "shall receive, and the sum of 50 shillings for every 100 pounds which he" "shall pay away, in credits, debts, legacies, or otherwise, during the course of" "administration; and so, in proportion, for any" "sums less than 100 pounds. Provided, that no executor or administrator shall, for his" "trouble in letting out any monies upon interest, and again receiving the same, be entitled to take or retain any sum exceeding 20 shillings, for every 10 pounds, for all sums arising by monies let out to interest; and in like proportion for a larger or lesser sum."

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*In *Taveau v. Ball*, (1 McC. Eq. 462,) it was held that an executor was entitled to two and a half per cent. for receiving money; ten per cent. upon the interest made by him on it; and two and a half on the capital and interest finally paid over by him to the party entitled.

In *Wright v. Wright*, (2 McC. Eq. 196,) it was held that the executor is entitled to ten per cent., on interest, only when the interest is made by letting out money, and receiving it in annually, by which it is made an accumulating fund, or when the executor suffers it to accumulate in like manner in his own hands. This decision must be taken as a modification of the judgment in *Taveau v. Ball*.

In *Massey v. Massey*, (2 Hill Eq. 495,) where the claim was for two and a half per

cent. in addition to ten per cent. for interest made, the claim was overruled, which was sufficient for that case; but the Chancellor proceeded to give his interpretation of the statute, which was, that two and a half per cent. was allowed for letting out to interest, and two and a half for taking in again, until the commissions amounted to ten per cent. on the interest made, at which, as a maximum, the commissions on interest must stop.

It is sufficient for this case, however, that by the decision in *Wright v. Wright*, limiting the previous case of *Taveau v. Ball*, ten per cent. cannot be allowed on the interest; inasmuch as it was not made an annually accumulating fund; and that the administrator is only entitled to two and a half per cent. for receiving, and two and a half per cent. for paying it away, (in other words to five per cent. on the interest.)

It is ordered, that the decree and the report be reformed accordingly.

DUNKIN and DARGAN, CC., concurred.
Decree reformed.

3 Rich. Eq. *18

SAMUEL DONNELLY, Guardian, and
JAMES B. and JULIET E. EWART, Wards,
v. DAVID EWART, Former Guardian.

(Columbia. Nov. and Dec. Term, 1850.)

[*Equity* ⚡271.]

Leave given to complainants, after final decree pronounced, to amend a purely clerical error in their bill.

[Ed. Note.—Cited in *Verdier v. Verdier*, 12 Rich. Eq. 142.

For other cases, see *Equity*, Cent. Dig. § 560; Dec. Dig. ⚡271.]

Before Dargan, Ch., at Chambers, May, 1850.

Complainants moved the following order, to wit: "that the complainants have leave to amend, nunc pro tunc, the bill in the case stated, by alleging that David Ewart gave bonds to the Commissioner of this Court; one bond in the sum of twenty-four thousand dollars, conditioned for the faithful discharge of his duty, as guardian of James B. Ewart, dated the tenth day of September, eighteen hundred and thirty-six, with John McMillan as surety to said bond; also one other bond in the like sum of twenty-four thousand dollars, conditioned for the faithful discharge of his duty as guardian of Juliet E. Ewart, dated the same day and year last aforesaid, with the said John McMillan as surety thereto."

In support of the motion, it appeared that the bill was filed in January, 1846; that it recited the bonds given by David Ewart, as guardian, stating the penalty of each to be in the sum of twenty thousand dollars; that in June, 1847, a final decree was pronounced

in favor of complainants against David Ewart, for near six thousand dollars; and that the amount of the penalty of each bond was, in fact, twenty-four thousand dollars. The error, it was alleged, arose from the circumstance, that a memorandum of the bonds, placed in the hands of the Solicitor who drew the bill, was not very legible.

His Honor, the Chancellor, refused the motion; and the complainants appealed.

W. F. DeSaussure, for appellant.
Gregg, contra.

DUNKIN, Ch., delivered the opinion of the Court.

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*It is not doubted that Courts of Law, as well as of Equity, have authority to correct their own records.

The expediency of exercising the power must necessarily depend upon circumstances. In *Wallis v. Thomas*, (7 Ves. 292,) although the decree had been passed and entered, the Court entertained an application to rectify a clerical error which had crept into the decree; and in several other cases the Court has extended the indulgence of rectifying decrees in which there have been clerical mistakes, to decrees which have been actually enrolled. (Coop. Rep. 134.) And in *Spearing v. Lynn*, (2 Vern. 376,) leave was given to amend the title of an order which appears to have been enrolled, although the effect of the alteration was to charge a surety who had been sued at law under the order, and relying upon the mistake in title of the order, had pleaded that there was no such order. See *Danl. Prac.* 1233.

The error now sought to be amended was not only purely clerical, but it was entirely unimportant. The proceeding was by the wards, against their former guardian, for an account. For the purposes of the case, the amount of the bond was not only immaterial, but it was equally immaterial whether he had given any bond at all. His undertaking the office and the receipt of their funds were sufficient to charge him. The recovery might have been for five times the amount of his guardianship bond. Why it should have been deemed necessary to recite the fact of giving the bond, is not very clearly perceived. The surety was no party to the proceeding. Still the recital was not irregular, and the complainants only seek to rectify the clerical error, so that the recital may be in conformity with the fact. The records of the registry afford the means of shewing the error and of correcting it.

The recovery against the defendant Ewart, who alone is entitled to be heard in the case, is less than one-fourth of either of his bonds.

We are of opinion that the order submitted

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by the complainants' solicitor should have

been granted, and it is now so ordered and decreed.

JOHNSTON, C., concurred,
Motion granted.

3 Rich. Eq. 20

NANCY MURPHY, by Her Next Friend, v.
DAVIS CALDWELL, and Others.

(Columbia. Nov. and Dec. Term, 1850.)

[*Husband and Wife* ⇨ 116.]

A parol gift of a slave to a trustee, to the separate use of a married woman, held valid, as against a creditor of the husband, although the slave went into the possession of the wife, the husband having the custody as property held by the trustee for his wife.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 416; Dec. Dig. ⇨ 116.]

Before Johnston, Ch., at Newberry, July, 1850.

This case will be sufficiently understood from the decree of his Honor, the presiding Chancellor, which is as follows:

Johnston, Ch. The bill was filed by Nancy Murphy, the wife of Tarlton Murphy, by her next friend, against Davis Caldwell, Simeon Fair, Robert Moorman, and the said Tarlton Murphy.

In 1838, Davis Caldwell obtained judgment in the common pleas for a large sum of money, and lodged his execution against Tarlton Murphy.

In 1842, he made an assignment of all his effects, including this judgment, to Simeon Fair, in trust for his creditors; and the effects assigned have turned out to be insufficient for the payment of his debts. Mr. or Mrs. Murphy had possession of two families of slaves, one called the Sims negroes, and the other the Buzzard negroes. And, in 1843, a question was raised, whether these slaves were not liable to be taken for satisfaction of said execution. By direction of a committee of the creditors, the question was submitted to Gen. Caldwell, then practicing

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*law, and his advice was such, that the committee instructed the assignee not to have the negroes levied on, and he forebore to do so. Davis Caldwell was not satisfied; and in 1849, he obtained from the assignee permission to have the negroes levied on, at his own expense; and he accordingly procured them to be levied on by the sheriff of Fairfield district. He does not claim that the Sims negroes are liable to be taken under the execution; but he insists that the Buzzard negroes are so liable.

The complainant is the illegitimate daughter of Mrs. Buzzard. About 1828, Mr. Murphy became insolvent. In 1830, Mrs. Buzzard died, and her property was sold. The negro woman Susan, from whom the rest of the Buzzard negroes have sprung, was bid off by Thomas H. Henderson.

The next of kin of Mrs. Buzzard consented that this negro should be secured to the separate use of Mrs. Murphy, and Mr. Henderson bid her off for that purpose. He paid nothing for her, and was to hold the title until a trustee should be appointed. The negro went into possession of Mrs. Murphy—Mr. Murphy having the custody of her as property held by Henderson for his wife.

In 1839 an order of this Court was passed, appointing Robert Moorman trustee of Mrs. Murphy, to take charge of all the property to which she was entitled as her separate estate; and requiring him to give bond for the faithful performance of the trust. He declined to give the bond, and said he would not accept the trust on that condition. He did, however, receive the property from Henderson, who turned it over upon his appointment, and acted as the agent of Mrs. Murphy in hiring out some of the negroes, and applying the hire to her use.

Mr. Fair knew in 1842, and some years before that time, that Mrs. Murphy claimed the Buzzard negroes as her separate property.

I am of opinion, that the Buzzard negroes are the separate property of Mrs. Murphy, and not liable to be seized under execution as the property of Tarlton Murphy.

It is, therefore, ordered, that the defend-

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ants, Davis Caldwell *and Simeon Fair, do release the slaves mentioned in the bill from the levy made by the sheriff of Fairfield district, and cause the said slaves to be restored to the possession of the complainant; and that the said defendants be perpetually enjoined from seizing or attempting to seize said slaves under said execution; and that a writ of injunction do issue so to enjoin and restrain them.

It is further ordered, that the defendant, Davis Caldwell, pay the costs of this suit.

The defendant, D. Caldwell, appealed, and moved the Court of Appeals to set aside the decree, on the following grounds, viz:

1. Because his Honor erred in decreeing that Thomas H. Henderson was the trustee of Mrs. Nancy Murphy, and held the negroes, Susan and children, as such trustee; whereas, it is submitted that no trust could be created, unless it had been in writing, or clearly proved as to its terms, and recorded, or direct notice given to D. Caldwell.

2. Because it was a fraud upon D. Caldwell that such secret trust existed, and that the property was permitted to remain in the possession of the husband, as his own property, without any notice to the creditors.

3. Because, if any trust did exist, it was a secret trust, and could not protect the property from the debts of the husband, contracted while the property was in his possession.

4. Because a gift by the relations of Mrs. Murphy to her, even though Thomas H. Henderson acted as her trustee, in bidding off

the negro, and considered himself as trustee, cannot avail against creditors without notice.

5. Because, it is submitted that no gift can be made by parol to a married woman, so as to prevent the marital rights of her husband from attaching, unless the same be in writing, or the terms directly expressed by deed, will, or decree of a Court of competent jurisdiction.

Hammond, Summer, for appellant.
Pope, contra.

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*PER CURIAM. This Court concurs in the decree of the Chancellor; and it is ordered, that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN and DARGAN, CC., concurring.

Appeal dismissed.

3 Rich. Eq. 23

HASFORD WALKER and Wife et al. v.
DAVID CROSLAND, HOLDEN W. LILES,
PHILIP E. CROSLAND et al.

(Columbia. Nov. and Dec. Term, 1850.)

[*Bonds* ⚭35.]

The condition of a bond, taken by an Ordinary from an administrator, with the will annexed, was in the form prescribed for cases of intestacy, by the 21st section of the Act of 1789, except that there was no clause for surrendering the administration in case a will should afterwards appear, and be proved by the executor—it contained no reference to the will, and omitted the clause requiring the administrator “to pay and deliver all the legacies” &c., as prescribed for cases of administrations, with the will annexed, by the 20th section of the same Act: *held* that the bond was not good as a statutory bond, and that it could not be enforced against the administrator and his sureties by a legatee.

[*Ed. Note.*—For other cases, see *Bonds*, Cent. Dig. §§ 40, 40½; Dec. Dig. ⚭35.]

[*Bonds* ⚭35; *Executors and Administrators* ⚭527.]

The validity of such a bond, at the common law, can properly be determined only in a suit in the Court of Law, in the name of the Ordinary.

[*Ed. Note.*—For other cases, see *Bonds*, Cent. Dig. § 40; Dec. Dig. ⚭35; *Executors and Administrators*, Cent. Dig. § 2362; Dec. Dig. ⚭527.]

Before Dunkin, Ch., at Marlborough, February, 1850.

The Chancellor. The principal facts of this case are fully and correctly stated in Allen v. Crosland, (2 Rich. Eq. 68.) This bill seeks to establish and enforce the liability of the defendants, Holden W. Liles and Philip E. Crosland, as sureties on the administration bond of David Crosland.

The defence rests on two grounds, which will be separately considered. First, the defendants insist they are not liable, because the bond is not in the form prescribed by law.

It appears, among other facts, that Matthew Allen died in Georgetown district in 1834, leaving a widow and one child, (now the complainant, Mary Ann Elizabeth Walker.) Some years afterwards, David Crosland married the widow, and, in January, 1839, he was appointed, by the Court of Equity for George-

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town *district, guardian of the child, giving bond with sureties in the penal sum of sixteen thousand dollars. Both he and his sureties were residents of Marlborough district. In the latter part of March, 1839, the bond, which is the foundation of these proceedings, was brought or sent up to Marlborough, where all the obligors resided, for the purpose of being executed. The bond bears date 22d March, 1839, and is made payable, in the penal sum of six thousand dollars, to E. Waterman, Ordinary of Georgetown district, and his successors, &c. The condition is that “David Crosland, administrator of the goods, chattels and credits of Matthew Allen, deceased,” shall make an inventory, &c., and exhibit the same in the Court of Ordinary, “and such goods, chattels and credits shall well and truly administer, according to law,” and “make a just and true account of his actings and doings therein, when required by the said Court; and all the rest of the said goods, chattels and credits which shall be found remaining upon the account of the said administration, the same being first allowed by the said Court, shall deliver and pay to such persons respectively as are entitled to the same by law.” At the time when the bond was presented to the defendants for execution, (as was proved by C. W. Dudley, the subscribing witness,) the following indorsements appeared upon the bond, viz: “I have understood that Mr. Crosland has already given bond to the Commissioner in Equity for all that part of the estate of Matthew Allen which he did not inherit by intermarriage with the widow; and if so, the above bond is one of mere matter of form.”—(Signed) “E. Waterman, Ordinary, G. D.” “I hold Mr. Crosland’s bond for sixteen thousand dollars, as guardian of Mary Allen.”—(Signed) “J. W. Coachman, Commissioner in Equity.” After the execution of the bond, the Ordinary of Marlborough district, on 2d April, 1839, gave an official certificate, under his hand and seal, as to the sufficiency of the sureties, and it was thereupon returned to the Ordinary of Georgetown district.

The Act of 1789 prescribes two forms of bond. The 20th section provides that an administrator, with the will annexed, shall enter into bond, with security in a sum equal to the

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value of the *estate at least, with condition “that C. D., administrator, with the will annexed,” shall make an inventory, &c., &c., “and further do well and truly pay and deliver all the legacies contained and specified

in the said will, as far as the said goods, chattels and credits will extend, and the law require."

The 21st section prescribes the form of the bond to be given by an administrator. It is not necessary to transcribe this form, as it is precisely that of the bond executed by the defendants, except that there is no clause for surrendering the administration in case a will should afterwards appear and be proved by the executors. The 15th section provides that, in the event of the death of an executor or administrator, intestate, without having fully administered, administration shall be granted of the goods, &c., left unadministered by the former executor or administrator.

David Crosland was appointed administrator, with the will annexed, of Matthew Allen, deceased, so far as his goods and chattels had been left unadministered by Thomas McConnell, deceased, the executor of Matthew Allen, deceased. The alleged default is, in not paying over to the complainant the legacies to which she was entitled under her father's will. The defendants insist that this is a liability not contemplated or provided for in the instrument executed by them.

Without doubt, the leading object of the Legislature, in prescribing a form of bond, is to protect the rights of persons interested in the estate. But it is a very important, though perhaps subordinate purpose, that parties may distinctly understand the obligations into which they enter. Every one is presumed to know the law, and he is bound, at his peril, to inquire into the facts to which such law is applicable. The bond to be given by an administrator, with the will annexed, demands that he should pay and deliver over the legacies contained and specified in the will of the testator, so far as his chattels will extend. To this his sureties are also bound. If they do not inquire into the provisions of the will, or the extent of the testator's estate, they must submit to the consequences of their engagement. The recital as well as the condition of their bond

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had admonished them that a will existed, and this was the rule of conduct for their principal.

Where a party dies intestate, the law prescribes the form of bond to be given by the administrator in such case: and the law also provides the distribution to be made of his estate. The sureties to his bond undertake that their principal shall administer the estate, pass his account with the Ordinary, "and the rest of the goods, &c., which shall be found remaining upon the account of said administration, shall deliver and pay to such persons respectively as are entitled to the same by law." This being the form of bond prescribed by the statute to be taken in cases of intestacy, the sure-

ties have only to inquire to whom the estate passes after the debts are paid. They undertake that their principal shall make distribution according to the provisions of the Act of 1791. This they know to be the measure of their responsibility. If the widow be the only person entitled, and she be also the administratrix, then it may well be supposed by the sureties that, the debts being paid, their bond, in the language of the Ordinary of Georgetown, was "a mere matter of form." But it is no part of the condition of their bond that their principal should pay and deliver the legacies contained in the will of Matthew Allen. That would be to vary materially the responsibility they assumed, and would have occasioned a very different inquiry before they entered into the obligation.

The bond to be given by an administrator, with the will annexed, is expressly prescribed by law. It has long since been held that a bond, taken differently from that prescribed by statute, is void. (1 Saund. Rep. 161, note.) The subject was considered by the Court of Appeals of Virginia, in *Frazier v. Frazier*, (2 Leigh, 642.) That was a bond taken from an administrator, with the will annexed, but not in the form prescribed for such official bond, but nearly in the form prescribed for an administrator's bond. It was held that this was not a good statutory bond, and that no suit, either in law or in Equity, could be maintained against the surety for the benefit or at the relation of a legatee. Nor does this decision seem at

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variance with *Peoples v. Peoples*, (4 Dev. & Bat. 9.) That, too, was a bond taken from an administrator, with the will annexed, and it was held good. But there is no statute of North Carolina which prescribes the form of bond to be given by an administrator with the will annexed. Besides, as intimated by Judge Gaston, there could be no misapprehension as to the purposes of the instrument, for "the condition of the bond stated, as facts, that the last will and testament of Harbert Peoples had been duly proved in the county court of Guilford; that the executors therein named had refused the office; and that, upon such refusal, administration with the said will annexed had been committed to the two first named obligors, Sally Peoples and Reuben Folger." But in the case under consideration the bond is in the form prescribed for an administrator of the estate of an intestate, and not in the form prescribed for the administrator of one who had left a will. The parties were aided by no recital or description in the bond which would awaken a suspicion that Matthew Allen had not died intestate. The defendants live a hundred miles off. But in order to give full information, and at the same time quiet all apprehension, the officer to whom the bond was

to be given annexes an official certificate that this instrument was a mere matter of form, as the principal in the bond had inherited, by marriage, one-third of the estate, and was entitled to the other two-thirds, as guardian of the minor; precisely the legal consequences which would have existed had Matthew Allen died intestate.

Being of opinion that the bond recited in the pleadings was not taken in conformity with the provisions of the statute in such case, and that the defendants are not liable, under their obligation, for the alleged default, the Court deems it unnecessary to discuss the grounds as to misrepresentation and mistake; both which grounds were very fully argued at the hearing.

It is ordered and decreed that the bill be dismissed, but without costs.

From this decree the complainants appealed, and moved to reverse the same, for the causes following, to wit:

First. Because his Honor, in his said de-

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cree, has adjudged that *the bond made by the defendants, David Crosland, Holden W. Liles and Philip E. Crosland, to secure the due administration by the said David Crosland of the unadministered estate of Matthew Allen, "was not taken in conformity with the provisions of the statute in such case:" Whereas, it is respectfully submitted, the said bond does not materially vary, in its form, from the direction of the Act of Assembly of 1789, and is a good and sufficient statutory bond.

Second. Because his Honor, in his said decree, has adjudged that the said bond, "not being taken in conformity with the provisions of the statute in such case," is therefore void, and "the defendants are not liable under their obligation for the default" of the administrator, alleged in the bill: Whereas, it is respectfully submitted, that the said bond, though it be held not to be a good statutory bond, is not therefore void, but constitutes a valid and legal obligation on the part of the defendants, in their fulfillment of which the complainants have such an interest as the Court will protect and enforce.

Inglis, Dargan, for complainants.

Dudley & Johnson, Thornwell, Hanna, for defendants.

WARDLAW, Ch., delivered the opinion of the Court.

Upon the death of Thomas McConnell, the acting executor of the will of Matthew Allen, David Crosland, who had married the widow of testator, become administrator, with the will annexed, of the estate of said Allen, unadministered by said McConnell, and entered into a bond to the Ordinary of Georgetown district, with Holden W. Liles and Philip E. Crosland as his sureties; and

the validity of this bond, as a foundation of a suit by legatees, is now in controversy.

Anciently, the ordinary was entitled to apply the residue of intestates's estates, after the payment of debts, to whatever purpose his conscience might approve. To correct the flagrant abuses occasioned by this power, the statute 31 Edw. III, st. 1, c. 11, provided that, "in case where a man dieth intestate, the ordinaries shall depute of the

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next and most lawful friends of *the dead person intestate, to administer his goods," &c. (1 Wms. Ex'ors. 263.) These administrators, until bonds were required by statute, were entitled to enjoy exclusively the residue of the intestate's effects, after the payment of the debts and funeral expenses; and where the ordinaries attempted to enforce distribution, by taking bonds from the administrators for that purpose, such bonds were prohibited by the temporal courts, and declared to be void in point of law, on the ground that, by the grant of administration, the ecclesiastical authority was executed, and ought to interfere no further. (2 Wms. Ex'ors. 1056.) To remedy this mischief, was passed the English statute of distributions, 22 and 23 Car. II. c. 10, which establishes the order of distribution, and empowered the ordinary to take bond from an administrator, with two or more sureties, the form of the condition of which was prescribed, *mutatis mutandis*. (2 Wms. Ex'ors. 1057.) Our Act of 1789, (5 Stat. 106.) pursuing the same policy, in section 21, prescribes the form of the condition of the bond to be given by a common administrator, and, in section 20, the form of the condition of the bond to be given by an administrator with the will annexed; and, further provides, that if the ordinary fail to take bond as aforesaid, he shall be liable to be sued, for all damages arising from such neglect, by any person interested in the estate. It thus appears that this whole matter, as to distribution and bonds, is of statutory regulation.

The condition of the bond now in question does not conform to the prescriptions of our Act of 1789, neither as to a common administrator, nor as to an administrator with the will annexed. It omits the clause required in the former case, "and if it shall hereafter appear that any last will and testament was made by the said deceased, and the same be proved in court, and the executors obtain a certificate of the probate thereof, and the said administrator do in such case, if required, render and deliver up the said letters of administration;" and it omits all reference to the will of the deceased, and the clause required in the latter case,—“and, further, do well and truly pay and deliver all the legacies contained and specified in the said

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will, as far as the *said goods, chattels and credits will extend and the law require."

The Courts in this State have decided, in many cases, that bonds taken in pursuance of statutes directing their substantial provisions, and not expressly declaring void bonds taken in other form, are good, if the provisions of the statutes be complied with in substance,—if the bonds be not unlawful in themselves, and if the obligors be not subjected to disadvantage beyond the requirements of the statutes;—as in *sheriffs's bonds* before our Act of 1829, prescribing the forms of bonds to be given by public officers, replevin bonds, attachment bonds, injunction bonds, &c. *Treasurers v. Stevens*, 2 McC. 107; *Treasurers v. Bates*, 2 Bail. 362; *Lee v. Waring*, 3 Des. 57; *Kilgore v. Rabb*, 1 N. & McC. 331; *Leach v. Thomas*, 2 N. & McC. 110; *Cay v. Galliot*, 4 Strob. 282. The case of *Commissioners v. Gains*, 1 Tread. 459, affords an instance where the bond was considered void for substantial departure from the requirements of the statute. In some of the cases, the unlawful conditions only have been annulled, and the bonds held good, as in *Anderson v. Foster*, 2 Bail. 501; *Bomar v. Wilson*, 1 Bail. 461; *Dudley (Geo. R.)* 22, 66. But none of these cases has full application to such a case as we now have before us, where the precise form of the bond is given by the statute. Ordinary v. Blanchard, (3 Brev. 136,) is the only case in this State, cited to us, in which the condition of an administration bond has been submitted to judicial construction, and the decision there cannot be regarded as authoritative. The condition of the bond, there, pursued nearly the form prescribed by the English statute of distributions, and provided, amongst other things, that "all the rest and residue of said goods, &c. shall deliver and pay unto such person or persons, respectively, as the said ordinary, by his decree, or sentence, pursuant to the true intent and meaning of the statutes and Acts of Assembly of force in this State, for the better settling intestates's estates, shall limit and appoint," instead of—"all the rest, &c. shall deliver and pay unto such persons respectively, as are entitled to the same by law," prescribed by the Act of 1789. Justices

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Nott and Smith thought the *variance fatal; Colcock, that the bond sufficiently answered the intent of our Act; and Brevard, that the bond was favorable to the administrator, not unlawful in itself, nor against the policy of the State, and intimated doubt whether the st. Car. II. was repealed; and the other Judges do not appear to have given any opinion.

The present case seems to be within the principle of *Brown v. Spand*, (2 Mill, 12,) where a married woman, entitled in fee to land, had joined her husband in the execution of a release of the land, and had relinquished her dower according to the form given in the Act of 1795, by which she renounced "all her interest and estate, and all her right and

claim of dower." In a relinquishment of inheritance, the married woman is required to renounce all her interest, estate and inheritance. It was held that the woman was not barred, mainly on the ground that the words, in the forms for relinquishing dower and inheritance, are not equivalent. Judge Nott, delivering the opinion of the Court, says, "the words here used, are those required in a renunciation of dower, whereas, in a release of the fee simple, the word inheritance is expressly required. So that whatever meaning the words might have had otherwise, the Act has given a meaning to them which can not be departed from." By like reasoning, we may conclude, that although legatees may be considered, in a popular sense, as entitled by law to their legacies, yet the Legislature, by requiring an administrator on a will to covenant expressly, "well and truly to pay and deliver all the legacies contained and specified in the will," &c. has limited the application of the terms, "entitled by law," to such persons as are entitled by the statute of distributions. If the bond here had conformed with reasonable strictness to the condition exacted from a general administrator, it might, perhaps, have been upheld, on the presumption that the ordinary had judicially determined the case to be one of intestacy, but the omission of that part of the condition which provides for the surrender of the administration on the probate of a will, certainly extends and amplifies the liability of

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the administrator and his sureties. *The disadvantages incurred by the obligors by being required to enter into a bond for the administration of an intestate's estate, instead of a bond for the administration with the will annexed, are well pointed out in the circuit decree. In *Monk v. Jenkins*, (2 Hill Eq. 12,) Chancellor Harper says, "where a statute is passed, authorizing a proceeding, which was not allowed by the general law before, and directs a mode in which the act shall be done, the mode pointed out must be strictly pursued. It is a condition on which alone the party can entitle himself to the benefit of the statute, otherwise the act is void."

In Virginia and Kentucky, the conditions of bonds required from common administrators, and administrators with the will annexed, are almost literally the same with those prescribed in our Act of 1789; and in those States we have express authorities on the point under discussion, which we are content to follow. The case of *Frazier v. Frazier*, sufficiently noticed in the opinion of the Chancellor, was re-affirmed in the case of *Morrow v. Peyton*, (8 Leigh, 54.)

In *Fulcher v. Commonwealth*, (3 J. J. Marshall, 592) the bond, on which the suit was founded, had the condition of an ordinary administration bond, but did not contain the condition for the payment of legacies, requir-

ed from an administrator cum testamento annexo. Held, that the administrator and his sureties were not liable to suit for a legacy. See *Moore v. Waller*, 1 Marsh. 488; *Barbour v. Robertson*, 1 Litt. 93.

We are of opinion that the bond is not good as a statutory bond.

On the second ground of appeal, it may be remarked that, if the bond, void for nonconformity to the statute, be good as a bond at common law, it is only good for the indemnity of the Ordinary, and in that phase, the Ordinary would be the obligee in interest, and his misrepresentation, even if growing out of a mistaken construction of the will, occasioning liability and damage to the obligors, might be well held to render the bond void. We prefer, however, to put our decision on the ground that, according to the cases above

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cited, a legatee has no right *to sue on this bond; and that the question of its validity, at the common law, can be properly determined only in a suit in the court of law, in the name of the Ordinary.

It is ordered that the appeal be dismissed, and the decree of the Chancellor be affirmed.

DUNKIN, Ch. concurred.

DARGAN, Ch. having been of counsel, did not hear the case.

Appeal dismissed.

3 Rich. Eq. 33

EDWARD FOOTMAN et al. v. BENJAMIN R. PENDERGRASS et al.

SAME v. WILLIAM STAGGERS and W. H. CARTER, Sheriff.

(Columbia, Nov. and Dec. Term, 1850.)

[*Fraudulent Conveyances* 2.]

The current of decisions in this State seems to be that the Statutes 13 and 27 Eliz., are in affirmance of the common law; and, at the common law, no distinction exists between the rights of creditors and purchasers as against a prior voluntary conveyance.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 3; Dec. Dig. 2.]

[*Fraudulent Conveyances* 74, 75.]

A voluntary conveyance, without actual fraud in its origin, is valid against the claims of a subsequent purchaser or creditor of the donor without notice.

[Ed. Note.—Cited in *Smith v. Smith*, 24 S. C. 315.

For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 189, 191; Dec. Dig. 74, 75.]

[*Fraudulent Conveyances* 298.]

A subsequent sale of the property by the donor, without notice to the purchaser, is evidence, but not conclusive evidence, of fraud in the prior voluntary conveyance.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 892-895; Dec. Dig. 298.]

[*Fraudulent Conveyances* 275.]

As against such a purchaser, without notice, the onus of shewing that the voluntary

conveyance was without fraud, is, it seems, upon the donee.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 807; Dec. Dig. 275.]

[*Fraudulent Conveyances* 132.]

The continued possession of the donor is also a badge of fraud, but that is explained where the possession is consistent with the terms of the conveyance.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 407, 422; Dec. Dig. 132.]

[*Sales* 235.]

A purchaser, with notice, cannot avail himself of the Statute 27 Eliz.; and such notice as would put the party on the enquiry, as would enable him with ordinary diligence to ascertain the fact, is deemed sufficient.

[Ed. Note.—Cited in *Gibbes v. Cobb*, 7 Rich. Eq. 67.

For other cases, see *Sales*, Cent. Dig. § 681; Dec. Dig. 235.]

Before Dunkin, Ch., at Williamsburg, March, 1850.

In the case first stated, *Footman v. Pendergrass*, the following is the decree of the circuit Chancellor:

Dunkin, Ch. This cause was originally heard by the late Chancellor Caldwell, at March sittings, 1848. On appeal from his decree, the case was remanded to the Circuit Court for rehearing, on the ground that his

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Honor, the presiding Chancellor, *had incorrectly permitted a commission to be received in evidence, which had been conveyed from the Commissioners in Orangeburg by Wm. C. Footman, the husband of one of the parties in interest. (See 2 Strob. Eq. 317.)

The case was again fully heard. The material facts, as set forth in the decree of Chancellor Caldwell, were fully substantiated. So far as a negative is susceptible of proof, it was shewn that Wm. C. Footman was clear of debt at the date of the instrument, although, as intimated by the Chancellor, the property is only protected from the future debts or contracts of Wm. C. Footman, and not from existing engagements. It is very doubtful whether, at the time of making the deed, Footman had any purpose of removing to South Carolina. The evidence does not seem to warrant that inference. But after he returned to the State, it is difficult to say that there was any attempt to conceal the situation of the property. On the contrary, the general understanding of the community, as proved by the defendant's witnesses, was, that from his coming back no credit should be given to Footman unless his wife joined in the contract. R. G. Ferrell gives the probable reason why the deed itself was not put on record in the clerk's office at Williamsburg. He was clerk of the Court and register of deeds. Peter M. Oliver brought him the deed. The witness told him it was well drawn, but the probate was not such as would authorize him to record it.

Oliver himself took it back, and said he would have it sent to Georgia and proved. Oliver himself was a very upright man, incapable of fraud himself, or of countenancing fraud in another. Footman had married his half sister, and he, Oliver, had married the sister of the defendant, Pendergrass. Oliver recommended to the defendant to make the loan, but told him he must have the signature of Mrs. Footman. Oliver must have known of the existence of the deed; but both he, and probably Footman, and his wife, thought that if Mrs. Footman joined in the mortgage, it would be perfectly valid. Pendergrass says, and the Court does not doubt the correctness of his assertion, that he was unaware of the existence of the deed when he

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made the *loan, yet he certainly was advised that he could not safely treat with Footman, unless his wife united in the contract. But even a bona fide purchaser for valuable consideration, without any notice to put him on the inquiry, cannot defend himself against one having the legal title. It is impossible not to sympathise with the defendant, who seems to have been not only a confiding, but an indulgent creditor. Until the recent case of Reid v. Lamar, [1 Strob. Eq. 27,] the power of a married woman in relation to the estate settled upon her, was not very distinctly defined, or well understood, even by the profession.

The Court does not undertake to repeat all that is said in Chancellor Caldwell's decree, but adopts it as the decree now made. There was no proof as to the time of the death of Peter Oliver Footman, or who was his legal representative. The legal title to the slaves claimed is in Edward Footman, the trustee, and he is entitled to a decree for specific delivery. That is the only issue presented by the pleadings.

It is ordered and decreed, that the defendant, Benjamin R. Pendergrass, be perpetually enjoined from selling the negroes under the mortgage, and that he forthwith deliver such as are in his power or possession, to the complainant, and that he account for the hire of such of the slaves as have been under his control or possession; and that it be referred to the Commissioner to ascertain and report the same. The plaintiffs to pay their own costs, and Wm. C. Footman to pay the costs of the defendant, Benjamin R. Pendergrass.

In the case of Footman v. Stagers & Carter, the following is the circuit decree:

Dunkin, Ch. This case was heard with that of the same plaintiffs against Benj. R. Pendergrass. The difference in the circumstances is, that pending the proceedings in that case, and after an injunction ordered by Chancellor Johnston, the defendant, William Stagers, caused a levy to be made on two of the negroes embraced in the deed to

the plaintiff, and purchased them himself at the sheriff's sale.

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*It is ordered and decreed, that the defendant, William Stagers, deliver up to the plaintiff the slaves, Prince and George, and account for their hire since 15 April, 1847, to ascertain which hire a reference is ordered. Costs of the proceedings to be paid by the defendant, William Stagers.

The defendants, Pendergrass and Stagers, appealed, on the following grounds:

1st. Because all the circumstances of the whole transaction shew that the deed originated in fraud, and the Chancellor should so have decreed.

2nd. Because the deed being the voluntary conveyance of the husband to his wife and children after marriage, was void against subsequent creditors and purchasers.

3rd. Because the deed is to be regarded as a post nuptial settlement, and void against creditors and purchasers.

4th. Because, in any event, the Chancellor should have decreed the interest of the said W. C. Footman, as a distributee of the deceased child, Peter Oliver Footman, under the said deed, liable to the claim of the appellants.

5th. Because the decree is in other respects against justice, equity and conscience.

F. J. Moses, for appellants.

Haynsworth, Rich. contra.

DUNKIN, Ch., delivered the opinion of the Court.

Both the Chancellors who heard these causes at the circuit having concurred in the opinion that there was no fraud in fact in the deed of March, 1832, it would require a strong case of misapprehension on their part, to induce this Court to revise the decree on the first ground assumed by the appellants. But so far from this, although the ground was taken, no commentary on the evidence was offered, and no argument urged on which it was to be sustained.

The parties had formerly resided in Orangeburg district, in South Carolina, and removed to Georgia. Before leaving this State, Footman had been embarrassed, but it

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was proved by Col. *Glover of Orangeburg, that Footman afterward received a legacy from Mr. Caldwell, a relative, and that the witness, as his agent, discharged every debt which he knew to exist against him. There was no proof that any debt remained unpaid. Mr. Robert Habersham, of Savannah, was the factor of Footman while in Georgia. He proved that in March, 1832, he owed no debts except one or two, for the discharge of which, funds were placed in the hands of witness, and the debts paid. This is the substance of his testimony, although his examination was not put in possession of the

Court. Superadded to this, is the express provision of the deed, that the exemption of the property is only from "such debts, or contracts, as may hereafter be incurred, or entered into, by the said William C. Footman." The deed was recorded in the proper office of the county in which the parties resided in the month after its execution, to wit, on the 11th April, 1832. In the decree last pronounced, it is said to be "very doubtful whether, at the time of making the deed, Footman had any purpose of removing to South Carolina. The evidence does not seem to warrant that inference." If this is a misapprehension, it could be demonstrated by the adduction of the evidence. The deed was executed on the 5th March, 1832. Footman did not remove to South Carolina till the Fall of that year, and the negroes remained until the following year. But after his return to South Carolina, the deed, which had been recorded in Georgia, was carried to the clerk of the Court in Williamsburg, (to which district they had removed,) for the purpose of being placed on record. But Mr. Ferrell, the clerk, testified, that he told the person who brought it, that, although the deed was properly drawn, the probate was not such as would authorize him to record it. But it was abundantly proved, and particularly by the defendant's witnesses, that from the time of Footman's return to this State, no credit would be given to him unless his wife joined in the contract. In the language of the witnesses, she was regarded as a sole trader. Under these circumstances, some four years after Footman's return to this State, to wit, in February, 1837, the defendant made the

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loan. Peter *M. Oliver, the friend and brother-in-law, both of Footman and the defendant, and who had carried the deed to the clerk's office for record, advised the defendant to make the loan, but told him to have the signature of Mrs. Footman. Oliver was a man of unimpeachable integrity. The defendant took the bond of Mr. and Mrs. Footman, and, to secure the payment, they executed to him a mortgage of a tract of land, and also of a portion of the slaves included in the deed of March, 1832. It is intimated in the decree of the Circuit Court, that all the parties probably acted under a misapprehension of the extent of Mrs. Footman's power over her separate estate. Wiser men than the defendant, and better lawyers than Footman, have fallen into similar errors. Pendergrass says he did not know of the existence of this deed, and his assertion is entitled to full credit. But is it not demonstrated that before he made the loan, he was distinctly advised that, in order to render the mortgage of the slaves valid, Mrs. Footman must join in the execution of the instrument. If Footman alone was the owner of the slaves, why take the joint bond and joint mortgage? Did not this clearly indi-

cate that Mrs. Footman had an interest in the premises, and put him on the inquiry as to the extent of her authority?

But the second ground assumes the position, and it is on this that the counsel chiefly relies, that although the deed of March, 1832, was bona fide, and that the party was not in debt at the time, yet, being voluntary, it is void against subsequent creditors and purchasers.

I think the proposition is properly put. For although many of the English cases cited are on the Statute 27 Eliz., yet it is conceded that this statute embraces only conveyances of real estate. But the current of our own decisions seems to be, that the statutes, both of 13 and 27 Eliz., were only in affirmance of the common law. I am not aware that by the common law any distinction existed between the rights of creditors and those of purchasers. Conveyances, which were fraudulent and covinous, were void as to both. But one of the leading cases, adduced in support of the appeal, was Cath-

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cart v. Robinson, (5 Peters, *264 [8 L. Ed. 120]). This turned on the construction to be given to the Statute 27 Eliz.; Chief Justice Marshall says, the recent English decisions upon this statute "go beyond the construction which prevailed at the American revolution, and ought not to be followed." He further says that "the principle which, according to the uniform course of this Court, must be adopted in construing the Statute 27 Eliz. is, that a subsequent sale without notice, by a person who had made a settlement not on valuable consideration, was presumptive evidence of fraud, which threw on those claiming under such settlement, the burthen of proving that it was made bona fide." None of our own decisions go beyond this. To say that a second sale for valuable consideration, by a man who had previously made a voluntary settlement of the same property, is, per se, conclusive evidence of fraud in the settlement, seems not sanctioned by reason. A second sale for valuable consideration, by a man who has already sold the same estate to another purchaser, is conclusive evidence of fraud, but surely not in the former sale, but in the second; and so, if a father in affluent circumstances makes a deed of gift of two slaves to his son, and five years afterwards sells the same slaves for valuable consideration, how can it be affirmed with reason that this is conclusive evidence of fraud in the previous gift? It indicated caprice and injustice to his child, and fraud in the sale to the bona fide purchaser, but is any thing else than conclusive, that the gift five years previously, was concocted in fraud. *Hudnal v. Wilder*, (4 McC. 294 [17 Am. Dec. 744,]) was determined on the ground of fraud in fact in the previous voluntary settlement, as affirmed by two concurring verdicts. It was, therefore, unnecessary to give

a construction to the Statute 27 Eliz., even if it had applied to personalty. Judge Nott, however, offers some observations on the reason of the law for considering fraudulent voluntary transfers by a grantor, who still continues in possession. "Possession," says he, "is the highest evidence recognized by law, of a right to personal property. A vendor continuing in possession, is regarded, as to creditors or subsequent purchasers, as the owner, against the most solemn uncondition-

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al deed to a bona fide purchaser not in possession." He afterwards says, "if such gifts or conveyances are to prevail against creditors and bona fide purchasers, it is impossible to foresee to what extent frauds may not be carried." It will be perceived that creditors and subsequent purchasers are placed by him in the same category, and their rights on the same footing. But the Judge admits, as has been repeatedly adjudicated, that, where the object of the deed was to make provision for the wife and children who were living with the donor, his possession was consistent with the terms of the deed, and, therefore, repelled the presumption of fraud arising from the variance between the terms of the deed and the possession. But if the deed were, per se, fraudulent, as to creditors and purchasers, because voluntary, how could this explanation make any difference? The common law, as has been said, recognizes no distinction between the rights of creditors and subsequent purchasers in reference to voluntary deeds. I am unable to find any decision of our own Courts, in which a deed has been declared void in favor of a subsequent purchaser, which would not also have been declared void in favor of a creditor. Both stand on the character of the voluntary settlement. The inquiry always is bona fide or mala fide. The decisions point out various badges of fraud, such as, in some cases, the continued possession of the donor, his existing indebtedness, &c. &c.; and the execution of a second deed, for valuable consideration, of the same property, may well warrant a jury in referring back the fraudulent purpose to the time of the execution of the previous voluntary settlement. But it is nowhere said that this is a legal inference, or a presumption not to be repelled by proof to the contrary. If it could be shewn that the donor had abundant means, not only at the time of the gift, but at the time of the subsequent sale, and that he was entirely able to indemnify the purchaser on his warranty, would not this evidence satisfactorily repel any presumption of fraud in the original gift, and shew, that if any fraud existed, it was in the second sale, and in that alone? Is there any adjudication of our Courts, which would warrant the purchaser in in-

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sisting on *the voluntary character of the settlement, as conclusive evidence of fraud,

and in retaining the property against the donee, although abundantly protected by his warranty? If not, then the execution of the second deed is only one of the circumstances from which fraud in the former deed may be inferred; and this is in perfect harmony with *Cathcart v. Robinson*. The judgment of the Supreme Court of the United States in that case carries the doctrine quite as far as it has been hitherto recognized in this State, and that only throws, on those claiming under the voluntary settlement, the onus of shewing that it was made bona fide.

But there can be no doubt that, according to the American decisions, a purchaser, with notice, cannot avail himself of the Statute 27 Eliz., and it is equally well settled, that such notice as would put the party on the enquiry, as would enable him with ordinary diligence to ascertain the fact, is deemed sufficient, (*Hudnal v. Teasdale*) 1 McC. 231 [10 Am. Dec. 671.] The defendant was about to lend his money to a man who, according to the distinct testimony of his own witnesses, for the last four or five years, had no credit unless his wife joined in the contract. He was cautioned that he must have her signature in this particular transaction. But Mrs. Footman, being a married woman, could have no authority to do any act but as derived from some deed, or will. The fact of requiring her signature to the mortgage, and the fact of her joining in the execution, while it shewed that Footman was not understood to possess the absolute dominion over the property, pointed also to the existence of some authority under which his wife acted. This was the inquiry which the defendant was bound as a prudent man to pursue. Oliver, who had given him the caution, had himself carried the deed to the clerk's office for record. He would certainly have told him of the existence of the deed, (as was, in fact, implied by his caution to him,) although it is most probable he would at the same time have assured him, that Mrs. Footman was authorized by the deed to execute the mortgage. The Circuit Chancellor intimates the opinion, that such seems to have been the view of all the parties to the transaction.

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*But this can have no effect on the construction which the Court must give to the deed, or upon the rights of the parties claiming under that deed.

This Court perceives no error in the decrees which are the subject of this appeal. It is ordered and decreed that the same be affirmed, and the appeals dismissed.

JOINSTON, Ch., concurred.

DARGAN, Ch., dissenting. Wm. C. Footman, originally an inhabitant and citizen of South Carolina, but afterwards residing in Bryan County, in the State of Georgia, at the last mentioned place executed a deed, bearing

date the 5th day of March, 1832, by which he conveyed to Edward Footman sundry negroes, therein named, constituting, so far as appears, all his property, and certainly the great bulk of his estate, in trust for the sole and separate use of his wife, Mariah H. Footman, and of his children, then in esse, and any future issue to be begotten between the said Wm. C. Footman and his wife Mariah H. Footman. At the date of the deed the parties and slaves resided in Bryan County, in the State of Georgia, and it appears to have been duly registered according to the statutory provisions of that State. Chancellor Caldwell (whose statement of the proof Chancellor Dunkin in the main adopts,) says that "the donor had formed the intention of removing to South Carolina before the execution of the deed, and accordingly did remove to this State afterwards." After the execution of the deed the negroes remained in Georgia about a year, and were then brought to this State. There is no evidence that the trustee, who did not reside in South Carolina, ever accepted the trust, or had any knowledge of the deed by which it was created. Wm. C. Footman and family, on their return to South Carolina, settled in Williamsburg district, where Mrs. Footman, though not engaged in mercantile pursuits or trade of any kind, was reputed to be a feme sole trader. It is a popular error that any married woman, whether engaged in trade or not, can become a free dealer, as it is called, simply by a publication of her intention to as-

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sume that *character. The property remained in the possession of Wm. C. Footman, and was ostensibly his own. The only suspicion upon his title was, that Mrs. Footman, as a sole trader, might have some claim upon it.

Under these circumstances, the defendant, Pendergrass, on the 2d day of February, 1837, loaned Footman and wife \$2,282, taking their bond, payable in ten years; and, to secure the payment, took from them a mortgage of a tract of land, and four slaves (the slaves being some of those embraced in the trust deed.) And afterwards, on the 11th March, 1845, Footman and wife being indebted to Pendergrass for arrears of interest and for supplies of corn and advances of money, executed to him a bond for \$1,070, payable on the 11th March, 1846; and, to secure the payment, they executed a mortgage of sundry other negroes, being of those embraced in the deed of trust. It was not proved that the existence of this deed was known to more than two persons in South Carolina. The defendant was advised, on loaning the money, to have the signature of Mrs. Footman to the bond; but it was not shewn that the ground of this advice was the fact of the property being settled in trust. But, on the contrary, the defendant, answering responsively to the bill, has stated his utter ignorance of that fact, and that the reason of his joining Mrs. Footman in the

bond and mortgage was the general impression that she was a sole trader. One thing is certain, the Footmans (husband and wife,) borrowed the defendant's money to a large amount, (considering their means,) and mortgaged negroes to secure the debt, without giving him the slightest intimation that the property upon which they obtained the loan was conveyed by a prior deed of trust. This certainly was a vile fraud upon the defendant, whatever may have been the character of the trust in its inception.

Both the Chancellors, who have heard this cause on circuit, have decided that there was no actual fraud proved as to this deed at its execution; or, in other words, that no fraud was then meditated. Upon this question of actual fraud, according to the proof made, I should have come to the same con-

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clusion. But I *cannot say that my suspicions have not been strongly awakened, and that, in my apprehension, there is not, if I may be allowed to use the expression, an odor of fraud arising from the circumstances. And if (according to some of the decisions) a voluntary conveyance, coming into collision with a subsequent bona fide conveyance for valuable consideration, is subject to the prima facie presumption of fraud, which it is necessary to rebut, then I think the complainants have most signally failed; for in my judgment, the circumstances elicited on the trial, if such prima facie presumption is to have its weight, serve rather to strengthen than to rebut it.

But the great question of this case, and one that is highly important in reference to its general bearing, I will now proceed to discuss. Is it true, as an abstract legal proposition, that a voluntary conveyance, without actual fraud in its origin, is valid against the claim of a subsequent purchaser for valuable consideration, and without notice? Upon this question the majority of this Court, as at present constituted, has responded in the affirmative. I feel constrained to say, in reference to the judgment which has been announced, that I differ toto cœlo. My opinion on this question has not been hastily adopted, nor formed at the present time. It is coeval with my earliest acquaintance with this branch of the law. It was derived from the most authoritative expositors, and has been strengthened by subsequent study and research. An opinion thus deliberately formed, I find it difficult to yield without a struggle; more particularly as I have read or heard nothing to shake it, and find myself supported by some of the ablest and most learned Judges who have ever presided in the English or American courts.

Is the legal proposition, as I have above stated it, true? There are few, I presume, who would have the temerity to deny that the converse of the proposition is the law

that at this day prevails, and for ages past has prevailed, in Westminster Hall. Indeed, many of the English decisions, (in fact, by far the greater part,) go so far as to say that want of notice is immaterial, and that the prior voluntary conveyance, though un-

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impeached for actual fraud, is void against the subsequent purchaser for valuable consideration, even with notice. We know, from the most authentic judicial history of those times, that this construction of the statute 27 Eliz. prevailed in the English courts from a period almost cotemporary with its enactment. In *Upton v. Bassett*, (Cro. Eliz. 445, (only ten years after the enactment of 27 Eliz.) "there was an evident admission and understanding," says Chancellor Kent, in *Sterry v. Arden*, (1 Johns. Ch. 261,) "of all the Judges, that a voluntary conveyance was void under the 27 Eliz. against a subsequent bona fide purchaser for valuable consideration." I have examined this case, and concur with the learned Chancellor in the inference which he has deduced from it. I remark, further, that Owen, J., "accorded" as the reporter has expressed it, with the other Judges "in omnibus, and said that he was present at the making of the statute."

Early in the next reign, in the 5th of James the first, the same construction was recognized in a manner still more explicit. In *Colville v. Parker*, (Cro. Jac. 158.) which was an information in the King's Bench against fraudulent conveyances, the case of one Woodie was cited as having been before that time decided, where it was held that a voluntary conveyance was void against a subsequent purchaser without notice, "because," as it was said, "it was a voluntary conveyance at first, and shall be deemed fraudulent from the beginning."

The troubled and disastrous reign of the first Charles furnishes no case or precedent, so far as my researches have extended, bearing upon this question. In that period of civil strife cases involving this question either did not arise, or the history and record of them have been swept away and lost amidst the convulsions and confusion of the times. Nor does the judicial history of England under the Commonwealth, and the protectorate of Cromwell, throw any light upon this subject.

The succeeding reign of Charles the Second furnishes several cases. The cases of this reign are much relied on by those who have advocated the opposite doctrine to that which I have adopted. At that period it was

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thought necessary that the question of fraud should be submitted to a jury. And in *Garth v. Moïs*, (Keb. 486, 15 Car. II.,) it was held by the Court, in submitting "evidence to a jury on this question, that a voluntary conveyance executed, is not fraudulent be-

cause voluntary, but is great evidence of fraud as against an after conveyance made bona fide, because the statute avoids such deeds as are bona fide and on consideration, if made *ea intentione* to defraud purchasers. And therefore this fraud must be found by a jury." I have extracted the whole case from the report. It is but a *nisi prius* decision at best, and very meagerly and unsatisfactorily reported. Let it go for what it is worth.

Jenkins v. Kemeshe, 1 Lev. 150, (in King's Bench, 16 Car. II.,) is also a case which has been much relied on by those who advocate a contrary doctrine. But on an examination of that case it will be found not to be in point. Sir Nicholas Kemeshe was tenant for life in certain messuages; remainder to his son Charles in tail general, with remainder over. They, (Sir Nicholas and his son Charles,) on the marriage of Charles with Blanche, his first wife, and in consideration of the marriage and a marriage portion of £2,500, levy a fine and recovery, to the use of Sir Nicholas for life, remainder to Charles and the heirs of his body begotten on Blanche, remainder to the heirs of the body of Charles generally, with power on the part of Sir Nicholas to charge all and singular the premises with the payment of £2,000, by way of mortgage. Upon which Sir Nicholas and Charles, without reciting the power, convey a portion of the premises to Jenkins, by way of mortgage. Sir Nicholas dies. Blanche also dies, without issue. And Charles marries a second wife, by whom he has issue the defendant. And the money not being paid, the plaintiff, the son of Jenkins, brings ejectment. Upon the trial two questions arose. The first was as to the execution of the power, and whether it was legal and valid. And the second question was, whether the consideration of the settlement, which was held to be valuable, extended to the issue of the second marriage. It was decided that it did. The defendant was considered as one hold-

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ing under a purchase for valuable consideration, and the judgment of the Court was for him.

In *Lavender v. Blackstone*, (2 Lev. 146, 27 Car. II.,) a settlement after marriage was held to be purely voluntary, and void against a subsequent mortgagee.

In *Prodgers v. Langham*, (1 Sid. 133,) cited by *Ellenborough* in *Otley v. Manning*, a father conveyed an estate to trustees for the benefit of his daughter till her marriage, and after her marriage to raise a portion for her. The conveyance to trustees for the benefit of the daughter was perfectly free from fraud in fact. Yet it was held to be a voluntary conveyance in its origin, and void by the statute 27 Eliz. against purchasers for valuable consideration.

In *Jones v. Purefoy*, (1 Vern. 46, A. D. 1682,) a voluntary settlement, though unin-

peached for actual fraud, was vacated in behalf of a subsequent mortgagee.

White v. Hussey, was decided in 1690 (Prec. in Ch. 14.) Here the question arose directly between the person claiming under the voluntary settlement, (who was the settler's mother,) and the subsequent purchaser, who claimed in the character of a mortgagee for valuable consideration without notice. "Upon hearing the cause," says the reporter, (Thos. Finde, Esq.) "the Court unanimously decreed for the plaintiff, (the mortgagee,) though it was strongly insisted by the defendants that they could not do so without directing a trial at law, whether the settlement was fraudulent or not; for that fraud or not, was triable only by a jury, especially where the fraud, if any, was only from its being voluntary. But the commissioners of the great seal were all of the opinion that they might decree a conveyance to be fraudulent, merely for being voluntary. And so they did in this case."

In *Sir Ralph Bovey's case*, (Vent. 193,) Lord Hale did say "that though every voluntary conveyance carries an evidence of fraud, yet it is not upon that account only always to be reckoned fraudulent, or to be avoided by a subsequent purchaser for a valuable consideration." He had said in *Lavender v. Blackstone*, already cited, that a voluntary

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conveyance is only prima facie evidence of fraud. His opinions, as quoted in both of these cases, are dicta merely. For in *Lavender v. Blackstone*, the voluntary settlement, though free from actual fraud, was set aside in favor of the assignee of the purchaser for valuable consideration. And in *Sir Ralph Bovey's case*, the settlement was not voluntary, but was founded upon the consideration of marriage, which is always regarded as valuable, and it was held valid against the subsequent grant to *Sir Ralph Bovey*, founded upon a money consideration.

In 1726, in *Gardener v. Painter*, (Cas. Temp. King, 65,) Lord King said it could never be a question whether a voluntary settlement be good against purchasers.

Two years later, in *Tonkins v. Ennis*, (Mich. T. 1727, 1 Eq. Cas. Abr. 334,) it was adjudged by the whole Court that "a purchaser for valuable consideration shall hold or take place against a prior voluntary settlement, though he had express notice thereof at the time; such voluntary settlement, by the 27 of Eliz., being made void against a purchaser, with or without notice."

An early distinction was taken by the English Judges in their construction of the 13th Eliz., (the object of which was to protect the rights of subsisting creditors,) and the 27th Eliz., (the design of which was to protect the rights of future or subsequent purchasers.)

Russell v. Hammond, (1 Atk. 13, A. D. 1738,) was a case arising under the 13th

Eliz., and was between creditors and the parties claiming under a prior voluntary settlement. There was no proof of actual fraud; and it was held that, a settlement being voluntary, is not for that reason fraudulent against creditors under the 13th Eliz., but evidence of fraud only: and that it was not fraudulent where the person making it was not indebted at the time.

In *Walker v. Burrows*, (1 Atk. 93, A. D. 1745,) Lord Hardwick, who also decided the case last cited, observed, "it has been said that all voluntary settlements are void against creditors, equally the same as they are against subsequent purchasers under the 27th Eliz. But this will not hold; for there

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is always a distinction upon the two statutes. 'Tis necessary on the 13th Eliz. to prove that at the making of the settlement the person conveying was indebted at the time, or immediately after the execution of the deed, &c. But upon the statute 27 Eliz. which relates to purchasers, there indeed a settlement is clearly void if voluntary—that is, not for valuable consideration. And the subsequent purchaser shall prevail to set aside such settlement. But this can only be applied to subsequent purchasers, and therefore there is a plain distinction between the two statutes."

I pause here for the purpose of making a passing comment on these decisions of Lord Hardwick, and of developing more fully the distinction he has drawn in the construction of these two statutes. The 13th Eliz. being directed against the perpetration of frauds upon subsisting creditors, it is obvious that its provisions do not apply where he is not indebted at the time, or immediately afterwards; which the Courts have, by a liberal construction, decided to be the same as existing indebtedness. But the 27th Eliz. is for the relief not of purchasers whose titles or claims were prior to the voluntary settlement, for these need no protection; but for the relief of subsequent purchasers for valuable consideration, (and as the American cases and some of the later English authorities say,) without notice. A party making a voluntary settlement, who is indebted at the time, may yet commit no actual fraud, and never contemplate any fraudulent act whatever. But in every instance of a subsequent sale to a purchaser for valuable consideration without notice, there is a gross and actual fraud perpetrated by the vender upon the vendee. And policy as well as authority warrants the construction that makes this positive fraud relate back to the time of the prior voluntary settlement, and taints it with an implied premeditated and fraudulent intent. There is another distinction between the case of a creditor, and that of a purchaser, which entitles the latter to greater consideration. The creditor gives his credit

upon the faith of the whole estate of his debtor: while the purchaser and mortgagee (who through the whole course of the English adjudications on this subject is regard-

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ed as a purchaser,) looks only to the specific property purchased or mortgaged.

I resume my review of the English cases. And I will here go back a few years for the purpose of noticing the case of *Oxley v. Lee*, decided A. D. 1736, and reported in a note in 1 Atk. 625. In this case there was a conveyance to trustees, for the consideration of love and affection, to the use of the donor's daughter. The plaintiff, Oxley, afterwards purchased the premises for valuable consideration. The decree was, that the trustee should convey the legal estate to the purchaser, and that the deed of settlement should be delivered up.

About this time (namely, in 1737,) the original text of the "Treatise of Equity," of which Fonblanque is the editor, was published. This is confessedly a work of great authority. In this treatise the doctrines held by Lord Hardwick as to the rights of purchasers under the 27th of Eliz. are explicitly asserted. (1 Fonb. 267.) *Fitzer v. Fitzer*, (2 Atk. 512, A. D. 1742,) was a case in which Fitzer, the defendant, after a separation from his wife, the complainant, made a voluntary settlement upon her and his daughter, out of property which he had acquired by his wife. The husband afterwards became a bankrupt, and assigned to the other defendant, Stephens, all his estate, real and personal, including the property settled upon his wife and daughter. Stephens, by the assignment to him, combined the character of creditor and purchaser. The Lord Chancellor (Hardwick) said to counsel, during the progress of the cause, "have you any instance of its being held, in this Court, that a conveyance from a husband to his wife, without any pecuniary consideration moving from the wife, has been held to be good against creditors?" The Attorney General, who appeared for the complainant, admitted that natural love and affection would not be a consideration, but suggested that there was a deed of separation, and the liability of the husband for the maintenance of the wife and daughter would be a sufficient consideration. Nevertheless the Court decreed the settlement void to the extent of the claim of the defendant, Stephens.

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**Taylor v. Jones*, (2 Atk. 600, A. D. 1743,) before the Master of the Rolls, was a contest between the creditors of the husband, Jones, and the persons claiming under a voluntary settlement made by him upon his wife and children. There was no pretence of actual fraud. "The first question," says the Master of the Rolls, "is, whether this settlement, made in trust for the wife and chil-

dren, is fraudulent in general, as it stands single and independent of the plaintiffs, the creditors. It has been insisted on, for the wife and children, that this settlement is for a good consideration; nay, looked upon very often as a valuable consideration, since they are, in some respects, esteemed creditors in regard to the father. There is no doubt but that it is a valuable consideration as against a father, even after marriage, and even against a voluntary conveyance. But I consider it a standing rule, as to creditors for a valuable consideration, that such a settlement is always looked upon as fraudulent," &c. And accordingly it was so decreed.

In *White v. Sanson*, (3 Atk. 409, A. D. 1746,) which was also a case before Lord Hardwick, the husband and wife had joined in a settlement out of the wife's estate not reduced to possession. This was held not to be fraudulent. "For nothing," said his lordship, "could be more just than for the husband to provide for the wife and children out of her own estate." He observed that this "at law would not be deemed fraudulent against creditors; nay, even against a subsequent purchaser, which is stronger; because I hardly know an instance where a voluntary conveyance has not been held fraudulent against a subsequent purchaser."

In *Lord Townshend v. Windham*, (2 Ves. Sr. 10,) Lord Hardwick said: "On the 27 of Eliz., every voluntary conveyance made, where afterwards there is a subsequent conveyance for valuable consideration, though no fraud in that voluntary conveyance, nor the person making it at all in debt; yet the determinations are that such mere voluntary conveyance is void in law by the subsequent purchase for valuable consideration."

In *Hamilton v. Mitton*, (2 Wilson, 358,

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note, 6 Geo. 3,) Lord *Chief J. Wilmot said, "the Stat. 27 Eliz. was made in favor of subsequent purchasers paying a valuable consideration, as against persons whose title is not supported by such consideration."

Goodright v. Moses, (2 William Blackstone's Rep. 1019, 15 Geo. 3,) was the case of a voluntary settlement and a subsequent sale for a valuable consideration. Lord Chief J. De Grey said, "the deed of 1747 was only a voluntary conveyance within the true meaning of the Stat. 27th Eliz., being founded upon a good and not upon a valuable consideration; and therefore cannot be set up against a bona fide purchaser."

The case of *Taylor v. Still* is cited by Sugden (p. 483) as having been decided in 1763. In this case Lord Northampton is said to have held it beyond dispute, that a voluntary settlement should be set aside in favor of a subsequent purchaser for valuable consideration, even with notice. And Bathurst, J., said he knew Lord Hardwick had so decided in twenty instances.

In *Chapman v. Emery*, (1 Cowp. 278, A. D. 1775,) one Richard Emery after marriage made a settlement of the premises in question upon himself for life, remainder to his wife, remainder to their issue in tail. And three years afterwards he mortgaged the same premises to secure the payment of a bona fide debt then contracted. There was some contradictory evidence as to whether the mortgagee had notice. There was no allegation of actual fraud in the voluntary settlement. Lord Mansfield held that the mortgagee was a purchaser, and that the settlement was void as to him. He went further, and held that notice was not material.

I have thus presented a careful and chronological analysis of all the English cases and authorities that were accessible to me, for the purpose of shewing what a slight foundation exists for the assumption that, at the period of the separation of the North American colonies from the mother country, the question that I have been discussing was not settled in England, and that diversity of opinion prevailed in that country on the question. I think I may safely say that at that period the right of a purchaser for a valuable consideration to set aside a mere

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voluntary settlement or conveyance, was as well settled as any other principle of English jurisprudence whatever; and nothing but what were there considered the most apocryphal cases (and those very few,) could be adduced in support of the contrary doctrine. Chief Justice Marshall, in *Cathcart v. Robinson*, (5 Peters's R. 264 [8 L. Ed. 120],) has lent his high reputation and commanding influence to the promulgation of this error. He felt himself at liberty to adopt the dicta of Lord Hale, which had been uttered more than a century before the revolutionary war, that a voluntary conveyance as against a subsequent purchaser was to be regarded as only *prima facie* fraudulent. If this rule were applied to *Footman v. Pendergrass*, the deed should be set aside. For if the onus is upon Footman, to shew that the settlement is not fraudulent, he has failed most signally; for to my judgment the circumstances of the case rather tend to strengthen the presumption of law.

After all, it is a very great fallacy to refer to the period of the American Revolution for the purpose of determining whether any principle of the English Chancery system is of force. At all events, it is not applicable as a criterion in South Carolina, where the English Chancery system was adopted long before that time by an Act of our Provincial Legislature.

I will now proceed with my review of the English decisions. In *Cadogan v. Kennet*, (2 Cowp. 432,) A. D. 1776, which was a case of creditors arising under the 13th Eliz., and not under the 27 Eliz., Lord Mansfield

decided, that a fair voluntary conveyance is good against creditors. He says the Statutes of Eliz. "cannot receive too liberal a construction, or be too much extended in suppression of fraud." Traveling out of the issue before him, he does say in this case that "the 27 of Eliz. does not go to voluntary conveyances, merely for being voluntary, but to such as are fraudulent."

And in *Watson v. Routledge*, (2 Cowp. 705,) A. D. 1777, he said something to the same effect. But in this case, the question now at issue did not arise. The prior voluntary conveyance was for love and affection to a neph-

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ew, a son of the grantor's *sister. The second conveyance was to another nephew, in consideration of £200, for a property proved to be worth £2000. This was considered no purchase at all, but a gift. It was considered a fraudulent artifice and combination, on the part of the grantor and second grantee, to defeat the first; and so it was adjudged.

In the dicta, which Lord Mansfield suffered to fall from him in the two last mentioned cases, he forgot that he had himself decided to the contrary, in the prior case of *Emery v. Chapman*. And in *Hill v. Bishop of Exeter*, (2 Taunt. 82,) decided by Lord Mansfield in 1809, we find him declaring that as "to the general doctrine that voluntary settlements, however reasonable, are void against a subsequent purchaser in consideration of money, there can be no doubt, for very strong cases have decided, that if a man after marriage make the most prudent settlement on his wife and children, such a deed as every wise man must approve, if the father is dishonest enough to sell it afterwards for money, he may." I think after this, his dictum in the intermediate case of *Cadogan v. Kennet*, is entitled to but little weight. Indeed, he himself intimates, that the latter case was not considered in reference to the authorities that might have been cited. He says, that in the argument, he had expected an authority, but did not get it. And in *Watson v. Routledge*, he supported his opinion by cases that are not considered as cases of voluntary conveyances, but as cases in which the settlements were supported by valuable consideration, such as the consideration of marriage, &c.

In *Evelyn v. Templar*, (2 Bro. C. C. 148,) A. D. 1787, it was decided by Lord Thurlow, that a prior voluntary settlement by a husband after marriage, though not indebted at the time, was void against a subsequent purchaser, though with notice.

In *Bothell v. Martyr*, (1 B. & P. N. R. 332,) A. D. 1805, it was held by Sir James Mansfield, "that it cannot now be held, that a prior voluntary conveyance shall defeat a conveyance to a purchaser for valuable consideration, without overturning the settled and decided law." He regretted that a con-

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struction had *prevailed, which rendered notice to the subsequent purchaser immaterial. This, I will remark, is the only part of the construction of the 27 of Eliz., which has been regretted by the English Judges. And in the American cases, this principle of the English decisions, has not been followed, but notice has been considered as destroying the right of a subsequent purchaser to have a prior voluntary settlement vacated in his behalf.

In 1808, the elaborately considered case of *Otley v. Manning*, (9 East, 59,) was decided by Lord Ellenborough, in which it was held, that a voluntary settlement of lands, in consideration of natural love and affection, is void against a subsequent purchaser for valuable consideration, though with notice of the prior settlement before all the purchase money was paid, or the titles executed; and though the settler had other property at the time, and was not indebted; and though there was no actual fraud in the transaction. I cannot resist the temptation of quoting the triumphant vindication by Lord Ellenborough, of the construction of the 27th Eliz., which the English Judges have adopted. He observes that "the Judges might very well apprehend, that subsequent purchasers might be continually defrauded by such secret conveyances, if they should be held good; and that when the question was between one who had paid a valuable consideration for an estate, and another who had paid nothing, it was a just presumption of law, that such voluntary conveyance, founded only in consideration of affection and regard, if coupled with a subsequent sale, was meant to defraud those, who should afterwards become purchasers for valuable consideration; and that a different construction would have so narrowed the operation of the Statute, as to leave the persons meant to be protected by it, subject to almost all the mischiefs intended to be remedied. And it is certainly more fit upon the whole, that a voluntary grantee should be disappointed, than that a fair purchaser should be defeated." The case of *Otley v. Manning* has placed this rule of construction upon immutable foundations. I here close my review of the English cases. To trace them further would be altogether a work of supererogation.

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*I shall notice only two of the American decisions upon this subject out of South Carolina. The first of these to which I invite attention, is that of *Sterry v. Arden*, (1 Johns. Ch. 261.) Chancellor Kent, than whom no greater name has ever adorned the judicial station in America, thus sums up the question: "Here then," says he, "is the case of a fair voluntary conveyance, made by a father to his daughter, he not appearing to be indebted at the time, and a subsequent sale made by him with intent to defeat that

settlement, but made for a valuable consideration, and to a purchaser chargeable only with notice in law. The question arising on this first point, is definitively settled in England by determinations of a recent date, in the four great Courts at Westminster. And it is impossible for me not to feel all the respect, which is justly due to decisions of such great weight and authority." "It has been suggested," continues he, "that this is a principle settled in England since our revolution; but it appears to me, that the late cases have declared no new doctrine, and have only followed the rule as they found it long before settled, by a series of judicial decisions of too much authority to be then shaken." In this case, the purchaser had heard that the vendor had made some provision for his daughter of the Greenwich street property, which was the subject of the purchase. This the learned Chancellor construed to be implied notice; and decided, that he would not hold the purchaser affected with the implied notice. But he intimates if the notice had been actual, he would not have been entitled to claim against the prior voluntary conveyance. The voluntary deed was set aside in favor of the subsequent purchaser.

I have already alluded to the case of *Cathcart v. Robinson*, (5 Peters, 264 [8 L. Ed. 120].) Chief Justice Marshall says, "the rule, which has been uniformly observed by this Court, in construing statutes, is to adopt the construction made by the Courts of the country by whose Legislature the Statute was enacted. This rule may be susceptible of some modifications, when applied to British statutes, which are adopted in any of

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these States. By *adopting them, they become as entirely our own, as if they had been enacted by the Legislature of the State. The received construction in England, at the time they are admitted to operate in this country, indeed, to the time of our separation from the British empire, may very properly be considered as accompanying the statutes themselves, and as forming an integral part of them." It would be arrogant in me to endeavor to add any thing to the force of these observations, on that part of the subject. The Chief Justice then proceeds to remark, "at the commencement of the American revolution, the construction of the Stat. 27 of Eliz. seems not to be settled." The error of this conclusion, I think, has been sufficiently demonstrated in the foregoing review of the British decisions.

I pass on to consider the judicial interpretations which have been given to the 27 Eliz., in South Carolina. The cases bearing on the question are very few, which is only to be accounted for, on the supposition that the law has been regarded as settled. As far as the decisions, or any expression of opinion on the part of the Judges, have gone,

they are in the strictest conformity with the doctrine established by the English decisions; with this exception only, that a subsequent purchaser, with notice, is not entitled to set aside a prior voluntary settlement.

The case of *Barrineau v. McMurray & McGill*, (3 Brev. 204,) presented some circumstances that might have been regarded as amounting to actual fraud. It is not certain, therefore, that in the view of the whole Court, the decision turned upon this construction of the Stat. 27 Eliz. But Judge Brevard, after some remarks upon the facts, says, "how far the deed is to be considered valid, or sufficient to transfer the estate in opposition to the prior deed to Belsey Brown, must turn on the true construction of the 27th of Eliz."

He goes on in the broadest terms, to adopt the construction of the English Courts. This doctrine, he observes, "has been sometimes doubted, in consequence of certain expressions of Lord Mansfield, in *Cadogan v. Kennet* and *Watson v. Routledge*. It seems to me that in those cases, Lord Mansfield

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has *confounded the rights of creditors, with these of purchasers; whereas, the Statutes of 13 and 27 Eliz. appear to have different objects in view. He says truly, that voluntary conveyances may be good against creditors; but it does not follow that they are so against purchasers. Voluntary conveyances are not void, merely because they are voluntary, but because from the circumstance of their being voluntary, coupled with the circumstance of a subsequent sale and conveyance, for valuable consideration, by the same person who made the voluntary conveyance it is to be collected and legally inferred, pursuant to the 27 of Eliz., that the voluntary conveyance was fraudulent; and because the statute declares such voluntary conveyance void as against such purchaser."

In *Hudnal v. Wilder*, (4 McC. 294 [17 Am Dec. 744,]) this question was considered, and decided. I say decided; for on a careful examination, I can come to no other conclusion. It was an action of Trover, for a negro named Frank. And the circumstances of the case were these. One Luke Norris, then the owner of the slave in question, on the 13th Feb., 1809, conveyed the negro, with other real and personal property, to Hudnal, the plaintiff, in trust, for the sole and separate use of his own wife for life, remainder to such children of the marriage as should be living at her death, remainder to himself. He was much indebted at the time, a circumstance which, though very material as regards the claims of creditors, is not very material as regards the rights of a subsequent purchaser for valuable consideration, unless an actual fraud was intended against the rights of creditors. For the Stat. 27 Eliz., by the most uniform construction, makes the prior voluntary settlement void

as to the subsequent purchaser, whether the donor be indebted or not at the time of the gift. On the 17th March, 1818, Norris, on the point of removing to the west, sold Frank to Teasdale, the defendant's testator, for \$900, which was paid in cash. There was some evidence to the effect that Teasdale had notice of the prior voluntary settlement; but it was not made clear that he had such notice, before he had completed the sale, and paid the

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purchase money. *The action was brought by Hudnal, the trustee, against Wilder, Teasdale's executor. Thus the issue was directly made between the party claiming under the prior voluntary conveyance, and one claiming under a subsequent purchaser, for valuable consideration made nine years afterwards. It is difficult to conceive a case in which the question under discussion could in a more direct manner be presented for the judgment of the Court, than *Hudnal v. Wilder*. Upon the question, whether notice would affect the claim of the subsequent purchaser, the Court was with the plaintiff; thus modifying to this extent the English decisions. They adopted, in this particular, a construction which the English Judges have regretted had not been adopted in England from the first, but which they found had been so well established, that they did not consider themselves at liberty to modify it. But in other respects, and particularly upon the question now before this Court, the decision in *Hudnal v. Wilder* conformed strictly with the English decisions. The verdict was for the defendant. The plaintiff, on the hearing before the Court of Appeals, had the benefit of the judgment of that Court, as to the effect of notice on the rights of the subsequent purchaser. The evidence on that point not being clear, and the law having been presented to the jury in accordance with the opinion of the Court of Appeals, they refused to disturb the verdict on that ground. The other questions before the Court were, first, whether the Stat. 27 Eliz. embraced in its purview conveyances of personal property, which was decided in the affirmative. And the great and principal question of the case was that which I am now considering. Hear Judge Nott, the organ of the Court, on this subject. "It has already been remarked," he says, "that the English decisions under the 27 Eliz. have gone the whole length of declaring that a subsequent sale to a bona fide purchaser, even with notice, shall prevail against a prior voluntary deed. These decisions, I shall undertake by and by to shew, cannot be supported by any just construction of the statute. But so far as they have gone to declare, that a subsequent sale to a bona fide purchaser

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without notice, shall *itself be evidence of fraud to avoid a voluntary deed, I do not know that they have ever been questioned. And we have been so much in the habit of

respecting the English decisions as authority, on all their statutes which have been made of force here, that I do not recollect that we have ventured to put a different construction upon one, which has come down to us through a train of decisions, stamped with the approbation of the able judges of that country." The defendant was permitted to retain his verdict upon this construction; a construction which, I have shewn, was adopted at a period contemporaneous with the enactment of the law, and which has prevailed through every succeeding age and generation, in England, down to the present times, with as little variation as can be challenged for any other important principle of the English jurisprudence. And I have also shewn it to be a construction which has been adopted in South Carolina, whenever the question has been mooted in our Courts; and once directly in the way of decision, by an able body of Judges, sitting as a Court of Appeals in the last resort, in a case where the rights of the parties turned directly upon that construction. If I am to have any respect for the authority of English decisions, upon the English statutes, (made of force by a solemn Act of our Legislature,) transmitted to us in an unbroken series through nearly three centuries; if I am to have any respect for the decisions of our own Courts, solemnly affirming the English interpretations; if I am not to cut loose from the control of all precedents, and the exposition of remote times in regard to an old statute; expositions made by abler and wiser judges than myself, then I am not permitted to adopt any other construction of the 27 Eliz., than that I have contended for.

Appeals dismissed.

3 Rich. Eq. *61

*MARY T. HOLMES et al. v. ELIZABETH HOLMES.

(Columbia. Nov. and Dec. Term, 1850.)

[*Equity* ⌘42.]

Query: Can a purchase, at a sale by the Master under a decree be set aside for fraud, on rule against the purchaser to show cause? or must the proceeding be by bill? If it can be set aside on rule, the case, it seems, must be tried and adjudged on the facts admitted in the answer to the rule.

[Ed. Note.—Cited in *Orr v. Orr*, 7 S. C. 383.

For other cases, see *Equity*, Cent. Dig. §§ 119, 120; Dec. Dig. ⌘42.]

[*Judicial Sales* ⌘19.]

To render a purchase, at a public sale, under a decree in Chancery, void because the biddings were joint, or there was a partnership among the bidders, it must appear that there was a fraudulent intent to depress and chill the sale, to obtain the property at an undervalue, or to obtain other undue or unconscientious advantages.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 43; Dec. Dig. ⌘19.]

[*Judicial Sales* ⌘19.]

Persons may lawfully unite for the purpose of making a bid among themselves, where neither is able to purchase, or desires to own, the whole property.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 43; Dec. Dig. ⌘19.]

Before Johnston, Ch. at Edgefield, June, 1850.

This case will be sufficiently understood from the opinion delivered in the Court of Appeals.

Carroll, Griffin, for appellants.
Wardlaw, contra.

DARGAN, Ch. delivered the opinion of the Court.

By a decree of the Court of Equity, the real estate of the late William Holmes was sold at Edgefield Court House, on the first Monday in December, 1849, by the Commissioner in Equity. At this sale, one Tandy Burkhalter became the purchaser of said real estate, at the price of \$5.50 per acre, he being, at that price, the highest and last bidder. Burkhalter having complied with the terms of the sale, the Commissioner executed to him a conveyance for the land.

This was a rule against the purchaser, to shew cause why the sale should not be vacated, and the deed of the Commissioner in Equity to him set aside, "on the ground of an unlawful agreement, between the said Burkhalter and A. B. Kilcrease, not to bid against each other for said land at said sale; which agreement was carried out, and whereby the said sale of said land was greatly affected, to the serious injury of the estate of the said William Holmes, deceased."

The rule was supported by the affidavit

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of Kilcrease, who *stated that the lands of the estate of William Holmes adjoined the lands of both himself and Tandy Burkhalter; that they each desired a portion of the lands about to be sold; that they had a conference upon the subject; and the result was, an agreement not to bid against each other at the sale; and that they further agreed on the manner in which the said real estate should be divided between them, if bought. The deponent further stated, that he attended the sale but made no bid, and that, if he had been the bidder, he would have given seven dollars per acre, rather than the land should have been bought by any other person. He further stated, that both he and Burkhalter were able to have bought and paid for the whole of the land.

From the affidavit of J. B. Talburt, it appears that Burkhalter, after the sale, refused to let Kilcrease have the part of the land he wanted, except at the price of \$12

per acre. Burkhalter stated to the deponent, that he had acted wrong in not telling Kilcrease on the day of sale, that if he, Kilcrease, wanted any part of the land he must be the highest bidder.

The answer of Burkhalter to the rule denies all the material allegations set forth in the affidavit of Kilcrease, and especially denies all partnership, or combination, with Kilcrease in the purchase. He admits they had a conversation about the land before the sale; that Kilcrease asked him if he intended to bid for the land, and that, on being answered affirmatively, Kilcrease said he wanted a portion, which he pointed out, and spoke of his wish to have a road through it to his plantation. To this Burkhalter replied, "if I buy the land, I will not hinder you from a road, and I will cut you off a piece." This, he says, was the whole substance of the conversation, and he denies having agreed to sell Kilcrease any particular quantity of the land in the event of his buying it, or at any stipulated price.

Upon this state of facts, the rule came on for trial. The Chancellor who heard the cause ordered the rule to be discharged, and confirmed the sale; the discharge of the rule to operate no prejudice to the parties in filing a bill.

From this order, an appeal has been taken,

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and notice given *of a motion to be made before this Court, to reverse the said order, and to set aside the sale, on the grounds,

"1st. That there was an unlawful agreement between the said Tandy Burkhalter and A. B. Kilcrease, entered into before the sale, not to bid against each other at said sale, which agreement was carried out, whereby the parties in interest were greatly injured."

"2d. Because, upon the affidavits submitted, and upon the law, and from considerations of public policy, the sale of the land should have been set aside."

I will not undertake to say, that a question of this kind may not be raised on a rule to shew cause. In *Hamilton v. Hamilton*, (2 Rich. Eq. 355 [46 Am. Dec. 58]), the question as to the validity of the sale was made in this way. There, titles for the property sold had not been executed by the Master. Chancellor Harper, who tried that cause, seems to have considered the case of an executory contract, in reference to this point, as not different from one in which titles have been executed and delivered. He says "the principle upon which the cases go is this; that by the falling of the auctioneer's hammer, and the entry of the sale by the Master in his book, the contract is complete; different from the English practice, according to which there is no contract till the biddings are reported, and the sale confirmed. With us, upon the falling of the hammer, and the entry of the sale, the purchaser has a right

to demand a title as a matter of course." The Chancellor appears to have doubted his authority to take cognizance of the cause in this form of proceeding. For he says, "it being a complete executory contract, I must seek for something, which will authorize me to set it aside; and it seemed to be agreed, that the motion was to be decided on the evidence before me, as if a bill had been filed for that purpose."

Upon this question, (as to the proper mode of proceeding) the Court means to conclude nothing at the present time. My individual opinion is, that a proceeding by bill is the most proper mode to bring such question, as is here raised, to a hearing. Certainly, if the question, as to the fairness of the sale,

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is to be *tried upon a rule, against the purchaser, (unless the facts can be agreed on, as in the case of *Hamilton v. Hamilton*.) the case must be tried and adjudged upon the facts admitted in the answer to the rule. The purchaser, whether he claims under a deed executed, or an executory contract that is complete, has rights, which, in a disputed state of facts, are not to be concluded by the affidavits of witnesses, who have not been subjected to the ordeal of a cross-examination.

If this case is to be adjudged by the answer of Burkhalter, (the purchaser) to the rule which has been served upon him, there is not the slightest ground for the interference of this Court in setting aside the sale. According to his statement, the transaction wears the most innocent aspect imaginable. But this Court is of opinion that, upon the shewing made in the affidavit of Kilcrease, the principal witness for the party moving in this proceeding, there are no such facts presented which, if they were uncontested, would authorize the Court to vacate the sale. This proceeding seems to have been instituted under a misapprehension of the cases upon this subject. It is not every joint bidding, or partnership among bidders, at a sale under a decree in Chancery, that is corrupt and fraudulent. Such joint or partnership biddings may be perfectly legitimate. To render them unlawful and void, there must be a fraudulent intent to depress and chill the sale, to obtain the property at an under value, or to obtain other undue and unconscientious advantages. An estate might be offered for sale, which neither of two joint bidders would be able, separately, to purchase. Or, it might be, that neither of two joint bidders, though able as to pecuniary means, would desire to purchase the whole of the estate offered for sale; though each would be desirous to become the owner of a part. Such persons, if not permitted to unite in their biddings, would not enter into the competition at all. To adopt so stringent a rule as that contended for, in reference to sales in Chancery would, in many

instances, have the effect of diminishing, instead of enhancing the prices. In the very

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case relied on in support *of this motion. (*Hamilton v. Hamilton*.) It is said by the Chancellor who delivered the opinion of the Court, citing with approbation the case of *Smith v. Greenlee*, (2 Dev. 128.) "It is shewn, however, in that, as in other cases, that persons may properly unite for the purpose of making a bid among themselves, where no one of the associates was able to purchase, or desired to own, the entire property exposed to sale." A fraud in a case like this, as in every other case, must be judged of by all the attendant circumstances. If the co-partnership in bidding appears, from the attendant circumstances, to have been entered into with a fraudulent intent to depress and chill the sales, and to obtain undue advantages in the purchase of property, the sale will be vacated. If such joint bidding has no such fraudulent intent, and is bona fide, it will not have the effect of vitiating the sale.

The Court is satisfied with the Circuit decree. It is ordered and decreed that the Circuit decree be affirmed and the appeal be dismissed.

JOHNSTON and DUNKIN, CC. concurred.
Appeal dismissed.

3 Rich. Eq. 65

WILLIAM HULL and Others v. ANN HULL and Others.

(Columbia. Nov. and Dec. Term, 1850.)

[*Executors and Administrators* ⇨272.]

The direction in a will, that the executor, "out of the testator's estate pay off all his just debts and funeral expenses," is some evidence, that the testator intended that the personality—the fund at the executor's disposal—should be first used for the payment of debts.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 771, 781-788; Dec. Dig. ⇨272; *Wills*, Cent. Dig. § 2151.]

[*Executors and Administrators* ⇨272.]

Where the testator, himself, gives no direction on the subject, the personal estate is the primary fund for the payment of debts; and, as between devisees and legatees, the personality must be exhausted in payments of debts, before the realty can be resorted to for that purpose. (a)

[Ed. Note.—Cited in *Farmer v. Spell*, 11 Rich. Eq. 549; *Richardson v. Inglesby*, 13 Rich. Eq. 99; *Laurens v. Read*, 14 Rich. Eq. 265; *Kinsler v. Holmes*, 2 S. C. 494; *McFadden v. Helley*, 28 S. C. 324, 5 S. E. 812, 13 Am. St. Rep. 675.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 771, 781-788; Dec. Dig. ⇨272; *Wills*, Cent. Dig. § 2151.]

(a) The following case, bearing upon the applicability of the personal estate, before the

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[*Executors and Administrators* ⇨353.]

In estimating the value of estates in land, a fee conditional should be valued as high as a fee simple; especially where the donee has a child living.

[Ed. Note.—Cited in *Du Pont v. Du Bos*, 52 S. C. Append. 608.

For other cases, see *Executors and Administrators*, Cent. Dig. § 1459; Dec. Dig. ⇨353.]

[*Wills* ⇨788.]

Where devises and bequests to a bastard, are avoided, under the Act of 1795, for the excess over one fourth of the testator's estate, the bastard has the right to elect what property he will retain—throwing off the excess—or to retain the whole and pay for the excess; partition will not be resorted to except where no election is made.

[Ed. Note.—Cited in *Williams v. Halford*, 73 S. C. 124, 53 S. E. 88.

For other cases, see *Wills*, Cent. Dig. § 2012; Dec. Dig. ⇨788.]

[This case is also cited in *Moore v. Hood*, 9 Rich. Eq. 327, 70 Am. Dec. 210; *Small v. Small*, 16 S. C. 71, as to the necessity of making heirs or devisees parties to a proceeding by executor or administrator for sale of lands for payment of debts.]

Before Dargan, Ch., at Edgefield, June, 1849.

In this case—which came upon exceptions to the Commissioner's report, in obedience to the order of reference made by the Court of Appeals, 2 Strob. Eq. 174-195—the decree of his Honor, the Circuit Chancellor, is as follows:

Dargan, Ch. This case having been referred, by the Court of Appeals, to the Commissioner in Equity, to enquire and report as to various matters of fact, necessary to be ascertained before a final adjudication of the questions between the parties could be made, the Commissioner has, at this term, reported upon all the matters submitted to him. To this report, both complainants and defendants have excepted, and this is the form in which it comes before me for a hearing.

I will consider the defendants' exceptions first, as they raise questions that may, in some measure, be considered as preliminary

real estate, in the payment of debts, is subjoined by way of note to the above case:

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*E. W— et al. v. F. H—.
Before De Saussure, Ch., at Newberry, June, 1819.

This bill was filed to set aside the sale of a tract of 250 acres of land of the testator, sold under execution against the defendant, as administrator cum testamento annexo, of the estate of the testator; and also to compel the defendant to account for the value of another tract of 138 acres, of the testator, also sold under execution against the defendant.

The testator died in the latter part of the year 1804, leaving a last will and testament, by which he devised the two tracts of land aforesaid, to the complainants, his widow and children; and, after payment of debts, the remainder of his estate to his widow and children. The executor named in the will having refused to qualify, administration with the will annexed was granted to defendant, who, in Feb'y,

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*to those presented in the exception of the complainants. The defendants's first exception to the report is, "because the Commissioner has erred in charging the balance of the debts, after exhausting the intestate property, to the bequests to the defendants, until the amount of said bequests was exhausted, and then apportioning the balance of debts still unpaid, between the devisees to the defendants; whereas, it is submitted, that where devisees and specific legacies have to abate to pay debts, there is no legal distinction between real and personal property, and that the value of both devisees and bequests should contribute rateably, without regard to the distinction between real and personal property."

This exception raises a very important question, and I am not aware that the particular question here made, has ever been expressly decided, in any case occurring in the Courts of this State. If the point were to be adjudicated by the law of England, the way would be perfectly clear and open. I would have but to travel a broad and beaten path, so well defined that it would be impossible to commit an error. In the Courts which sit in Westminster Hall, on a bill to marshal the assets of a testator for the payments of debts, a specific legacy would, in a question like this, undoubtedly be primarily

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liable, in exoneration of a devise of real estate, which is always specific; and the primary fund would have to be exhausted before the devise could be touched. And in support of this doctrine, as strong an array of authorities and decisions, flowing in a uniform and unbroken current, could be presented, as could be adduced in support of any principle of British jurisprudence whatever. The origin of this deed preference of the

1805, made sale of the personality to the amount

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of \$833. The defendant afterwards confessed judgment on two notes of the testator, apparently for a considerable sum, but on which there was due only a very small balance. Under the execution issued on this judgment, the two tracts of land were sold by the sheriff—the tract of 250 acres to the defendant himself, and the tract of 138 acres to one C.

DE SAUSSURE, Ch. It was shewn by the very clear report of the referee, Mr. Farnandis, that there was a large balance of the personal assets of the estate in the hands of the defendant; much more than enough to have paid off the balance due by the estate of the testator, on the ^{land and amount if it had been applied to the payment.} But the funds of the personal estate were not so applied; and levies were made on two tracts of land belonging to the testator's estate; one containing 138 acres, and the other containing nearly 250 acres, but levied on, the 14th June, 1808, as containing 100 acres. The two tracts were put up to sale, by the sheriff of Newberry, and sold, 7th Aug, 1809. The former tract (of 138 acres) was knocked off to one C. for \$472; which was a small price. The other tract (of 250 acres) was knocked

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off at \$126, to Mr. J., who was bidding for 28

English law, in favor of the heir or devisee, over the legatee or inheritor of personal property, is to be looked for in remote ages. Among a people living under the feudal system, landed estate constituted the predominant element in the social and political organization. And hence, we can hardly be surprised at the vast importance that was attached to its possession. The aggregate of the personal property then, embraced but a small portion of the wealth of the nation, while the few goods and chattels, that were possessed by the humbler classes, were insecure, and liable to be snatched away by the lawless, marauding barons. The lands were all monopolised and held by the strong arm of military power. Commerce had not then expanded her sails upon every sea, and in co-operation with the mechanic arts, and a more enlightened agriculture, swelled the wealth of the nation in personal property, to the enormous and incalculable amount that

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*now exists. The feudal system yielded to the irresistible influence of advancing civilization; but it yielded slowly, and its stern features are still, and for a long period to come will remain, deeply impressed upon the civil polity of the British Isles. And

defendant, the administrator. The land was conveyed to defendant, by the sheriff, and has been kept by him ever since as his property.

It was fully proved that this tract of 250 acres, purchased by defendant at the sheriff's sale, for \$126, was worth at the time of the sale, at least \$7 more per acre, which would amount to \$1750; and is worth, at this time, at least \$13 per acre, which would amount to \$3250.

It was also proved that defendant not only did not pay the debt on judgment out of the personal estate, but pointed out the lands to be levied on and sold to pay the debts; and that he employed Mr. J. to bid for him, without informing him that himself was administrator, but assigning as a reason for his request, that if he bid openly, himself, others would run up the land upon him to a high price. Mr. Farnandis, who thought the land worth \$8 per acre, at the time of the sale, did not bid, because he saw Mr. J. bidding, with whom he was intimate, and did not choose to interfere.

Upon this state of facts, supported by proofs,

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it is contended by the complainants, that the sale of the 250 acres, was fraudulent and void. After a careful examination of the facts, it appears beyond all doubt, that there were funds arising from the personal estate, in the hands of the administrator, which were more than sufficient to have paid the debts; and at all events to have satisfied the judgments. That—even if that had not been the case—the sale of the tract of 138 acres (bought by C.) was more than sufficient to pay the debts. No necessity, then, existed for the sale of the 250 acres. Yet, it appears, that the administrator, who ought to have protected the estate, not only did not perform his duty, by paying the debt, but pointed out the land to be levied on and sold under the execution.

The levy was made on the tract as containing only 100 acres; and Mr. Farnandis, (then in the sheriff's office,) proved that it was usual to set up land at the quantity represented.

How this error arose, does not appear. But the administrator—who was intimately acquaint-

even here in this new and distant land, and under our republican institutions, differing so widely from those of mediæval ages, it not unfrequently imposes its rude shackles upon the administration of justice. Such is the origin of that preference, given by the English law, to the devisee over the legatee, and which discriminates unreasonably and unjustly between them. I have alluded to the vast increase, in modern times, of wealth in personal property in the United Kingdom. Its aggregate value now, greatly exceeds that of the real estate. This change in the condition of the country, as to the relative value of real and personal property, it might be supposed would lead to some modification of those distinctions which the law makes between them, and this result has happened to a very considerable extent; but, though the feudal system has passed away, leaving, however, its strong impress upon the institutions of our mother country, there are causes still in operation, that impart to real estate an importance beyond its intrinsic value. The hereditary nobility constitute the great bulwark of the British

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monarchy; the privileged classes form a barrier, that interposes between the throne, and popular encroachments and republican tendencies. The existence of their privileges, is identified with the prerogatives of the crown. They support the throne, not as their war-like ancestors did, by the sword and by military array, but by the influence of their enormous wealth, and their power as hereditary legislators. They are the strong pillars that support this ancient monarchy. Volcanic and pent up fires smoulder beneath the venerable pile; the waves of popular discontent dash madly round the foundations. Take away the barrier, from which the

surge is made to recoil; remove the weight by which the popular upheaval is repressed, and the flood and the earthquake would do their work in an instant; and this proud and powerful monarchy, in all its colossal proportions, would be swept away at once and forever. No reflective mind that has pondered upon the rise and fall of empires, can doubt for a moment, that the same revolutionary vortex that swallows up the British nobility, will also engulf the British monarchy. These views are forcibly felt, if not acknowledged, by their enlightened statesmen and public functionaries. They are appreciated by the middle classes, and

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by all the friends of peace, order and stability, who hence submit to admitted evils and abuses, "rather than fly to those they know not of."

The British nobility are essentially a landed aristocracy. They have other forms of wealth of course; but their dignity and family pride, are made to rest principally upon their territorial domains. A landless noble is an unfortunate being. A Duke, a Marquis, or other hereditary peer, without a rental, is an object of contempt to his own order, and of ridicule to the classes beneath them. The same remarks apply, with greater or less force, to other orders of the nobility, and the gentry generally. Very great stress is laid upon their hereditary real estates. And no sooner has a tradesman, who has amassed a fortune, received the order of knighthood, or retired without that distinction,—or a judge, or a successful soldier, enriched by the rewards of the State, been raised to the peerage, than they look about for investments in real estate. They purchase country seats, and their appurtenances, and hope to become the founders of aristocratic

ed with the affairs of the estate, and with the land—might have corrected it.

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*The witnesses do indeed say, that they did not see any improper conduct in the administrator on the day of sale; or hear him make any misrepresentation. That might be avoided by an experienced man, who was endeavoring to force a sale of land of the estate in his hands, that he might buy it in at a very low price. The evidence of the facts—the *evidentia rei*—is irresistible in the case. The non-application by the administrator, of the assets in his hands—which were more than sufficient to pay the judgment—raises a violent presumption against him. His pointing out, and permitting the land to be levied on and sold, for a very trifling balance on the judgment, increases that presumption. His not bidding, himself, because he feared that other persons might then bid on him, and run the land up to a high price, shews a settled design to get the land as low as possible. His employing (by what appears now to be an imposition on him) privately a third person, a gentleman of most respectable character, who was ignorant of his situation as administrator, and did not know the land, to bid for him, proves a deliberate prosecution of that design. And when that friend had bid in the land, at ten times less than its then value, his taking advantage thereof, and accepting an absolute title

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to himself, is the completion of the scheme, which was to enrich himself, at the expense of the widow and the orphans, whose estate and whose interests he had in charge.

It is wonderful that a person of so much understanding, should be so blinded by interest, as to beguile himself into a belief that such transactions could escape the scrutinizing eyes of Courts of justice.

It is the duty of this Court to correct such transactions; and that duty must be performed. It would be a disgrace to the administration of justice, if this were not uniformly corrected, when brought to the view of the Court.

The administrator had no right, in the confidential relation in which he stood, to become the purchaser; at all events, not under such circumstances as he appears to have created, or availed himself of, to gain a most advantageous bargain to himself, to the great loss and ruin of the widow and children, whose personal estate was in his hands, and might, and ought to have been applied to prevent the sale of the land altogether.

It was alleged by the counsel for the defendant, that if the Court should set aside the sale, and order an account for rents and profits, it would be proper to make some allowance to the defendant for his improvements. This defendant is not entitled to any favor from the

houses, and to transmit their honors and possessions to their posterity. It cannot be denied that—where orders of nobility are to exist—landed property constitutes the best

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form of wealth, and the most stable foundation on which the dignity of ancient and aristocratic houses can repose. Such an estate is less likely to be alienated or dissipated. With such an estate the owner can more easily identify himself, than with money or stocks. The capitalist cannot love his money, as an individual or a thing; but the moral sentiments cluster thickly and strongly around ancestral halls and hereditary forests, lands, parks and waters. If such an estate is alienated from necessity or caprice, the price is soon dissipated, and the degradation of the owner from his castle, soon follows.

Thus, it has become a prevailing principle in the English law, to give preference to land, and a prevailing sentiment in the aspiring portion of English society, to seek that mode of investment. Hence their law of entails, and their laws of primo-geniture, the policy of which is to sustain their ancient aristocratic houses, by preserving their estates from alienation and disintegration. Hence the law, which exempted real estate from the payment of debts, except those secured by specialty; and even in that case, the remedy

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of the creditor was restricted. And hence the principle, which has become the subject of enquiry in this case, by which a preference is given to a devisee, over a specific legatee, in the payment of the testator's debts. None of the causes which in the mother country conspired to produce this unjust and unreasonable distinction, are in operation with us. We are far enough removed, both in the

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Court; but he is entitled to justice; and if he has made any valuable and durable improvements, beneficial to the complainants, he ought to be allowed some compensation for them. That must be the subject of further examination.

It is ordered and decreed that the purchase made by the defendant, at sheriff's sale, of the tract of 250 acres of land, be declared null and void, and set aside; that the defendant deliver up the sheriff's conveyance to him to be cancelled; that he deliver quiet possession of said land to the complainants; that he account before Mr. Farnandis, the referee, for the rents and profits thereof, (in which account he shall be allowed all reasonable deductions for actual expenditures, and improvements on said land, beneficial to the complainants.)

It is further ordered and decreed, that all the matters of account between these parties be referred to Mr. Farnandis, to settle and adjust, including the price of the land purchased by C. This defendant to pay all the costs of suit.

An appeal from this decree was heard at Columbia, December Sittings, 1819, when it was affirmed by the whole Court, consisting of Chancellors DE SAUSSURE, WATIES, GAILLARD, JAMES and THOMPSON.

O'Neill, for complainants.

Crenshaw & McDuffie, for defendant.

lapse of time and the form of our institutions from the feudal system, not to be fettered by its dogmas, where they are felt to be inconvenient, unreasonable and unjust; more particularly where, as in this case, we are not bound by any authoritative decision of our own Courts. The statute *de donis conditionalibus* has never been of force in this State. We have abolished long since the law of primogeniture. Our law of descent is adapted not to aristocratic, but to republican forms of society. Its policy is rather to pull down, than to build up and sustain, great and overgrown estates. By the Statute 5 Geo. 2, Ch. 7, A. D. 1732, we have abolished all distinctions whatever, between real and personal estate, in the payment of debts. By its provisions, lands are declared to be assets for satisfying the claims of creditors, and are made liable to execution, "towards the satisfaction of such debts, duties and demands, in like manner as personal estates in any of the said plantations respectively, are seized, extended, sold or disposed of, for the satisfaction of debts," (2 Stat. 571.) In the construction of this Act, our Courts have held (and this has long been the settled law,) that the lands of an intestate, which have descended to the heir, or of a testator, which have been given by will to a devisee, may be levied on and sold by the sheriff, under an execution against the executor or administrator, without making the heir or devisee a party to the proceedings, by notice or otherwise; although there may be sufficient personal assets to satisfy the debts. *Martin v. Latta*, (4 McCord, 128;) *D'Urphay v. Nelson*, (Ib. 129, note.) The Stat. 5 Geo. 2, and the judicial interpretation it has received, have placed real and personal property upon precisely the same footing, as it respects the compulsory satisfaction of debts. Every portion of a testator's estate is liable to his creditors.

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In regard to them, the question, as to which fund is primarily liable, does not arise. And they have the same facilities of relief, in the way of process, for enforcing payment against the one, as against the other.

Such being the state of our law, and its policy on this subject, is there any thing in justice or reason which would, as between a devisee and a specific legatee, subject the property given by the testator to the latter, to the payment of his debts, to the exemption of that given to the former, by the same benefactor? Lands have not here that adventitious value, which for causes we have investigated, obtains in the parent country. They are not more valuable than personal property; than negroes, for example. Indeed the latter, if facility of converting them into cash, at an established marketable value, may be considered a test, are the most desirable of the two. Setting aside the reasons to be derived from the social polity of England, past and present, is there a single ar-

gument by which the distinction can be vindicated? Is there any sound legal philosophy which supports it? Is it not opposed to justice and condemned by reason? Where a testator gives a tract of land to one, and a chattel to another of his friends, by the same specific form of language, and a description which identifies both, a rule that would make one of those gifts liable before the other, for the payment of debts, is nothing less than absurd; except, indeed, where the rule has originated in some great and controlling policy. If the testator indicates which fund shall be primarily liable, it is, of course, a different question; for his will is the law of the case. But the distinction, which is obnoxious to the charge of absurdity, is where both are given in the same form of language, without any expression from the testator, as to which fund shall be primarily liable. Let me illustrate by an example. The testator says, "I give and devise to my son, Michael, my house and lot, in the town of Columbia, on which I live," &c. "To my daughter, Mary, I give and bequeath the following slaves, namely, Tom, Dick, Bet," &c. The testator dies indebted to the value of the slaves, which he intended as a provision for his daughter, who must now remain portion-

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less, *and be turned a beggar upon the world, because her legacy, although as specifically intended for her, as the real estate was intended for the son, is, by the rule, primarily liable. Is it not the better and more equitable rule, that the devise and legacy should abate pro rata? I dare affirm that the rule which, in such a case, would subject the legacy to the exoneration of the devise, would, in nine times out of ten, defeat the intention of the testator. When a testator gives his legatee a specifically described negro, he as clearly means that his legatee shall have and enjoy that particular negro, as when he gives to his devisee his land. Where the testator has not intimated the slightest distinction between them, nor hinted which would be primarily liable for debts, upon what principle of justice can the Court interfere, and say that the one of those two equally favored objects of the testator's love and bounty shall pay the debts—even to the entire exhaustion of his share, and to the exemption of the other? There is no principle upon which such an interposition can be justified. The intention of the testator, we are taught, is the pole star in the construction of wills. We carefully and laboriously seek it, through all the obscurities of language, and by rules of interpretation that are sanctioned by reason and experience. And when we have found the intention of the testator, we are obliged to enforce it; unless, indeed, it be that such intention be contrary to the policy of the law. But in this case, we are called upon to violate the manifest intention of the testator, not because that inten-

tion is opposed to the policy of our own laws, but because such a decision would be more in consonance with the policy of a distant and alien land.

If we were trammelled by precedents and decisions of our own Courts, the case might present a more dubious aspect. But I have looked over the reported decisions, and do not find that this point has ever been made as an issue and adjudicated by the Court. Dicta there are, contrary to the conclusion to which my judgment has led me. But opinions upon collateral questions of law, expressed, arguendo, by the Judge, who acts as the organ of the Court, in delivering its

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judgment, cannot be considered more authoritative than his own individual and private opinions. Indeed it is exceedingly unfair to consider them the result of his own settled and deliberate judgment. Such collateral matters are not discussed before and adjudged by the tribunal that decides the case, and oftentimes are but slightly considered by the Judge who expresses his opinion upon them. Therefore, upon the soundest principles, they are regarded as fallacious guides. I would not impugn the decisions in which their dicta have been expressed, nor deny that, as a general rule, personal property should be the primary fund for the payment of debts. But I say that the rule should admit of some qualification, and that a specific legacy of personal property should be liable only, *pari passu*, with a devise of land; and not liable at all, until other assets, real or personal, not specifically disposed of, or charged with or devised for the payment of debts, are exhausted. It is said by the Lord Chancellor, in *Harmood v. Oglander*, (8 Ves. 106,) "that in the administration of assets, ordinarily, the first fund applicable is the personal estate, not specifically bequeathed; then land devised for the payment of debts, not merely charged, but devised or ordered to be sold; then descended estate; then lands charged with the payment of debts." It is obvious, therefore, that even in England the intention of the testator is respected, and the legatee is protected, except where he comes into conflict with the devisee; in which case, the latter is exonerated until the interest of the former is exhausted. For such a distinction, I see, as I have said, no reason applicable to the state of circumstances existing in this country. In *Warley v. Warley*, (Bail. Eq. 400,) Chancellor Harper, in allusion to the rules prevailing in the English Court, in the administration and marshalling of assets, says, "we have adopted the English rule to a considerable extent; but the approximation of real and personal estate, in descent and in other particulars, has shaken the rule a good deal." From which I infer, that it was the opinion of that philosophic jurist that our Courts were not, in the altered circumstances of

this country, bound to follow the English decisions on this subject.

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*It was urged, in the argument of this cause, that the first clause of G. H. Hull's will, in which he expressed his wish that his executor should "out of his estate, pay off all his just debts and funeral expenses," was an indication of an intention that the personal estate should be primarily liable; because the real estate not being devised to the executor for this purpose, nor any authority given to him to sell it, the implication is, that he meant that the executor should pay the debts out of the personal estate only. This construction is somewhat specious, but it does not strike me as correct. The word "estate," embraces the realty, as well as the personal property. The words of the clause would, in England, be sufficient to charge the real estate, in cases where it was exempt. And if so, the construction contended for, cannot be the true one. I cannot suppose the testator to have entered into the nice legal distinction which this meaning would imply. I think it clear that he thought his devises and specific legacies would remain intact, and that the general residuary estate, would be sufficient to pay his debts.

After a great deal of deliberation, I have adopted the conclusion, intimated in the foregoing remarks, to sustain the first exception of the defendants, which is accordingly done.

The third exception of the defendants is, "because the Commissioner, in ascertaining the value of the real and personal estate, devised to defendant, Zulina, has estimated the fee simple value thereof; whereas, it is submitted, that she could have the enjoyment of the property, but for life, without the power of disposing of it at her death, and that her interest therein, should have been estimated and valued accordingly." The appeal decree directs the Commissioner to ascertain and report "the nett value of the devises and legacies to Zulina; and the excess received by her, over one-fourth of the testator's estate, clear of debts." The same decree has adjudged that she takes a fee conditional in the real, and a life estate in the personal estate. In regard to the personal estate, the children of Zulina, if she had any, would take as purchasers. In regard to the real estate, they would not

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take as purchasers, but by way of *limitation, and per formam doni. If she takes a fee conditional, as she does by the express terms of the appeal decree, as well as upon principle and authority, then the ulterior limitations over in the event of her dying without issue, are void. A remainder cannot be limited after a fee conditional. The only abridgment of her interest in the land, is its being reduced from a fee simple to a fee conditional. The question then occurs, whether, in valuing her interest in the real

property, there is to be any deduction in its estimated value, in consequence of its being a fee conditional, instead of a fee simple. If Zulina Hull, (now Bryan) should have children capable of inheriting this fee conditional, then she may alien and bar the issue. It then becomes in marketable value and for all practical purposes and uses, equal to a fee simple. If she does not alien, it is true that she can not devise it; but, on this contingency, it must descend to her issue, per formam doni. If she suffers it thus to descend without exerting her rights of alienation, it will be her own election, and she cannot complain. If she forbears to bar the issue, having the power to prevent the descent, it may be considered as her own voluntary disposition of the estate; and it will go as most persons would desire their estates to be disposed of after death. The only feature that can depreciate the value of a fee conditional is, the possibility of a reverter, to the heirs of the testator. This reverter is not considered in law as an estate. It is too small and remote an interest to have that character impressed upon it. It is too remote and contingent to be valued. There is no appreciable interest left in the donor. I do not know by what process, or mode of calculation, we could estimate the value of a possibility of reverter to the testator. The value of the possibility of reverter constitutes the only difference between the value of an estate in fee simple, and an estate in fee conditional. It is admitted that Zulina has, at this time, a child or children. If she has, her fee conditional estate, for all practical purposes, is worth as much as if she held it by a fee simple title. There was no evidence as to the birth of children, but the fact was admitted at the trial. At all

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events, *she being a young woman, and married, the contingency of a reverter of the estate is exceedingly remote. I think, therefore, that the principle on which the Commissioner valued the devise was correct.

The case is very different as to her legacy. The Court of Appeals has adjudged that she takes only a life estate in the personal property. It has gone farther, and has adjudged that the remainder to her children, after the termination of her life estate, was to be excluded in the valuation of the fourth of her father's estate, which she is entitled to retain under the provisions of the Act. The language of the decree is most explicit. "But," says the Court, "if we should take into consideration bounties of this remote description, we should entangle ourselves in inextricable difficulties in the application of the statute. And we deem it safer to hold, that the interests of the children of Zulina, who take as purchasers distinctly from their mother, and not through her, and in connection with her, shall not be considered as a gift to her." In connection with this part

of the decree, the direction to the Commissioner to report the nett value of the devises and legacies to Zulina, has a meaning and an object. It will be perceived that the language of the passage quoted, repels the idea of excluding from the valuation the interest which the children take in a fee conditional; where they do not "take as purchasers distinctly from the mother, but through her, and by way of limitation." While the principle is as distinctly declared, that where a life estate is given to the parent, with remainder directly to the issue as purchasers, the life estate is alone to be regarded as a gift to the parent. There are familiar and practical modes by which the value of a life estate may be ascertained. The process, though in some degree necessarily arbitrary, is every day resorted to in the Courts both of law and equity. Approximation is the only thing possible, or that is aimed at, in such estimates. The Commissioner was in error in placing the fee simple value on the negroes given to Zulina by testator's will.

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So much *therefore, of the exception of Zulina, as relates to the valuation of the negroes bequeathed to her, is sustained.

The fifth exception of the defendants is, "because the defendants, Bryan and wife, have a right to select out of the property devised and bequeathed to the wife, the particular property which they prefer to keep; and, in throwing off the excess of one-fourth, they have the same right to point out what property is thus rejected. In this case, said Bryan and wife elect to take in the first place the whole personal bequest to her, and the balance in real estate." This exception raises another difficult question. It is singular that an Act so short, and apparently so simple in its provisions, should have given rise to so much litigation in the Courts, and so many difficulties in its construction. I can scarcely hope to pass through the labyrinth of difficulties presented in this case, without falling into some error. The question made in this exception seems to have been decided in favor of the exceptants, in the unreported case of *Gardner v. Atkinson* (MS. Decisions, Book B. p. 340 Columbia). I have not seen that case. It is quoted by Ch. Johnston, in his circuit decree in this proceeding, (2 Strob. Eq. 187.) I should not consider the principle of construction, that obtained in that case, *Gardner v. Atkinson*, entirely free from doubt. There are difficulties; but, upon the whole, I incline to think that the decision may be supported, as the correct interpretation of the Act. As Chancellor Johnston has said, in his circuit decree in this case, "it is the amount or value of the excess over one-fourth that is declared void, and if the bastard will pay up that excess in value, he is entitled to the devise of the whole estate." The Act does not declare that the gift shall be void for

the excess over one-fourth, but "that it shall be null and void, *for so much of the amount or value thereof*, as shall or may exceed such fourth part," &c. It appears to me, that there is significancy in the peculiar form of the phraseology, that I have placed in italics.

The Act does not say in words what disposition is to be made of the portion of the

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gifts to the illegitimate child, that is *declared void. That is left to implication. But, by judicial construction, it is not absolutely null and void, but voidable, at the instance of the lawful wife and children. In *Owens v. Owens*, (MS.) it was held that the will of a testator was good and valid against all the world, except as against the lawful wife and children. And in *Breithaupt v. Bauskett*, (1 Rich. Eq. 465,) it was held, by Chancellor Harper, that the right to vacate the gift for the excess, was so entirely a personal privilege to the wife and children, that it did not survive to the executor.

The force and effect of these decisions, and of this construction is to establish this principle, that the lawful wife and children are not joint tenants, or tenants in common, with the illegitimate child, where the gift exceeds the fourth of the testator's estate. If the Act constituted them joint tenants, or tenants in common, the estate or interest of the wife and lawful children would, on their death, descend to the heirs at law, or, in case of a chattel, be transmitted to the personal representatives. The right then of the wife and lawful children in such a case, is not an estate or vested interest. It is not devisable, descendible or transmissible: is it even assignable? If it is, and should not be recovered in the life of the party assigning, the assignment would be defeated. What, then, is the interest, which the wife and lawful children take in the gift to the bastard, where it exceeds a fourth? It is anomalous, and difficult to be defined. It may be called a claim entirely personal to them, to which they are entitled under the restrictions which I have above expressed; a claim to call on the illegitimate child for "the amount or value," of what said child has received over the one-fourth part of testator's estate. The legal title of the bastard is good and perfect, subject only to this purely personal equity, created by the Act, in favor of the wife and lawful children. If they obtain the excess over the fourth in "amount or value," is not the spirit of the Act as well as its words satisfied?

Suppose that the bastard takes, by the will,

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houses, lands or *chattels, which exceed the fourth by an inconsiderable amount; will it be said that pecuniary compensation for the excess would not satisfy the requisitions of the law? Or suppose, as in this case, the bastard takes negroes by the gift, to which

she is, or may be attached, as well as lands as the claimants have no legal title or estate in any of the property; may she not say to them, I will satisfy your claim out of the lands? It seems to me that Bryan and wife have a right to elect what property they will keep, to make up their lawful fourth, and to throw off the excess. This exception is sustained.

I come now to the consideration of the exceptions on the part of the complainants. The first claims an unqualified right of partition of the property, on the part of the complainants, with an account of rents and profits. I have already decided this question, in my decision upon the fifth exception of the defendants. The unqualified right to a partition would pre-suppose that the wife and lawful children had an estate or vested right in the property, to the amount of their claim. This, we have seen, is not the case. There are circumstances in which partition may be proper, and even necessary, and where the Court will resort to this process, as a means of obtaining the proper and necessary results. It must be subordinate to the right of the illegitimate child, to elect what property to retain, to make up the fourth, and what she will throw off; and also to satisfy, by pecuniary compensation, the excess in amount or value over the fourth. If the bastard refuses or omits to throw off, or to give pecuniary compensation for the excess, partition may be resorted to, in the discretion of the Court, for the purpose of dispensing justice among the parties. This exception is overruled.

The complainants's second exception is, because, "even if the plaintiffs have no right to partition of the specific property given to the defendant, Zulina, by the will of Gideon H. Hull, they are at least entitled to such proportion of the income and profits thereof, accrued since his death, as the excess of the provision for her above one-fourth part of the clear value of his whole estate bears to the whole value of such provision, in

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lieu of interest upon the sum at which such excess is estimated." As a result of the decisions on this statute, and of the principle that the right of the wife and lawful children is a mere personal claim, awaiting their demand, and that they have no estate in the property, I doubt if they are entitled to interest or rents and profits until a demand is made. Of this they could not complain, as in the most of instances it would be their own default, if the demand was not immediately made. On this point, I express no opinion, but say that they are entitled to interest, or an account for rents and profits, (if entitled at all) according as the illegitimate child may elect to make pecuniary compensation, or a partition of the specific property be resorted to as a necessary process, to ascertain and put them in possession

of their rights. This exception is overruled.

It is ordered and decreed, that the report be re-committed to the Commissioner, and that the parties have the rights belonging to them, as declared in this decree, and that the report be re-formed and made conformable to the principles herein above set forth.

The complainants appealed, on the grounds,

1st. That the decree is erroneous in deciding that lands, specifically devised, are chargeable, and must contribute for payment of the testator's debts, rateably with personally specifically bequeathed, where the will does not otherwise direct.

2d. That, according to the correct construction of Gideon H. Hull's will, the entire personality of his estate is charged primarily with the payment of his debts, and must be exhausted before any contribution for that purpose can be exacted from the real estate devised.

3d. That, instead of the excess in value of the provision made for the defendant, Zulina, by the will of Gideon H. Hull, above the one-fourth part of the clear value of his estate, estimated in money, with interest thereon, the plaintiffs are entitled to have partition made between her and them of the specific property given to her by the will, and an account of the income and profits of the same, accrued since the testator's death.

4th. That the decree errs in sustaining the

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fifth exception of the defendant, Zulina, to the Commissioner's report, the law admitting no such right of election on her part as is set up by that exception, and recognized by the decree.

The defendants also appealed, on the ground,

As to that part of the decree which sustains the Commissioner's report, and overrules so much of defendants's third exception to that report as relates to the valuation of the interest which Zulina Bryan took under the will in the real estate devised to her, the defendants submit, and will endeavor to maintain, that the interest she took in the real estate devised to her, whatever be its legal character or denomination, is less than an absolute or fee simple title; that, at the death of the testator, it was practically, at most, but a life estate to an unmarried female infant, about ten years of age, with the capacity of becoming enlarged to a fee simple, upon her living to the age of twenty-one and having lawful issue. The estimated value of these contingencies should have been ascertained by the Commissioner, and deducted from the intrinsic value of the lands.

Carroll, Yancey, for complainants,
Bauskett, Gray, for defendants.

JOHNSTON, Ch., delivered the opinion of the Court.

Of the numerous questions presented by this appeal the only one argued was that re-

specting the relative liabilities of real and personal estate to the payment of the debts of a deceased.

Before proceeding to the more particular discussion of it, it may be proper to bestow a passing attention upon the direction of the testator, that the executor, "out of his estate, pay off all his just debts and funeral expenses." In the absence of any specific indication of the fund out of which the payment should be made, this direction is some evidence of intention that the executor should employ the personality, which is at his disposal, as the means of accomplishing the end pointed out.

"If," says a respectable elementary writer,^(b) "the executor is pointed out as the person to pay, that excludes the presumption

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*that other persons, not named, are required to pay;" and "if the testator directs a particular person to pay, he is presumed, in the absence of all other circumstances, to intend him to pay out of the funds with which he is intrusted, and not out of other funds, over which he has no control."

The distinction, though nice, is—as this author justly observes—clear in theory, however difficult in its application to particular cases.

But, without the aid of this clause, the majority of the Court is prepared to sustain the proposition submitted in argument by the plaintiffs' counsel; that, in the administration of the assets of a testator, who has given no specific direction on the subject—as between legatees of the real and personal estate—the personal estate is liable for the payment of debts, before resort to the realty.

It is hardly necessary to remark that creditors are not concerned in the question. The Chancellor has properly observed that "every portion of a testator's estate is liable to creditors;" and, therefore, "in regard to them, the question as to which fund is primarily liable, does not arise. They have the same facilities of relief, in the way of process, for enforcing payment against the one as against the other."

It is stated in the decree—and it is true, beyond controversy—that, by the law of England, (which is our law, except so far as we have modified it,) personal estate is the primary fund, as between personal and real estate, standing in the same circumstances.

Has this law ever been abrogated or modified in this State? Until the present time, I believe it has been received and accepted as the unquestioned law of the land, both by the community, the profession, and the Legislature; and, if there has been no express adjudication on the point now presented, it may be accounted for by the fact, that the doctrine was never doubted; and, therefore, the question was never raised.

It is not perceived that the legislation of this State has abolished the distinction between real and personal property, in respect to their administration.

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*It is true the statute *de donis* has not been adopted by us. Fees conditional, unless alienated by the tenant, or charged by him in his life time, as it is said he may do,^(c) descend, upon his death, *per formam doni*; and though, by the Statute 5 Geo. 2, ch. 7, (2 Stat. 571, P. L. 250,) of which I shall speak hereafter, they may be as liable, in the hands of the special heirs, as lands held in fee simple are liable in the hands of the heirs general (which may be doubted); this does not prove that they are equally liable with personal estate.

It is also true that we have altered the law of descent as to real estate. The inheritance is no longer confined by primogeniture, but falls equally upon all the children. Does it follow that the intention was to strip the children of their inheritance,—to abolish the distinction between this species of property,—which is in its nature inheritable, and goes to the heirs, and the chattel property, which goes to the personal representative, and in which the issue of the deceased have only an interest resulting to them, after the representative has performed his duties out of it?

The Statute 5 Geo. 2, ch. 7, § 4. (2 Stat. 571,) is no proof (further than that it has not been repealed by us,) of the policy of this State. It was enacted by a foreign legislature in 1732, while we were yet a colony. It has express and exclusive reference to the interests of creditors, and was probably intended to give confidence and security to the English merchants with whom the colonists dealt. There is nothing in it to affect the relative liability of lands and personal property, as between the heirs and distributees, or the devisees and legatees; and, as we have before observed, the question as between them is one in which creditors have no concern.

The decisions upon this statute, to which the decree refers, (which, by the way, have been greatly modified,) ^(d) recognize the distinction between the liability of lands and chattels. How then can they be authority for the position that there is no distinction?

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*The earliest of these decisions adjudged (though with a strength that has been diminished by subsequent cases),^(e) that an execution obtained by a creditor against the personal representative of his deceased debtor, might be levied upon his lands, in the hands of his heir, or devisee, though the

(c) *Izard v. Izard*, Bail. Eq. 234, 5.

(d) See the cases, 4 McC. 129; 2 Hill, 579; Speer's Eq. 250; 2 Hill Eq. 260.

(e) See the cases, 4 McC. 129; 2 Hill, 579; Speer's Eq. 250; 2 Hill Eq. 260.

(b) 2 Story Eq. § 1247.

heir or devisee was no party to, nor had notice of, the suit in which the execution was obtained, and though there were personal assets in the hands of the representative to satisfy the debt.

It is, perhaps, unfortunate that the cases alluded to, occurred in,—and that the questions involved in them, were consequently presented to,—a law Court. Had the creditor brought his case in equity, where perfect relief could have been administered with reference to the rights of all parties concerned, he might have brought in not only the heir, but the executor, and the decision would have been such as not only to secure the creditor in all his just rights, but to adjust the liabilities of the heir and executor according to the relation subsisting between them, and arising from the assets received by them, respectively.

The earlier law decisions to which I have alluded, did not, it seems to me, sufficiently distinguish between the liability of the land, created by the statute, and the remedy, or means of enforcing that liability. Too much stress was laid on the mere words of the statute, as respected the remedy.

No doubt exists that lands are made liable under the statute, but the material question in this case, was in no respect within its provision; and that question is affected by the decisions referred to in the decree, only so far as they affirmed the right of the creditor to sell the land in the hands of the heir, or devisee, under a proceeding against the administrator or executor alone.

These decisions have never been satisfactory to the profession.^(f) To sell a man's land for debt, without impleading him, when the land was not bound by a judgment when it came to his possession, and when assets are, or may be, in the hands of an agent expressly appointed by law to pay the debt,

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is against common right. The Courts have, on several occasions, expressed their regret that the decisions were ever made, and declared their determination never to extend them, and have, in fact, materially restricted them. The decree, in this case, violates deliberate opinions thus expressed, by assuming that the decisions are unexceptionable, declarative of the true policy of the State, and entitled to be extended to new results beyond the points decided.

These decisions do not determine that the land—though liable—is not the secondary fund. The Judges were of a different opinion. It was not decided in these cases, nor could it be decided in a law forum, at least in such a proceeding, that the heir or devisee had no recourse over against the executor, or against the legatee, to whom the executor had paid the personal assets. The

(f) See note (d) and Speer's Eq. 252; Rice Eq. 388.

only judgment given was, that the land was liable to the unpaid creditor. Upon the Chancellor's own principle, the heir was entitled to an after proceeding for contribution. This is proof that there is a right to recover over. Is there any thing in the decisions referred to, to shew the extent of this right, to shew that it is limited to an equal contribution, and shall not go to the whole loss sustained by the heir? If not, then those decisions have determined nothing on the questions we are now discussing.

Taking those cases (I still mean the earlier cases quoted in the decree) to have decided nothing more than that the land of a deceased was liable for his debts, (and this is all they did decide,) their only fault was, that the judgment was made to bear upon a party who was never impleaded. The error in this decree consists in extending those decisions, by inference, into adjudications that land is equally liable with personality for debts—when that point was not, and could not have been, adjudged in the cases.

The decree is not only confessedly contrary to the law, as we borrowed it from England, but is, as we have just shewn, unsupported by the cases referred to, to sustain it.

What else is there to support it?

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*The argument is that it is demanded by our peculiar policy.

At an earlier period of my judicial life, I would have said roundly—as I have perhaps somewhere said—that questions of policy are exclusively for the legislature, and that the sole duty of the Courts is to declare, and not to reform, the law. Greater experience has chastened and modified many of my earlier opinions; and among others, to a slight extent, those bearing upon this subject.

While the legislative power extends to all questions of policy, and while to the legislature belongs the right to alter and reform the law, at their discretion, with no other limit than the constitution, the judicial power, as it had always been exercised by Courts of justice, was vested, by the constitution, in the judicial forums.

It is their province to declare the law. But the law has never been stationary. It is, and has ever been, actuated by certain great cardinal principles; and it is, and ever has been, the function of Courts of justice to apply these principles to the affairs of men, brought under their cognizance, as they may be varied by their circumstances, or the circumstances of the community, or the age.

By this process it must necessarily occur, that in the application of the leading or elementary principles, some subsidiary or secondary rules or principles, become, in the progress of time, more developed or perfected, and others more restricted, according as they serve, more or less, to promote and administer the great ends of forensic justice.

Sometimes a new subject, fit to be brought

under judicial cognizance, is discovered, which had hitherto escaped observation, although the law of the forum fully embraced it. And sometimes a remedy is brought to view, which had not been hitherto administered, but which the powers of the Court enabled it, upon principle, to administer, and bound it to administer. Sometimes the legislature introduces, by statute, a principle, or enacts a measure, as a measure of policy, leaving the principle or the measure, to be carried out to its legitimate results.

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*What is a Court to do? It is its shame, if possessing light, it does not discern its duty; and, if possessing the power, it does not employ it to the purposes for which it was created. It is its glory, if calling into exercise the great principles at its command, it so employs them as to advance the remedies within its jurisdiction.

Such an exercise of power has been called legislation—bench-made law. It is unjustly so denominated. It does not originate policy, but perfects it. It does not generate reforms, but carries them out. It does not create principles, but develops them. It is bench-declared law, not inferior in authority, or in excellence, to any other. Its progress is gradual, and occasions no sudden revolutions, to the surprise, or ruin, of the interests of society. Being the offspring of acknowledged principles, it commends itself, by the power of those principles, to whose to whom it is applied. And being tested, at each step of its development, by practical experience, it may be modified, restricted or amplified, as that experience dictates.

These functions may be performed by the bench; and rightly, usefully, and, I add, constitutionally performed. But the work must be done gradually, and with a constant regard to precedents, and an anxious reference to first principles. Sudden changes, great changes, changes looking to reform, or dictated by policy alone, belong exclusively to the legislature. To the Court belongs the development of pre-existing principles.

Then, what principles have we on which to rest the great innovation proposed by the decree?

If we look to the origin and history of administration, or to the apparatus by which it always has been, and now is, accomplished, or to the respective qualities of real and personal property, we shall be led to conclusions very different from those proposed for our adoption. If we look to precedents, and to the opinions of our own Courts, and the action of our own legislature, we shall perceive what surprise and revulsion of property interests, and what inconvenience in the administration of estates, the adoption of that proposition would occasion.

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*Administration was originally confined to personal property, and the course and sub-

jects of it have never been altered, except by statute. It was performed by the Ordinary, originally, at his discretion; then, according to a course prescribed; afterwards by deputies appointed by him. The duties of these administrators, except when named by a testator, were secured by bond, according to the value of the personality.

To accomplish the purposes of administration, the personality vests in the personal representative, as its legal owner. Why? To give him that control necessary to the perfect administration of it. Only an equitable interest falls to the distributee or legatee, to be enforced after the payment of debts.

This is the quality of personality. Is it the quality of real estate? No. That descends to the heir. The title does not vest in the personal representative; nor has he any control of such property, except what may result from the provisions of the will. If it is devised, unless devised to the executor, or power is given him to dispose of it, he has no power to interfere with it, and the devisee takes it without his assent.

This distinction, in the qualities of the two species of property, forms one reason of the relative liability for debts. The executor has the control of the one and not of the other.

Are there no other reasons why land should be more favored than chattels?

May it not be for the interest of infant or female devisees, to have their portions in that species of property, which is more permanent in its character, less subject to be eloiigned, or devastated, upon which the marital right of the husband of a female heir would not so fully attach, and which cannot be alienated without her express consent after attaining majority?

May it not be for the benefit of estates, that the debts be paid primarily out of that species of property which is more perishable, and more subject to be eloiigned or devastated; and which, as we all know, and as the decree states, is more saleable, and is less liable to be sacrificed.

Is nothing due to sentiment? Is the home

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of one's ancestors, *the place of one's nativity, with which all the recollections of childhood are associated, to be put on a footing with vulgar chattels?

The decree, in putting real and personal property upon the same footing, disregards the distinctive qualities of the two species of property. Can any sagacity foresee the results?

Aliens are incapable of taking real estate by inheritance, but may take personalty. Is it not desirable to reserve, to those taking under a will, that species of property to which allegiance is annexed?

How will the proposed alteration affect the widow's right to take dower by election?

Will it not augment the necessities for that

election, and call for the choice at an earlier period in the administration, when it will be more difficult to make it?

Then, the decree establishes a principle, as I have said, contrary to the constant current of professional opinion, to the practice of our Courts, and to the legislation of the State. As evidence that it is contrary to the opinion of the profession as represented by the Judges, (besides referring to what is said in this very case *(g)*)—which is almost a decision for the case—and to what is said in *Laurens v. Magrath*, 1 Rich. Eq. 300, which is almost a decision of the question,) I have only to refer to *Stuart v. Carson*, 1 Des. 513, decided in 1796, and to the long current of cases which have followed it, as *Halyburton v. Kershaw*, (3 Des. 115;) *Dunlap v. Dunlap*, (4 Des. 329;) *Hall v. Hall*, (2 McC. Eq. 269;) *Warley v. Warley*, (Bail. Eq. 397;) *North v. Valk*, (Dud. Eq. 212;) *Gregory v. Forester*, (1 McC. Eq. 329;) *Goodhue v. Barnwell*, (Rice Eq. 240;) *Pell v. Ball*, (1 Speers' Eq. 523;) and *Jenkins v. Hanahan*, (Chev. Eq. 135.)

What is said in these cases, though it may not amount to decision, gives unmistakable evidence of settled opinion; especially the elaborate and most enlightened view taken of the subject in *Warley v. Warley*, which has never before, so far as I know, been disputed.

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*The decree is also contrary to the practice of both Courts.

For some evidence of the practice of this Court, I refer to the case of *Swift v. Miles*, (2 Rich. Eq. 154.)

That of the Court of Law is more explicit. The Rule of that Court requiring executors and administrators, pleading *plene administravit*, to file with the plea a full and particular account of their administration, on oath, with an office copy of the inventory and appraisement of the goods and chattels, evidently recognizes the liability of personality before realty.

The 22d Rule (of those adopted the 4th July, 1758) directs that this be done "to the end it may appear to the Court that the personal assets of the testator or intestate are really and in truth fully administered:"—after a preamble, reciting that suits were frequently brought against executors and administrators, to subject real estate of testators or intestates to the suing creditor, and that upon plea that the personal estate was fully administered, to which (admitting the plea) replication was made, that testator, or intestate, died seized of lands, &c., which course of practise was "injurious to those persons, who by devise, descent or otherwise, are interested in the lands of the original debtor; and by fraud or collusion real assets may be subjected and made liable to the payment of debts, before the person-

al assets are exhausted and fully administered:— for prevention whereof," &c. *(h)*

The 6th Rule (of those adopted in 1800) requires the same account, on oath, to accompany the plea of *plene administravit*, "to the end that it may appear to the Court that the personal assets of the testator, or intestate, are really administered, to the extent pleaded." *(i)*

The 6th Rule (adopted in 1814) is in identical words. *(j)*

The 6th Rule (adopted in 1837) is in the same words—omitting the word "personal" before "assets," *(k)* probably to make the Rule more perfect, by meeting and providing for the case where the will charged lands primarily or equally with personalty, and directed the executor to sell.

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*To what has been said, I add that the decree is contrary to the legislation of the State; and if the policy which the decree advances is the policy of the State, the Legislature was never aware of it.

The Statute of 1789, Sec. 20, (5 Stat. 109,) prescribing the oath of an executor or administrator, with the will annexed, requires him to execute the will "by paying first the debts, and then the legacies, contained in said will, as far as his (testator's) goods and chattels will thereunto extend, and the law charge me," and to make a true inventory of the goods and chattels; and the bond required from an administrator, cum testamento annexo, is directed to be conditioned for the administration of the goods and chattels only—although by the Act of 1787, such administrator might sell lands directed by the will to be sold, without saying by whom, the proceeds probably being regarded as personalty.

By the 19th section of the same statute of 1789, (5 Stat. 109,) power was conferred on the Ordinary, which he has possessed ever since, to sell personalty of testators or intestates, for payment of debts, as well as for division, or to prevent loss of perishable articles—yet he had no power to sell real estate, for any purpose, until 1824, when he was empowered to sell lands for division only. *(l)*

The Statute of 1842, (11 Stat. 232,) authorizing ordinaries, in certain cases, to pay over to executors or administrators the proceeds of real estates, sold by them for division, provides that this be done, "if the personal estate of any (such) testator, or intestate, in the hands of the administrator or executor, or if the assets set apart by a (the) last will and testament, be insufficient to pay the debts of the deceased."

We have seen that the doctrine of the decree is unsupported by authority; that it

(h) Miller's Comp. 4—5.

(i) Miller's Comp. 14.

(j) Miller's Comp. 22.

(k) Miller's Comp. 34.

(l) 6 Stat. 248.

(g) 2 Strob. Eq. 193.

is not only contrary to the English authorities, but contrary to the judicial opinion of this State; contrary to the practice of the Courts, from the earliest times to the present; contrary to the legislation of the State; that it confounds the well defined and very

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distinct qualities of the two species of *property, and sacrifices interests of devisees and heirs in real estate, without reason or necessity; and that it lays the foundation for further results, the effect of which cannot be foreseen.

To this I might add that the doctrine is contrary to that of other States,^(m) whose condition and laws are similar to our own, and whose policy must, therefore, be the same; but I hasten to a conclusion.

It is argued that when a testator disposes of real and personal property, in the same words, to different persons, his intention is defeated, if the personal legacy is taken for debt, in exoneration of the devise of the realty. This is only true, if we suppose him to have drawn his will in ignorance of the law. Like disappointments frequently occur where that is the case, and can scarcely be prevented. But if a testator knows that unless he expressly makes real and personal equally liable, the legacies must contribute before the devisees; he must intend when he gives them in the same terms, that the former shall be liable before the latter, and is not disappointed when the law takes its course.

Suppose the legal operation of his will had been explained to this testator, and that he still adhered to and executed his will, (and this is the legal presumption), where is the ground for disappointment? The disappointment would have existed only if the legal operation of his will had been disallowed.

After all that can be said, the general reasoning of the decree applies as well to cases of intestacy as to those of testacy; and if lands should be put on the same footing with personalty in the one case, it should in the other; and who is prepared for that?

If not prepared to go so far, and yet prepared to apply the doctrine proposed to testate property—leaving intestate to be governed by a different rule, have we not anomalies enough in the law already, without adding this to the number?

We prefer to stand where we are, and it is

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*Ordered, That so much of the decree as sustains the first exception of the defendant, Ann Hull, be reversed, and that said exception be overruled; and that with this modification the decree be affirmed.

DUNKIN, C., concurred.
Decree modified.

(m) 3 Johns. Ch. 148; 1 Paige, 190; 3 Murph. 201; 1 S. & R. 453; 3 Gill & J. 157; 6 Mass. R. 151; 13 S. & R. 348.

3 Rich. Eq. 96

WILLIAM J. TAYLOR, Executor of Powell McRa, Deceased, v. MARY M. McRA, A. C. SPAIN, Her Committee, MARY McRA and JULIA McRA, WILLIAM KIRKLAND and MARGARET SARAH, His Wife, and DUNCAN McRA.

(Columbia, Nov. and Dec. Term, 1850.)

[1. *Insane Persons* ⇨40.]

Testator, having a wife, who was a lunatic, and grand-children, but no lawful child,—by the first clause of his will, devised and bequeathed his whole estate to W. T., in trust for his two illegitimate children; by the second clause he declared, that if the preceding clause should be declared void by any Court in this State, authorised so to decide, then, he gave one-fourth of his estate to his two illegitimate children, and the other three-fourths to his friend and executor, W. T.; by another and the last clause, he appointed W. T., executor, concluding the same as follows: "to his special kindness and protection, I commit my beloved daughter and son, and invoke for them his most kind attention and protection." Held, that the committee of a lunatic wife, might, under the Act of 1795, elect to avoid gifts to illegitimate children; but that, in making such election, he was subject to the control and direction of the Court.

[Ed. Note.—Cited in Bouknight v. Brown, 16 S. C. 168.]

For other cases, see *Insane Persons*, Cent. Dig. § 62; Dec. Dig. ⇨40.]

[2. *Wills* ⇨675.]

That the clause, commending the illegitimate children to the kindness and protection of W. T., created no trust in their favor.

[Ed. Note.—Cited in *Gore v. Clark*, 37 S. C. 545, 16 S. E. 614, 20 L. R. A. 465; *Beaty v. Richardson*, 56 S. C. 190, 34 S. E. 73, 46 L. R. A. 517.]

For other cases, see *Wills*, Cent. Dig. § 1588; Dec. Dig. ⇨675.]

[3. *Wills* ⇨856.]

That if the clause, devising and bequeathing the whole estate to W. T. in trust for the two illegitimate children, should be declared void by the Court, then, W. T. would take absolutely, and discharged of any trust, three-fourths of the estate.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 2172; Dec. Dig. ⇨856.]

[4. *Wills* ⇨782.]

That the Court would not permit the committee of the wife to avoid the gifts to the illegitimate children, as the effect of his election would be, not to benefit the wife, but only to vest three-fourths of the estate in W. T.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 2033; Dec. Dig. ⇨782.]

[5. *Wills* ⇨785.]

That grand-children had no right, under the Act of 1795, to avoid gifts to illegitimate children.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 2035; Dec. Dig. ⇨785.]

This case is also cited in *Gore v. Clarke*, 37 S. C. 537, 16 S. E. 614, 20 L. R. A. 465, and distinguished therefrom.]

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*Before Dunkin, Ch., at Kershaw, June, 1848.

This case will be sufficiently understood from the decree of his Honor, the Circuit Chancellor, which is as follows:

Dunkin, Ch.—The will of Powell McRa bears date the 11th day of January, 1844; and the testator died on the 19th day of May, 1847. The complainant is the executor of the will, and asks that the trusts of the same, as well as of the will of Duncan McRa, may be “declared and executed, so far as respects the estates in his hands.” The devisees and legatees of Powell McRa, as well as his heirs at law, are made defendants; but none of the other parties interested under the will of Duncan McRa are parties to these proceedings.

By the first clause of Powell McRa's will, his whole estate is devised to the complainant in trust to pay his debts, and two small annuities, and to support, maintain and educate his two natural children, called, in his will, Margaret Sarah McRa, and Duncan McRa; and “so soon as either of them become of age, or marry, to convey to each of them one half of my said estate, real and personal, to them, their heirs and assigns forever.”

The second clause is as follows: “but if the foregoing clause of this will shall be declared null and void by any Court of this State, authorized so to decide, then, and in that case, I give, devise and bequeath to my children, Margaret Sarah McRa and Duncan McRa, aforesaid, one-fourth part of the clear value of my estate, after the payment of my debts, to them, their heirs and assigns forever.” And after providing for the death of either of them under age, or unmarried, the will proceeds: “and I give, devise and bequeath the other three-fourth parts of my said estate to my friend and executor, William J. Taylor, to him, his heirs and assigns forever.” The last clause appoints the complainant executor of the will, and concludes: “to his special kindness and attention I commit my beloved daughter and son, and invoke for them his most kind attention and protection.”

Powell McRa had been separated from his wife for more than thirty years; and on the

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6th March, 1817, complete and mutual *releases of all conjugal and marital rights had been, on valuable consideration, executed, recorded, and carried into effect; a copy of the instrument was adduced at the hearing, but was not furnished to the Court. John Singleton, the father of Mrs. McRa, was one of the parties to the deed, and Duncan McRa, the father of Powell McRa, was a subscribing witness. Among other provisions of the deed, Powell McRa conveyed thirty slaves to John Singleton, in trust for Mrs. Mary Martha McRa, his wife. Within the last few years, Mrs. McRa has been found of unsound mind, and the defendant, Albertus C. Spain, appointed her committee. The answer of the committee submits, that the testator, “having a lawful wife, to wit, the said Mary Martha McRa, then living, all gifts or bequests for the ben-

efit of his natural children beyond one-fourth part of his estate, are null and void, by the Act of 1795; and that the remaining three-fourths are either distributable among his heirs at law, and next of kin, or vest in the said Mary Martha McRa, widow of the said Powell McRa.”

The Act of 1795, (5 Stat. 271,) has recently received the deliberate consideration of the Court, in the case of Hull v. Hull, (2 Strob. Eq. 174,) at Columbia, in May, 1848. “The general scope and intention of this Act,” says the Court, “are very evident. Its provisions were intended, so far as the Legislature could safely interpose for that purpose, to prevent a man who had forgotten his domestic duties, from squandering his property upon the object of his perverted affections, to the wrong and injury of his family; and by depriving him of the means of rewarding the associates of his vitiated appetites, or providing for their progeny, to discourage both him and them from entering into such immoral and pernicious connexions.” The Court afterwards say: “It was long ago determined, in Owens v. Owens, (MS.) that the will of a testator in favor of his mistress or illegitimate children, was a good and valid will as to all the world, except his lawful wife and children; and so far has this doctrine been carried, that in Breithaupt v. Bauskett, (1 Rich. Eq. 465,) it was held by Chancellor Harper, that the election to avoid it was so completely personal to these parties, that the priv-

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ilege *expired with the life of the wife, and could not be exercised by her executor. The instrument is not void, but voidable,” &c.

Many of the circumstances of this case illustrate the propriety of the decision in Breithaupt v. Bauskett. The right to avoid the will or deed should be subject to the personal discretion of the injured party. “The object of the Act,” say both Chancellor Harper and the Court of Appeals, in Hull v. Hull, “was to provide for the personal support of the wife and legitimate children.” These parties were separated by mutual consent in 1817; and ample support was, by the terms of the deed of separation, secured to the wife; at least she, and those most interested in her happiness, were willing so to consider it. The property settled, passed into the possession of her trustee, and so remained. It was said at the bar, that the illicit connexion of the testator with the mother of his illegitimate children did not commence until seven years after the separation from his wife. By the terms of the settlement of 1817, the wife released and renounced all claim which might accrue to her, on the death of her husband, to any part of his estate. It is not necessary to determine how far the deed is obligatory on the wife; but it would be a violation of the well settled principles of this Court to permit her to avoid the will, without bringing into the estimate of her

husband's estate, the property settled upon her by the deed of 1817. Being discovert, she ought to have the privilege of determining whether that deed should stand as the final adjustment of her rights in the estate of her husband. But being now, by the act of God, civiliter mortua, her right to avoid the will is at least suspended.

But at the time of the death of Powell McRa, in 1847, he left, besides his widow, two grand children, the issue of a deceased son, who are infant defendants. On their behalf it was insisted that, although not within the strict letter of the Act of 1795, their case was within the mischief intended to be prevented by it; and that the terms should be construed to include grand children. On this point, the opinion of Chancellor Harper, in *Smith, Ex'r. Farr, v. Hoates*

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et al. (MS.) at Charleston, in January, *1829, is very direct; and is recommended as well by the reasoning as by the authority of his name. The testator had left the greater part of his property to two illegitimate children; and he left also a legitimate grand child. The bill was filed by the executor to obtain the direction of the Court, and the question was, whether the case fell within the provisions of the Act of 1795. "The Act," says the Chancellor, "speaks only of lawful children; but it is contended that the case of grand children comes within the reasons of the Act, and the mischief to be remedied; and cases have been cited to shew that, in the construction of wills, the term children has often been taken to mean grand children. It is admitted, however, that such is not the natural signification of the word; but that, in the cases where it has been so taken, it was because the intention so to use it must be necessarily inferred from the context, or from the circumstance that there were no children to whom it could be applied. But there is no such necessity in construing the Act of the Legislature: the Legislature may have intended the case of children alone. There is nothing ambiguous in the term to authorize me to resort to construction, derived from the spirit and objects of the Act. If the words of a statute are plain, the words must govern; though it may seem to us that an analogous case, equally requiring a remedy, is left unprovided for. Reasons may be conceived, however, for making a distinction between the case of children and grand children. Grand children must have had a mature parent, to whom the duty of providing for them more immediately appertained, and who may have had ability to do so." The claim of the grand child was, accordingly, rejected; and this decision has been more than once adverted to by the Appeal Court without dissent, although the point has never been the subject of direct adjudication.

But, from another view, it seems to the Court very immaterial, either to the wife or to the grand children of the testator, whether the first clause of the will be, or be not, obnoxious to the provisions of the Act of 1795. In the second clause the testator has provided for the contingency; and in the

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event that the devise *and bequests should only be valid to the extent of one-fourth of his estate, he devises and bequeaths the remaining three-fourths to his friend, the complainant. It is true that in a subsequent clause the complainant is also appointed executor, and that the children are "committed to his special care and protection." It was faintly argued that these words created a trust. But the language of the will is too explicit to be misunderstood. Three-fourths of the estate are devised to the complainant, "his heirs and assigns, forever," but "charged with the maintenance and support of the testator's sister, Margaret Housen, and an annuity of one hundred dollars besides, from the period of his death." In all other respects, and for all other purposes, the estate was absolute in the devisee, and the disposition of it left entirely to his discretion. See 2 Story's Eq. § 1070. It was then argued that this provision was a fraud on the law. In this connection the language of the Court, in *Hull v. Hull*, is pertinent. In considering the Act, with reference to its general intention, it must be remembered that there are few rights more valued by the citizen, or more universally respected by the Legislature, (of which we have abundant evidence in this very statute,) than the *jus disponendi*; and no construction in abridgment of this right can be conformable to the spirit and intent of this Act, except where the abridgment arises necessarily from the application of the Act to the cases which it describes, or becomes necessary in carrying its provisions into effect, as provisions of a remedial statute. The Act declares the bequest to be void so far as it exceeds one-fourth of the testator's estate. It is not provided that the surplus shall belong to the wife and children. If there is a residuary clause to a stranger, as was held in *Breithaupt v. Bauskett*, the surplus would pass, under that residuary clause, as of any other property not effectually given. If the policy of the law were not sufficiently vindicated by declaring void, to a certain extent, the intended bounty to the illegitimate children, it is the duty of the Legislature, not of the Court, to abridge the *jus disponendi* on the part of the citizen. If no trust is established, how can the bequest

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to the complainant be regarded as a *fraud upon the law? No one doubts the right of the testator to leave his entire estate to a stranger, regardless of the claims of conjugal or parental ties. His motives, however un-

worthy, however inexcusable, are not the subject of inquiry. This right would not be impaired or forfeited, because he announces on the face of the will his abhorrence of the law which has checked the current of his bounty in a particular direction. If the provisions of the will are within the prescribed limits; if no more is given to the illegitimate children than the law allows; if the law has not declared that the surplus shall be devised to the wife and children; or, as in the Act of 1841, that it should be held for the benefit of the distributees, or next of kin; then it is impossible to declare that the bequest to the complainant is a violation of law or a fraud upon the law.

But, as has been already declared, the provision in behalf of the illegitimate children is not open to impeachment at the instance of any of the parties before the Court.

It is ordered and decreed that the complainant execute the will of Powell McRa, deceased, according to the principles of this decree. Parties to be at liberty to apply for such further orders as may be deemed necessary. Each party to pay their own costs; those of the complainant to be a charge on the estate of his testator.

The defendants, Albertus C. Spain, on behalf of Mrs. Mary Martha McRa, and the infants, Mary and Julia McRa, appealed from so much of his Honor, the Chancellor's decree, as established the entire validity of the gifts, legacies, devises and bequests to their co-defendants, Mary Kirkland and Duncan McRa, or on failure of the same, to the complainant; and they moved that the said decree be reformed in this respect—so as to restrain the said gifts, legacies, devises and bequests, to one-fourth part of the clear value of the testator's estate; and further, that the right of the appellants to the remaining three-fourths of the said estate be established and declared by the decree of this Honorable Court. In support of which motion, they relied upon the following grounds.

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*1. That the said gifts, legacies, devises and bequests, are clearly void, under the Act of 1795, as against the testator's widow, Mrs. Mary Martha McRa, for the excess over one-fourth part of the clear value of his estate: and that the circumstance of her being a lunatic does not deprive her of the right to avoid the said gifts, legacies, devises and bequests, but only of the discretion to waive her objection to them; and that it is both the right and duty of her committee to insist upon the said objection.

2. That the settlement of 1817 is neither obligatory and binding on the widow, Mrs. McRa; nor, if it were, does it impair her right to avoid the gifts, legacies, devises and bequests aforesaid, under the Act of 1795.

3. That by the well settled rules of con-

struction, the words "lawful children," in the Act of 1795, must be construed to mean "issue," and to include all legitimate lineal descendants; and that the infant defendants, Mary and Julia McRa, are, therefore, clearly entitled, in their own right, to the protection of the Act of 1795, and to avoid the gifts, legacies, devises and bequests aforesaid, as to all but one-fourth part of the clear value of the testator's estate.

4. That the devise over to the complainant, in the event of the legacies and devises to the testator's illegitimate children being declared void, is a plain fraud upon the law, and, therefore, a nullity; and that were it otherwise, yet the gift is plainly in trust for the same children, and, therefore, void, for the same reasons which invalidate the direct gift.

5. That his Honor erred in directing the costs of the defendant, A. C. Spain, the committee of Mrs. Mary Martha McRa, and of the infant defendants, Mary and Julia McRa, to be paid by themselves.

Moses, for appellants.

DeSaussure, Chesnut, Smart, contra.

WARDLAW, Ch., delivered the opinion of the Court.

The circuit decree, in this case, is placed

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on the grounds, 1st, *that the committee of a lunatic wife has not the privilege to avoid, under the Act of 1795, the gift, by a testator, to his illegitimate children, for the excess of the subject of gift beyond one-fourth of the clear value of his estate; and 2d, that the only effect in this case of avoiding the gift, for such excess, would be to vest such excess in the plaintiff, who is a stranger to any trust.

To establish the doctrine contained in the first ground might do no great mischief in this particular case, but in many conceivable cases, would produce great hardship and injustice. If a wife, having no separate estate, who had been driven to madness by the infidelity and brutality of her husband, were deprived, by his devise to his bastards, of the means of food and raiment, and left to depend upon the charity of the world to supply her destitution, could we, possessing the reason and sensibilities of human nature, venture to hold that the committee, under the supervision of this Court, might not avail himself in her behalf of the provisions of the Act of 1795? In the parallel disability of infancy, it is the personal privilege of the infant to avail himself of the plea of infancy to avoid a contract, and yet his guardian may resort to this defence in the infant's behalf. In the case of Hill v. Hill, (3 Strob. Eq. 94,) this Court allowed the committee of a lunatic wife to assert her equity to a settlement out of her estate, and the present case is within the same principle. In Parnell v. Parnell, (2 Phil. 158,) Sir Wm. Scott adjudged, that the committee of a lunatic

may institute proceedings against the wife of the lunatic for adultery. It would be a great reproach to this Court, which professes in a peculiar manner to protect the rights of infants, married women, and lunatics, to add additional privation to loss of mind—the greatest affliction of Providence.

But this privilege, by the committee of a lunatic, to avoid gifts under the Act of 1795, must be exercised under the supervision of the Court, which will in a proper case control his election. In general, where it is doubtful whether the interests of the wife will be promoted by such intervention on the

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part of her com*mittee, the Court will direct the proper inquiry to be made by its proper officer. This inquiry will usually be confined to pecuniary interests. This Court does not determine questions according to the factitious dictates of a code of honor, or delicacy, but according to settled rules of law and honesty. Still, in the present case, many reasons might be found to induce the Court not to interfere in behalf of the wife, at least *sua sponte*. She is amply provided for; she was separated from her husband for thirty years before the execution of the will; in 1817, her father, interfering in her behalf, received from the husband twenty-four negroes for her sole and separate use, and covenanted in her behalf, and with her written approbation, that she should make no further claim upon the husband's estate. It may be true that, in this State, under the decisions in *Reid v. Lamar*, (1 Strob. Eq. 38,) and like cases, this covenant would impose no legal obligation on the wife, although it might be different in England, where the wife has the power to alien and incumber her separate estate. Yet it would hardly be consistent with good faith on the part of the wife, to disturb now a family arrangement, which has been executed for thirty years, the effect of which disturbance would be to throw heavy responsibilities on her father and trustee. It is unnecessary, however, to conclude any thing on this point, as the decree must be sustained on the other ground taken by the Chancellor.

We will not permit the committee here to avoid this gift to the testator's illegitimate children, for the necessary result would be to vest the estate in the plaintiff. It has been strongly urged, that the alternative devise to the plaintiff, is a mere fraud upon the Act of 1795, and that this appears by the will. It is not pretended that there is any secret trust on the part of the plaintiff for the illegitimate children, and it is conceded, that the gift to the plaintiff makes him the absolute proprietor of the estate, unless the terms of the will create an express trust. The course of Courts of Equity, of late years, has been against the conversion of legatees into trustees, by vague expressions of wishes, or recommendation, in the disposition of the

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estate; (*Sale v. *Moore*, 1 Sim. 534; *Meredith v. Heneage*, Ib. 542; *Wright v. Atkyns*, 1 Tur. & Russ. 143); and here, there is nothing more than a commendation of his children, by the testator, to the kindness and protection of his executor, without reference to the estate, and after a contingent gift thereof in fee. It is said, however, that the gift to the plaintiff, being on the contingency, expressed in the will, that the previous devise to the illegitimate children should be declared void by any Court of this State, authorized so to decide, affords indubitable evidence of the purpose of the testator, to evade the Act of 1795. It may be conceded, that such was the purpose of the testator, if, to keep the provisions of his will out of the operation of the Act can be called evasion; but surely it is not the province of the Court to usurp legislative power, and extend the Act to cases not within its enactments. The Act does not declare void, gifts to a stranger by an adulterer, or father of bastard children, and it may be well doubted, whether such abridgment of the *jus disponendi*, would ever have met with the favor of the legislature. Nor does the Act declare, even in cases where the gift is voidable, that the void excess shall go to the wife and children, only that the gift to the mistress or bastards, shall be void for the excess above one-fourth of the clear value of the donor's estate. Its great object, is to brand and punish incontinence in particular cases, by restricting, to a limited extent, bounty to a mistress, or bastards. If, here, where the devise is not prohibited by the statute, we must nevertheless pronounce it void as an evasion, we in effect pronounce that an adulterer, or father of bastard children, having a wife, or lawful children, must give three-fourths of his estate to his wife or children.

It is objected to our conclusion, that we ratify a scheme by which the purpose of the Act of 1795 may be always defeated. But we do no more here, than we do in every case where we give construction to a statute. It is the duty of Judges to expound and not to make the law; to declare what cases are within, and what without, legislative enactments; but not to include within these enactments, upon our notions of policy, the cases

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*omitted by the Legislature, whether by accident or design. It is for the Legislature and not for us to correct any supposed mischief, in the present state of the law, on this and all subjects.

In *Wadlington v. Kenner*, (MS.) and in two circuit opinions of Chancellor Harper, one cited in the decree [*B. v. B.*, 1 Rich. Eq. 465.] and the other reported [*Ford v. McElbray*] 1 Rich. Eq. 474, it has been decided that grand children could not interpose to avoid gifts under the bastardy Act, and we acquiesce in these decisions.

The fifth ground of appeal is sustained, and it is ordered that the costs of A. C. Spain, committee, and of Mary and Julia McRa, be paid by the plaintiff out of his testator's estate.

In all other respects the decree is affirmed and the appeal dismissed.

JOHNSTON and DUNKIN, CC., concurred.

DARGAN, Ch., dissenting.

I do not concur with the majority of this Court in the decree which they have rendered. The testator, Powell McRa, having a lawful wife and grand children, but no lawful children, gives the whole of his estate, in trust, to pay his debts and two small annuities, and to support, maintain and educate his two natural children, Margaret S. and Duncan McRa; and so soon as either of them becomes of age or marries, to convey to each of them one-half of his estate, real and personal, to them, their heirs and assigns forever. The will then provides, that if the foregoing clause of this will shall be declared null and void by any Court in this State, authorized so to decide, the testator gives to the said illegitimate children one-fourth part of the clear value of his estate, real and personal, after the payment of his debts, to them, their heirs and assigns forever. In this event, he also gives the remaining three-fourths of his estate to the complainant; and after nominating the complainant as his executor, he concludes as follows: "To his special kindness and attention, I commit my beloved daughter and son, and invoke for them his most kind attention and protection."

Such is the will. In its construction, sev-

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eral questions have arisen. I concur in the opinion that grand children have no right to vacate the illegal provisions of a will in favor of illegitimates. If grand children were so entitled, by a parity of reasoning and the same wide construction, remote descendants would have the same right. Such an interpretation would comport neither with the language of the Act nor its objects.

I think, too, that the decision in *Breithaupt v. Bauskett* is correct, and that the right to vacate a deed or will, which is in violation of the provisions of the Act of 1795, is personal to the wife and lawful children; such a disposition is valid against all the world but them; and their right is so far personal, that it does not survive to the personal representatives of the wife and lawful children. But when it is asserted that the right is personal, in a sense that would forbid a lunatic wife or child from making the claim, or its being made in their behalf, I differ entirely. Such a conclusion is, in my judgment, a most unwarranted inference from the decisions; which, when they

declare that the right is personal, mean only that it is personal in the sense of the legal maxim, "*actio personalis moritur cum persona*." This clearly is the doctrine, and none other. In the circuit decree it is decided that the lunatic wife of Powell McRa is *civilliter mortua*; and being *civilliter mortua*, she cannot exercise her personal discretion in asserting her claim, and that this Court cannot do it for her. I am not aware that a lunatic, in consequence of lunacy, loses any of his civil rights besides that of making contracts and testamentary dispositions of his property. The male lunatic cannot exercise any of his political rights and franchises. He has the same rights of person and of property as if he was sane. In the case of an election being necessary, this Court will exercise the right in his behalf. I will not discuss this subject further, but content myself with thus entering my protest against the doctrine of the decree on this point.

I concur in the opinion that, if the complainant takes the three-fourths of the estate given to him, he takes it discharged of any trust. If there were a direct and secret understanding between the testator and him-

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self that he should hold for the *benefit of the illegitimates, on proof of that, the gift to him should be vacated on the application of the wife. But, as regards Taylor, no such fraudulent intent or violation of the Act appears upon the face of the will. No trust is created nor legal or equitable obligation imposed. The moral obligation he might or might not fulfil, as his own sense of duty or honor should dictate.

But the difficulty with me lies in another view of the case. The lunacy not being an impediment, the widow of Powell McRa has a right, under the Act of 1795, to vacate the gifts to the illegitimate children, for the excess over one-fourth of the clear value of the estate. But, by the decree in this case, Taylor's right, under the will, is superior to that of the wife; while confessedly, and by the decision in *Owens v. Owens*, approved in this case, the right of the illegitimate children is superior to that of Taylor. The wife and lawful children are preferred to the illegitimates; the illegitimates are preferred to Taylor; and Taylor is preferred to the wife. Here is a circle. In this conflict of claims, why should the preference be given to the person claiming under the executory devise? He is not entitled until the wife comes into the Court and obtains a decree vacating the provisions of the will. The wife must have a decree before Taylor's right arises. And in the self same decree in which her right is accorded to her, it is snatched away and given to another. This is keeping the word of promise to the ear, and breaking it to the hope.

I protest against the decree, because it

puts a construction upon the Act of 1795, by which the Act stands repealed, and is virtually expunged from the statute book. This, I am aware, is strong language, but is well warranted by an interpretation which enables any well advised or acute testator to defeat entirely the provisions of the Act. When this decree is reported, it will be a publication to the world of a form, under the sanction of this Court, by which rights of wives and children, under the Act of 1795, may be completely frustrated. The sagacious and well informed will be thus

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enabled to evade the law, while *wills drawn by the ignorant, or without the advice of counsel, will still fall under its operation. Will any wife, or lawful child, hereafter, in the case of a will after this form, come into this Court to vacate its unlawful provisions in favor of the concubine and the illegitimates? Cui bono? For what purpose should they come? The only effect of their application, and a decree in their favor, is to give the property to a remainder-man, who may keep it himself, or bestow it where the law has not allowed the testator to bestow it. Strange, inconsistent, absurd doctrine!! that the only effect of a decree of the Court of Equity in favor of a person, is not to give that person the benefit of the decree, but instantly to take it away. But why should the wife and lawful children spend money and time in unnecessary litigation, and fruitlessly expose to the gaze and comment of the world their domestic sorrows and wrongs? They come into Court with the Act of 1795 in their hands. They bring their claims within its provisions. The Court says, yes; you are entitled to vacate the illegal dispositions of the will, and here is a decree in your favor; and then, as it were in mockery, the Court says, this decree in your favor is but the condition on which the property is to be taken from you.

We have a maxim in our law-books, as old as the common law itself, that it is the duty of Courts in their interpretation of statutes, so to construe them, as to advance the remedy and suppress the mischief. The decision, in this case, withholds the remedy, and provides a way in which the mischief may be perpetrated with impunity.

This Act of 1795, consisting, as it does, of but a few lines, has given rise to much difficult and embarrassing litigation. Questions have risen under it which no human sagacity could have foreseen. The Courts have often been called on for its construction. Decision after decision has been made, and interpretation piled upon interpretation, until the Act is covered all over by interpretations and judicial commentaries. One interpretation has been made the platform of another. Inferences are made from the language of the commentary, instead of the

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words of *the Act, the original complexion of which is lost sight of. We have gone on in this way, until we are involved by this case in a perfect labyrinth, which we may break through but cannot unravel. The Act, and all its tall superstructure of judicial construction and commentary, have now fallen down together; for the effect of the present decision is, in substance, to declare that there is a form by which its provisions may be defeated and set at naught.

Appeal dismissed.

3 Rich. Eq. 111

FRANCIS MULLIGAN et al. v. DANIEL WALLACE.

(Columbia, Nov. and Dec. Term, 1850.)

[Equity \S 396.]

Defendant, a Commissioner in Equity, having funds of the Court to the amount of about \$1,600, in his hands, was ordered by the Court to invest the same at interest, on good personal security; one M. owed the defendant, on his private account, about \$1,000, and defendant, as Commissioner, loaned M. the \$1,600, on bond and personal security, retaining, by M.'s offer, out of that sum, the amount that M. owed the defendant. M. and his surety afterwards became insolvent, and nothing could be collected on his bond;—*held*, that defendant had not invested the \$1,600 in conformity to the order of Court, and that he was liable for the whole amount thereof, with interest.

[Ed. Note.—Cited in Spear v. Spear, 9 Rich. Eq. 198; Nance v. Nance, 1 S. C. 220, 221.

For other cases, see Equity, Cent. Dig. \S 860; Dec. Dig. \S 396.]

Before Dargan, Ch., at Union, June, 1850.

So much of the Circuit decree as relates to the point on which this case was decided, is as follows:

Dargan, Ch.—Daniel Wallace, the defendant, as Commissioner in Equity for Union district, was in possession of a fund belonging to the complainants, called the Mulligan fund. At June Term, 1836, this fund, amounting to one thousand five hundred and eighty-eight dollars and seventy-seven cents, being cash in the hands of the Commissioner in Equity, was, by an order of the Court, directed to be invested at interest on good personal securities. The Commissioner was ordered to make the investment. In June, 1837, in the execution of this order, he took the bond of Daniel A. Mitchell, as principal, and one

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*William T. Crenshaw, as surety, for the amount of the fund. The reason the defendant assigns for not having sooner made the investment, is, that such was the abundance of money, that he was unable to effect a loan. At June Term, 1840, the Commissioner reports to the Court, that although he considers the parties to the bond, (Mitchell and Crenshaw,) to whom the fund was loaned, as solvent, yet, as they were somewhat embarrassed with debt, he recommends that an or-

der be made, requiring additional security, and that on failure to comply within a reasonable time, the bond should be put in suit.

The order was passed, and in pursuance thereof, one Giles N. Smith was given as additional security to the bond.

At June Term, 1842, the defendant reported that he was "not well satisfied that the securities to the bond were sufficient," and recommended that an order be passed, requiring that a new bond, with two good and sufficient securities, be given within a reasonable time, and in default thereof, that the bond be put in suit. The Court made an order according to the recommendation of the Commissioner. Mitchell was served with a notice of the order, and failing to comply, the bond was lodged with an attorney for suit, and a writ was issued on the 25th February, 1843. Before judgment was recovered, Mitchell and Smith had confessed judgments to more favored creditors; the former to a very large amount. The property of the obligors to the bond has all been sold by the sheriff, with the exception of some negroes carried off by Mitchell from the State. None of the proceeds of the sale has been applied to this claim, which has been utterly lost by the insolvency of the parties.

The complainants have filed their bill against the defendant, for the purpose of making him liable for not having invested the fund in conformity with the order of the Court.

They allege that Daniel A. Mitchell was indebted to the defendant, and that the defendant, instead of loaning the fund, kept it himself, and gave up to Mitchell the bond or note on which he was privately indebted to the defendant, and took his bond, with Crenshaw as surety, for the amount of the Mulli-

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gan *fund. The only evidence on this point, is that which is afforded by the defendant's answer. The defendant was particularly interrogated in regard to this transaction, and the facts as he states them, are to be regarded as the only evidence by which the question is to be adjudged. The defendant denies that Mitchell was, at the time, indebted to him the whole amount of the Mulligan fund. The precise amount of Mitchell's indebtedness to him, he does not remember. He has no means now of ascertaining, but believes that it was something over one thousand dollars. He did keep to himself as much of the Mulligan fund as was equal to the debt which Mitchell owed him, turned over to him the balance in cash, and took his bond, with Crenshaw as surety, for the whole amount of the Mulligan fund. He had then on hand that fund in cash, in the specific bills in which it had been paid to him. He was not anxious to realize his debt on Mitchell at that time. It was Mitchell's offer to discount, in the loan, the amount that he owed to the defendant. According to the de-

fendant's best recollection, there was no previous agreement to this effect between Mitchell and the defendant; nor was the collection of his own debt against Mitchell, any inducement in negotiating the loan to him. This is substantially the defendant's statement of facts.

The question is, whether this was an investment according to the order of the Court. I am far from thinking that the bona fides of the defendant is to be impugned in this transaction. His character for official and private integrity, and his present high position, would forbid any such conclusion. Nor is there any thing in the facts, as they appear to the Court, from which such an inference could be deduced. But the question is, whether he has followed the terms of the order, in investing the Mulligan fund; and whether the policy and settled principles of the law do not forbid that the financial officer of the Court should be permitted to mingle up his own private money transactions with those of his official trust. I am of opinion, that he did not pursue the terms of the order in the investment. He did not invest the Mulligan fund, except in part. To the amount

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of *a thousand dollars or more, he invested his own debt or claim against Mitchell, and to that amount retained the Mulligan fund in his own hands.

There may not have been, on the part of the Commissioner, the slightest want of honesty of purpose in this transaction. Let that be conceded. But that is not the question. It is necessary that the financial department of the Court should be kept pure, and without suspicion. It is important that the officer in charge of it, should not be exposed to the temptation of making unlawful gain, and therefore, that he should be subject to rules, which should forbid his embarking in private speculation, in connection with affairs of his office, however innocent and lawful such speculations might be, if disconnected with his official duties. In order to carry out this policy effectually, it is necessary that rules should be established and inflexibly adhered to, which should forbid all such dealings and transactions. The enquiry in such case, is not whether the particular transaction is fair and honest. It may be a very corrupt transaction, and yet be made to wear a very fair exterior. Such is the power of the officer, on account of the nature of the trust and confidence, that a transaction of this character is difficult to be probed to the bottom; to say nothing of that numerous class of cases, in which the rights of parties committed to his hands might be grossly injured, without ever coming to their knowledge, or if known, without the ability or energy, on the part of the persons injured, to seek redress by appealing to Courts of justice. To prevent such great mischiefs, the law inhibits such dealings altogether.

I am not aware of any case that is precisely a precedent for this. But I am satisfied that it falls within well settled principles and analogies. A Commissioner in Equity, like all other agents and trustees to sell, cannot purchase at his own sale, however fair the competition, equivalent the price, or honest the transaction in every particular. The object of the rule is to prevent such purchases altogether; the tendencies being, (however fair and honest the particular transac-

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tion.) to lead to corruption and speculation. It removes temptation, by withholding all inducements by which cupidity may be excited.

In *Com. of Public Accounts v. Rose*, (1 Des. 461.) it was held that an Attorney General, acting for the State in a suit upon a bond placed in his hands for collection, cannot discharge or release the same by taking lands or other property in payment, the proceeds of which he applied to his own use, without accounting to the State. Though he had delivered up the bond and mortgage by which the debt was secured, the debtor was not thereby discharged, but the original debtor was decreed to pay the debt. In the case of *Latham v. Sarrazin*, cited in the last mentioned case as having been then recently decided, it was held that an attorney can do no act incompatible with the nature and end of his authority; and that if he gives a discharge, or releases the debt without receiving it, his client would not be bound by it.

In *Jamieson v. Forbes, Walker and others*, (3 Des. 529,) Forbes, an attorney, had gotten possession of a bond by assignment, from W. H. Gibbes, the Master of the Court. The assignment was made to Forbes, not for his own benefit, but for third persons, who were interested as creditors, and he assigned it to the defendant, Walker, in satisfaction of his own debt. It was decreed by the Court, that the assignment by Forbes was void, and the bond was enforced against the obligor, for the benefit of the persons originally interested in it.

In the *Treasurers v. McDowell*, (1 Hill, 184 [26 Am. Dec. 166].) it was held that though an attorney has an authority, after judgment, to receive his client's money from the defendant in execution, and thereby to discharge the judgment, he cannot discharge the judgment by accepting an indemnity, or by making executory contracts in relation to his client's rights. *Jackson v. Bartlett*, (8 Johns. 366); *Kellogg v. Gilbert*, (10 Johns. 220.)

It seems to me that the foregoing cases present strong analogies for the case now before me. In the latter, the defendant, the Commissioner in Equity, was ordered to invest a certain sum, then in cash in his hands,

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at interest. In the execution of the *order,

he kept to himself, and for his own use, a portion of the fund, and invested a debt due himself on a note. This, I have said, is no compliance with the terms of the order. It is objected to this view of the case, that it was the same thing substantially, because, if the cash had been paid to Mitchell on the loan, he could then forthwith have handed it over to the defendant, in payment of his note, and the effect of the rule would be to require an empty formality, and something to be done by indirection, which could not be done directly. The Court would look with great jealousy upon a case where the transaction had assumed the form stated in this argument. But I apprehend it will not be doubted, that if an attorney were to satisfy the claim of his client, or the sheriff that of a plaintiff in execution in his hands, by receiving property to his own use, or by accepting in satisfaction his own debt, the whole transaction would be held void, and the original debt enforced—yet the argument here urged in favor of the defendant, would apply with equal force in the case supposed; for there, the debtor might go through the formality of paying the money to the attorney, or sheriff, and receiving back and giving his own debt, or other property, in payment. In either case the objection is unavailing. In the present instance, that subterfuge or contrivance has not been resorted to. If it had, the Court would have looked closely into the transaction. It is time enough to decide such a case when it arises. The decree of the Court must be against the defendant, for the sum of one thousand dollars with interest, for he admits that he received at least that much of the Mulligan fund, in payment of his note on Mitchell.

It is ordered and decreed, that the defendant account before the Commissioner of this Court, for one thousand dollars, and the interest thereon, so far as the same has not been paid, and that the Commissioner report thereon.

The defendant appealed, on the following grounds:

1. Because the Commissioner complied with the order of the Court, in loaning the money, and the decree should have been for defendant.

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*2. Because the Commissioner was guilty of no omission or neglect of duty, but on the contrary, used unusual diligence in endeavoring to secure the fund.

3. Because the decree should have conformed to the former order of the Court, directing one-half the interest to be appropriated to the payment of certain debts, although the defendant should be liable.

The complainant also appealed, on the ground:

Because, from the case made, the Chancel-

lor should have decreed against the defendant for the whole demand.

Bobo, for complainants.

Herndon, Dawkins, for defendant.

WARDLAW, Ch., delivered the opinion of the Court.

The reasoning and authority by which the Chancellor has been conducted to the conclusion, that the defendant did not invest the fund in question in conformity to the order of the Court, are so satisfactory, that additional observations would add little to their strength. But in determining the extent of defendant's liability, the decree does not seem to carry out fully its own principles. To secure the faithful execution of his duties, by the officer having charge of the funds in the custody of the Court, it is indispensable that he should be held to such strict accountability, as will disable him from making profit, by mixing private affairs with his official functions. To remove all temptation to the officer to engage in private speculations with trust funds, we must declare all such transactions to be unlawful. This is a rule, founded on policy, and of general application, and not depending upon the fairness or fraud of particular transactions. A trustee to sell, is forbidden to purchase at his own sale, however full may be the price he offers, and however frank and honest may be his conduct; and so a trustee to lend, shall not make the loan to himself, nor in lending to another, substitute his own 'rights and credits' for the trust money. Without meaning to impeach the honesty of the defendant in this case, it is proper to suggest, that an officer might be too readily

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induced to lend fifteen hundred dollars of the funds of the Court, upon insufficient security, if, in the process, the temptation be offered to him that he may coterminously collect his own debt for \$1000 from the borrower. One great purpose of establishing, as a rule, that such transactions are unlawful, is to avoid the necessity of inquiry into the circumstances of particular cases. The opportunities of evasion, and the difficulty of scrutiny, are so great, that an inflexible rule on the subject is a matter of necessity. If the officer will mingle his private affairs with his official functions, he shall do it at the hazard of indemnifying suffering parties to the full extent of their loss.

It is manifest in this case, that full justice cannot be done to the plaintiffs, by fixing the liability of defendant at any sum short of the whole amount of the fund he was directed to invest. The defendant states in his answer, that he does not remember, and has no means of ascertaining, the precise amount of the borrower's debt to him.

but that it was something over one thousand dollars. The debt, then, was more than one thousand dollars, and why should defendant's liability be limited to that sum, or any other less than the whole amount of the fund? The impossibility of ascertaining precisely the sum, and all the confusion on the subject, have been produced by the official misconduct of the defendant, and he must pay the penalty.

On the defendant's third ground of appeal, it has been suggested to the Court, that by the original order of the Chancellor, directing the sale of the estate, the proceeds of which constitute the fund in question, one-half of the interest of the fund was to be appropriated to the payment of certain debts of Mulligan, until they were extinguished, and the other half only to be appropriated for the use of the plaintiffs. If this be so, one-half of the interest of the fund must be applied to the creditors, protected by the original order, and one-half to the use of the plaintiffs, until the interest lawfully accruing, would extinguish the debts, and afterwards the whole interest be applied to the use of the plaintiffs; all proper payments of interest being allowed.

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*It is ordered and decreed, that the defendant account with the plaintiffs, before the Commissioner of this Court, for one thousand five hundred and eighty-eight dollars and seventy-seven cents, and the interest thereon from June, 1837, on the principles of this decree; and that the circuit decree be modified accordingly.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

Decree modified.

3 Rich. Eq. 119

JOHN Z. HAMMOND v. JAMES R. AIKEN and JOS. KENNEDY.

(Columbia. Nov. and Dec. Term, 1850.)

[Assignments for Benefit of Creditors *see* 298; Partnership *see* 289, 291.]

A firm doing business in W. was dissolved, but no notice of the dissolution was published in a newspaper; about the time of the dissolution, K., a member of the firm, gave a note, in the name of the firm, to a bank at C., which note was, after the dissolution, renewed by an agent acting under a sealed power of attorney given by K. in the name of the firm; *held*, that the notice of the dissolution was insufficient, so far as the bank at C. was concerned; that the firm were liable on the note, whether given before or after the dissolution; and that, if the renewal was void, the bank had the right to recover on the original note, which it had retained; *held* further, that an assignee of the firm, for the payment of the debts thereof, had properly paid this debt to the bank, although he, the assignee, may have had the

requisite notice of the dissolution, and that the debt was contracted afterwards.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 875; Dec. Dig. § 298; Partnership, Cent. Dig. §§ 656, 657; Dec. Dig. § 289, 291.]

[Partnership § 286.]

K., before the dissolution, gave his individual note to H. & W., for another note, which he used for the benefit of the firm: K.'s note was not paid at maturity, and he gave a draft for the amount thereof to H. & W.; the draft was protested, and then K., after the dissolution, gave H. & W. a note, in the name of the firm, for the amount of the draft; held, that the firm were not liable for this note; and that the assignee was not justified in paying it.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 646; Dec. Dig. § 286.]

Before Dargan, Ch., at Fairfield, — Term, 1850.

The decree of his Honor, the presiding Chancellor, is as follows:

Dargan, Ch. The decree of the Court of Appeals remanded this case to the Circuit Court, only as to the two matters, namely, the note, purporting to be the note of the

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firm of Jos. Kennedy & Co. to the Branch Bank at Camden, amounting at its payment by the assignee to \$312.85; and the note, purporting to be the note of the same firm, to Hazeltine & Walton, amounting at its payment to \$1129.81. The assignee, James R. Aiken, has paid these notes, as the notes of Jos. Kennedy & Co., and claims credit for their payment, in the settlement of his accounts. By the complainant, this is resisted, on the ground, that by the terms of the assignment, he was the assignee only for the payment of the debts of Jos. Kennedy & Co., and these are not the debts of Jos. Kennedy & Co., having been executed after the dissolution of the partnership.

The dissolution took place some time in the fore part of the year 1841. But the precise time is not satisfactorily proved. A. H. Chambers says, "there was a sale of the goods of Joseph Kennedy & Co., about the 15th of Feb., 1841; that sale was in pursuance of some advertisements posted up some time previous, at different places in the town of Winsted, in which the dissolution of the firm of Jos. Kennedy & Co. was made public." This is loose. Was the dissolution at that time prospective, or had it then taken place? Why were not the advertisements themselves produced, or some evidence offered to prove more specifically their contents? It seems certain, that the business of the firm went on after the auction; for O. R. Thompson says he "was acting as clerk for Jos. Kennedy & Co., in the spring of 1841; thinks he left them about the 13th March, 1841; feels pretty certain that the time is correct. After witness left them, one of the Mr. Twittys, or probably two of them, acted as clerks for the firm. Witness thinks the Twittys remained with Jos. Kennedy & Co. as clerks

about three months. Witness knows of no dissolution of the partnership, but that while he was acting as clerk, there was an auction of goods that continued two days. Shortly after this auction, witness left their employment. There were goods remaining after the sale, but their amount was inconsiderable." Strange, that there should have been an actual dissolution, and the acting clerk of the house know nothing about it! I shall as-

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sume in what is *to follow, that there has been no actual dissolution satisfactorily proved, prior to the 12th of May, 1841.

The note paid by the assignee, the principal of which was for \$300, and interest to the time of payment \$12.85, was executed by Ch. J. Shannon, after the dissolution of the firm, under the authority of a sealed power of attorney, given him by Joseph Kennedy, in the name of the firm. This note was a renewal of a previous note, itself a renewal. The original debt to the bank was for \$1000, secured by a note payable at sixty days, signed by "Jos. Kennedy & Co.," and dated 12th May, 1841. I am not satisfied, as I have said, that the partnership was dissolved at this time. The renewals may have been void as notes, having been executed after the dissolution, and by an attorney too, who, so far as it appears, may have been appointed by Kennedy after the dissolution. But if the renewals were void, the bank had a right to recover on the original note, (which it retained,) the balance that was due.

In the foregoing, I have assumed that the original note to the bank was executed before the dissolution of the partnership. If it was afterwards it could not have been long. There is no proof that this firm had any previous dealings with the bank. "When a partnership is dissolved, and one partner, for whatever reasons, is no longer willing to be responsible for the acts of his co-partners, reason and justice require that the world should be fully apprised of the dissolution of their joint liability, and that the severance of the partnership should be made as notorious as the partnership itself was. Accordingly it has been decided, that particular persons, such as those having dealings with the firm, must have particular notice, and the world in general must have general notice. If sufficient notice is not given, all the members will still be liable for contracts made by their co-partners." Carey on Part. 182. "Notice in the gazette is sufficient to those who have had no previous dealings with the firm." Ib. 183. The same author, p. 185, remarks: "It has been decided, that a retiring partner is liable after the lapse of seven years from the period of dissolution, when

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no notice was given in the *gazette, and the dissolution was not known to the creditor,

though generally known in the neighborhood where the business was carried on."

There was no notice whatever of the dissolution of the partnership of Jos. Kennedy & Co. ever published in a newspaper. The only notice ever given, was that mentioned by the witness, Chambers, as having been introduced in the advertisement of sale posted up in different places in the streets of Winnsborough. This may have been sufficient for the general public of Winnsborough. I am of the opinion, that it is not sufficient for the citizens of Camden, more particularly at so early a period after the dissolution. I doubt very much the notoriety of this event, even in the community of Winnsborough; for of all the witnesses examined, there was but one who speaks of their having been a dissolution at that time. It was a fact not even known to the principal clerk of the house.

If the payee of this note, from the want of notice of the dissolution, could have recovered against the partnership, the assignee was justified in paying it, and must have credit for the payment, though he may himself have had the requisite notice of the dissolution, and that the debt was contracted afterwards. This was the opinion of the Court of Appeals, as expressed in its decree in this case. So much of the complainant's first exception, as relates to the debt due to the branch bank at Camden, is overruled.

The debt due Hazeltine & Walton stands upon a different footing. That debt unquestionably did not stand in the name of the firm until after the dissolution. The history of the transaction is as follows: one J. H. Propst held a note on J. & J. Nelson, for \$890. About the 13th of February, 1841, he transferred this note to Kennedy; who, in consideration thereof, gave him a note, at 60 days, payable at the Commercial Bank, to Hazeltine & Walton. This note was, at its maturity, protested by the bank for non payment. Kennedy made an arrangement with Hazeltine & Walton, by which he took up his note, and gave them for the amount thereof,

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a draft, at 60 days, *on Shannon & McGee. This draft was also protested. And Kennedy remained the individual debtor of Hazeltine & Walton. In satisfaction of the draft upon Shannon & McGee, Kennedy, after the dissolution of the partnership, executed the note to Hazeltine & Walton, in the name of "Joseph Kennedy & Co." The note was endorsed by James R. Aiken and J. J. Myers.

In regard to this debt, no credit was given in its inception, to the firm of Joseph Kennedy & Co. Nor was any such credit given in any of the changes, or renewals, which it underwent, until the last. And in that transaction, Hazeltine & Walton, the payees of the note, took it from Kennedy, as a partnership note, knowing that it was the individual debt of Kennedy, upon which the

partnership was not liable. They have no ground to complain of the want of notice of the dissolution, when they knew that the debt for which they took the partnership note, was not a partnership liability. Nor does it appear that there were any dealings whatever, between the payees of this note, and the firm of Joseph Kennedy & Co. For a creditor of an individual member of a partnership, to take from his debtor a note in the name of the firm, without their consent or knowledge, is a fraud upon the other members. And though such note, if taken during the continuance of the firm, and transferred to a third party without notice, may be binding upon the firm, such is not the case where the question is between the firm and the payee.

The note of J. & J. Nelson, for which this debt was originally contracted, was devoted to partnership purposes. It was transferred by Kennedy to Trenholm & Tomlinson, in part payment of a bill of goods, furnished by them to Jos. Kennedy & Co. It is urged, that because the consideration of the note went to the use of the firm, they ought to be liable. There is no ground for any such conclusion. The credit was given to Kennedy individually, and he gave the credit by advancing his own funds to this extent, in paying the debts of the company. There is no equity for a subrogation. And if there was, the

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subrogation *could be only to the rights of Kennedy. His rights depend upon a settlement of the accounts, and the closing of the balance sheet. If on accounting, he falls in debt, or the whole capital has been absorbed in losses, he has no rights in the property of the firm. The account has not been taken. And for all that I know, in advancing, for the use of the company, the note of J. & J. Nelson, he may have been discharging but a small part of his obligations to the firm. This part of the first exception is sustained, and the Commissioner's report in that regard is confirmed.

The defendant, James R. Aiken, appealed, and moved the Court of Appeals to reverse the decree so far as regards the Hazeltine & Walton claim; and failing in that, so to modify the same, as to reserve or suspend the final adjudication of the Court upon the said claim, until the accounting be had between the complainant and Joseph Kennedy, the defendant.

The complainant appealed from so much of the decree as over-ruled his exception, on the grounds:

1. Because the branch bank at Camden could not in law have recovered judgment against complainant on the note they held signed by Joseph Kennedy, in name of Joseph Kennedy & Co., and therefore the payment of said note, by defendant Aiken, was unauthorized.

2. Because, under the facts of the case,

the complainant was not liable to the bank on said note, and the payment by Aiken was unauthorized.

Cooke, McDowall and Boylston, for defendants.

Rutland, Boyce, for complainant.

DARGAN, Ch., delivered the opinion of the Court.

This Court is satisfied with the decree of the Chancellor who tried the case on the Circuit. And it is not deemed necessary to add any thing to what is said in the Circuit decree, in regard to the questions therein discussed. If, on the final adjustment of the accounts of Joseph Kennedy, with the firm of Joseph Kennedy & Co., it should appear

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that the said Joseph Kennedy *is entitled to any thing, as a balance due him, arising on the effects and assets of the said firm, in the hands of James R. Aiken, the assignee, the Circuit decree does not conclude, nor does this Court intend to conclude, the said James R. Aiken from using the debt of Hazeltine & Walton, which he has paid, as a discount, or set off, against any balance that may be found due to Joseph Kennedy, on the settlement of his accounts, in manner as aforesaid.

It is ordered and decreed, that the Circuit decree be affirmed, and the appeals dismissed.

JOHNSTON and DUNKIN, CC., concurred.

Appeals dismissed.

3 Rich. Eq. 125

DAVID LESLEY, Ordinary of Abbeville, v.
WILLIAM E. COLLIER and Others.

(Columbia. Nov. and Dec. Term, 1850.)

[*Perpetuities* ⚡4; *Wills* ⚡852.]

Testator bequeathed as follows: "I give and bequeath unto P. C., and in the event of his dying without issue, to go to his blood relations, the following negroes." &c. P. C. died, without issue, in the life-time of testator; *Held* (1) that it was not the intention of testator that the "blood relations" should take as the substitutes, or alternates of P. C., in the event of his dying, in the life-time of testator, without issue; (2) that testator intended a limitation over to the "blood relations"; (3) that such limitation over was too remote; and (4) that by the death of P. C., in the life-time of testator, the legacy lapsed.

[*Ed. Note.*—Cited in *Clark v. Clark*, 19 S. C. 349; *Key v. Weathersbee*, 43 S. C. 424, 21 S. E. 324, 49 Am. St. Rep. 846.

For other cases, see *Perpetuities*, Cent. Dig. § 27; Dec. Dig. ⚡4; *Wills*, Cent. Dig. § 2167; Dec. Dig. ⚡852.]

Before Caldwell, Ch., at Chambers, Charleston, Jan'y, 1850.

Caldwell, Ch. Edward Collier died on the 7th of May, 1848, leaving his last will and testament, dated 23rd of Aug., 1837.

By the tenth clause he bequeathed as follows: "I give and bequeath to Patrick Henry Collier, son of the said Sarah Collier, and in the event of his dying without issue, to go to his blood relations, the following negroes: Alfred, Satyra, and Emeline, child of Betsey, with all their increase." Patrick Henry Collier died, without issue, in the lifetime of the testator, leaving his mother Sa-

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rah *Collier, and his brothers, James G. Collier and William E. Collier, and his sisters, Mariah, (who intermarried with J. B. Hart,) and Lucinda, (who intermarried with A. B. Elliott,) his distributees; the mother has since died, and the brothers and sisters are his next of kin. The first question is, has the legacy lapsed? The execution of a will conveys no interest or estate in presenti, and derives all its efficacy from the death of the testator; during his lifetime, he may alter, amend or destroy it; and from its ambulatory nature, the doctrine of lapse necessarily arises and extends its effects to bequests and devises with or without limitation. When the legatee dies in the lifetime of the testator, the legacy lapses. Our statute relaxes this stringent rule of the common law in the case of a child, (dying in the lifetime of a father or mother,) leaving issue not equally portioned with the other children of the father or mother when living; this exception cannot exempt the legacy from lapsing. If Patrick Henry Collier had survived testator, what estate would he have taken under the will? There is no direct gift to his issue; nor do the terms of the will tie up the generality of the expression, "in the event of his dying without issue" to a definite period, or specify a particular class of issue that must come into esse within a life or lives in being, so that the words have all of the characteristics of an indefinite failure of issue. To give the fullest effect to the untechnical form of the phrase, that the legatee would take an interest in the property, defeasible on the contingency of his dying without issue in the first, second or some more remote generation, whenever this incident happened the blood relations would come in. If this was the intention of the testator, the words he has used are in contravention of the well established rules of the law, and cannot be permitted to prevail. Great variety of expression has been used in the different wills that have been subjected to the construction of the courts, and it would be utterly unsafe to adopt the popular, instead of the legal interpretation of the words of the will. When personal property is limited over, if the first taker "dies without issue," or if he

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"has no issue," or if he *dies "before he has any issue," or "in default or want of issue," &c. all these cases are clearly within the

rule of being too remote; the extinction of issue not being restricted to any particular point of time, or the limitation not being confined to a class of persons designated with certainty, and who must come into being within the prescribed period, will render the limitation obnoxious to a general and indefinite failure of issue. The only two exceptions to the general rule are, when the testator having no issue, devises his property on failure of his own issue: this clearly indicates that he intends to make the legacy contingent on the event of his leaving no issue surviving him, and that he does not contemplate an extinction of issue at any time, (2 Fearn, 271, Smith's ed.); and the other exception arises when the testator uses the expression (or what is equivalent to it) "leaving no issue."

Independently of argument in the abstract, this case has been settled by numerous well considered cases in England and in this State. Where a testator gave all his real and personal estate to A and his male issue; for want of such issue after him, to B and his male issue—Sir William Grant, the Master of the Rolls, held that A took the absolute interest in the personal estate, *Donn v. Penny*, (1 Mer. 20); and, in a more recent case, his successor, Lord Langdale, held, when a testator gave £500 stock to S, T to receive the interest during life and then to her issue, but in case of her death without issue, the £500 to be divided between, &c.; she died without issue—that the limitation over was void for remoteness, and she took an absolute interest under the first words, *Attorney General v. Bright*, (2 Keen, 57.) The case of *Massey v. Hudson*, (2 Mer. 138,) is strongly illustrative of the same principle. Many of our own cases have settled the same point; I shall rely upon two—*Dunlap v. Dunlap*, (4 Des. 313,) and *Postell v. Postell*, (Bail. Eq. 390)—the latter is on all fours with the case under consideration; there the bequest was to two brothers, "to them and their legal issue, and should either die with-

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out lawful issue, the *said property to revert back to the surviving brother or his lawful issue."

I am of opinion the legacy lapses, and it is, therefore, ordered and adjudged that the said negroes in the tenth clause, and their issue, have lapsed by the death of Patrick Henry Collier, and the same is, under said clause, intestate property of the testator; and it is ordered that David Lesly, Ordinary of Abbeville district, do administer the said property according to law.

The defendants appealed, and moved the reversal of Chancellor Caldwell's decree, on the grounds,

1. That the legacy is not lapsed.
2. That the limitation in question is not too remote, uncertain, nor after an indefinite failure of issue.

3. That the legacy, according to circumstances at testator's death, was direct, absolute, and unconnected with any limitation, and should have been so declared.

4. That the obvious intention of testator was, to give to a class, and that the same construction should have been applied to the item in question, as would be to other unquestionably good bequests to others of the class.

Petigru, Thomson & Fair, for appellants.
McGowen, contra.

DARGAN, Ch., delivered the opinion of the Court.

On this appeal, two questions have been discussed. It has been argued in the first place, that the legacy to Patrick Collier did not lapse in consequence of his death before the testator, because the limitation over to Patrick Collier's blood relations, in the event of his dying without issue, is not too remote and uncertain, nor after an indefinite failure of issue; and that on the death of the testator, the limitation over to his blood relations took effect in favor of the persons who could bring themselves within that description. This is the appellant's first proposition.

If there be a legacy to one, for life, with remainder to another, which remainder, on the death of the testator, would be direct and vested, and not contingent, and the person in-

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tended to be *the tenant for life dies in the lifetime of the testator, I think it cannot be doubted that, in such case, the legacy does not lapse, but on the death of the testator, goes at once to him who, in the scheme of the legacy, was intended to be only a remainderman. And it may be true, that a limitation over in favor of "blood relations," as a class, might be valid and effectual, provided it was conformable with all the rules which the law has prescribed against the creation of perpetuities. But, conceding that the limitation over (in this case) in favor of the first taker's blood relations, was not too remote in consequence of its being after an indefinite failure of issue, it would have been, (if the first taker had survived the testator,) a contingent limitation, and not a vested remainder. It would have been contingent upon the event of the first taker's dying without issue living at the time of his death. And if this condition had not happened, the first taker would have had an absolute estate, and the limitation would have been gone forever. And I am not prepared to admit that, where a legacy is given to one, with a valid but contingent limitation over, and the legatee dies in the lifetime of the testator, the legacy does not lapse. It is unnecessary for me further to develop these views, or to sustain them by authority or illustration, as they are not immediately involved in the question which the Court deems it incumbent upon it to decide. For, as to the question of the

limitation, the Court is of the opinion, that the limitation (if one was intended) is after the indefinite failure of issue, and, therefore, void for being too remote. Indeed, it seems to me that this construction is too clear for discussion.

The second proposition submitted to the Court on this appeal is this—that the benefit intended by the testator to Patrick Collier's blood relations, was not to be enjoyed by them in succession to Patrick Collier, or after the efflux of any estate to him or his issue; but was a direct estate to them, as a substitutional or alternative legacy, given to them as a class, in the event of the death of Patrick Collier without issue in the lifetime of the testator. The corollary of this propo-

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sition, namely—that *the legacy has not lapsed, is perfectly legitimate, if the principal proposition has been sustained.

It is perfectly clear that this position is entirely inconsistent with the first ground assumed, that there was a valid limitation. Both cannot be true. This, however, is no satisfactory solution of either question.

If a testator gives a legacy to one, either absolutely or with limitations, and declares that if the first named legatee should die in his lifetime, the same legacy should go to another person, or to a clearly designated class of persons, capable of being identified; and the first of the alternative legatees should die in the lifetime of the testator, undoubtedly this is a case in which there would be no lapse. The legacy to the second alternative legatee would take effect as a substantive legacy; directly, and not in succession to the first named or preferred legatee. And if such were the intention of the testator, clearly to be inferred from the whole will by a fair construction, though not expressed in formal language to that effect, such intention would be respected, and efficacy given to it by the decree of the Court. In the foregoing remarks, I have admitted in the broadest terms, the legal principles upon which the second ground discussed on this appeal is based.

But the Court perceives nothing in the will of Edward Collier, to which these unquestionable legal principles will apply. According to the construction which the Court has given to the will, there is no intention on the part of the testator, indicated either directly or by implication, to appoint the class of persons called the blood relations of Patrick Collier, as a substitute for him, in the event that he should die in the lifetime of the testator. The clause in question is as follows. "I give and bequeath to Patrick Henry Collier, son of the said Sarah Collier, and in the event of his dying without issue, to go to his blood relations, the following negroes," namely, &c. The Court perceives in this, nothing but a common and fruitless at-

tempt to create a limitation in favor of the blood relations, which is ineffectual from an ignorance or misapprehension of those well

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*defined legal boundaries, by which that species of estate or interest in property is restricted. Suppose the clause had read thus:—"I give and bequeath to Patrick Collier, the following negroes, namely," &c. "and in the event of his dying without issue, the said negroes to go to his blood relations." On the construction of such a clause, could there be a doubt? The transposition of the words in which the blood relations are mentioned, from the parenthetical form, does not vary the plain sense and meaning of the clause.

To adopt the construction contended for by the appellants, the copulative conjunction which stands in the way, must be removed. The Court would have no difficulty in changing the copulative into the disjunctive form of expression, and e converso, where it is necessary to effectuate the intention of the testator. But to authorize the Court to take such liberties with a will, the intention must be manifest. It is done in the construction of wills, to prevent the clear intention of the testator from being defeated. It will not be done to carry into effect a conjectural intention, however plausible such construction may be.

It is to be remarked in this case, that the testator gives nothing to the issue of Patrick. There is no limitation to them, contingent or otherwise. If Patrick had died in the lifetime of the testator leaving issue, by the terms of this will such issue could not take. The word issue here, is a word of limitation, and not of purchase. There is nothing given to Patrick's issue as such, and if there were, there is nothing to limit the generality of that form of expression. If Patrick had died in the lifetime of the testator, leaving issue, there being nothing given to them as purchasers, the legacy would have lapsed; for, according to the appellant's own construction, the blood relations were not to take, unless Patrick should die in the testator's lifetime without issue. The testator, therefore, could not have intended the blood relations as the substitutes or alternates of Patrick; for, by legal construction, he must be considered as having intended a lapse, in the event of Patrick's dying, leaving issue, in his lifetime.

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*If the words of the bequest had been these:—"I give and bequeath to Patrick, and in the event of his death to go to his blood relations," &c. omitting the mention and condition of Patrick's dying without issue, there would have been strong reasons and high authority for the construction that would give the property to the blood relations as the alternates or substitutes of Patrick. But the unfriendly interposition of the words

relating to Patrick's issue spoils this construction, and renders inapplicable the authorities cited. The strongest of them in support of the appellants' construction, *Galland v. Leonard*, (1 Swans. 161) is an anomalous case, and appears to have been decided with reference to its peculiar circumstances. An interpretation was given to the will to reconcile direct and palpable inconsistencies, and to harmonize its conflicting provisions. In these provisions there was much complexity, and the testator's meaning was carefully gleaned from the whole. The case is not considered as furnishing a parallel to this.

It is ordered and decreed that the appeal be dismissed, and the circuit decree be affirmed.

JOHNSTON, DUNKIN and WARDLAW, CC. concurred.

Appeal dismissed.

3 Rich. Eq. 132

EDMUND ATCHESON and Others v. DOUGLAS ROBERTSON and JOHN HILL.

(Columbia. Nov. and Dec. Term, 1850.)

[*Executors and Administrators* ⚡125.]

Testator directed his two executors to sell his slaves, prescribing the manner of sale; the executors, finding the manner prescribed impracticable, and the necessity of a sale being manifest, sold in a different manner; they both signed the sale-bill, which was returned by them to the ordinary; J. R., one of the executors, took the larger portion of the notes given for the credit portion of the sale, and kept the whole of them for about five months, when he turned over about one-half to his co-executor, D. R.; a few years afterwards J. R. died insolvent, having wasted the assets retained by him; Held that D. R. was not liable for the devastavit of J. R.

[Ed. Note.—Cited in *Clarke v. Jenkins*, 3 Rich. Eq. 341; *Miller v. Sligh*, 10 Rich. Eq. 249, 250; *Gates v. Whetstone*, 8 S. C. 247, 28 Am. Rep. 284; *Tompkins v. Tompkins*, 18 S. C. 21.

For other cases, see *Executors and Administrators*, Cent. Dig. § 512; Dec. Dig. ⚡125.]

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*Before Johnston, Ch., at Edgefield, June, 1850.

The decree of his Honor, the presiding Chancellor, is as follows:

Johnston, Ch. William Robertson made his will on 17th September, 1840, and appointed as executors thereof, his nephews, James Robertson and Douglas Robertson, who were cousins; and he died in May, 1841. On 7th June, 1841, the will was admitted to probate, and both executors qualified. On 24th November, 1841, the executors concurred in a sale of the personalty, for the aggregate sum of \$9,403.24, and both signed the sale-bill and were present when it was returned to the ordinary, on 2d May, 1842; but all their subsequent returns to the ordinary,

were separate. Whether they joined in the clerical act of taking from the purchasers at the sale, the securities for the purchases, is not clear by the proof, nor important; but my conclusion from the evidence is, that James Robertson took the larger portion of the securities, and kept the whole of them in his possession from the time they were taken until 23d April, 1842, when he delivered over some of them, to the sum of \$4,739.53, to his co-executor, Douglas. James Robertson was older than his co-executor, and a more expert man in business, and enjoyed the intimacy and confidence of his testator; and, until about a year before his death, which happened about the close of the year 1847, he maintained good credit with the community, but, as the event has shown, he wasted the assets of his testator, and died insolvent, and may have been insolvent from the time of his appointment. On 6th September, 1847, Douglas Robertson, who seems by the evidence to have been recently informed of the pecuniary condition of his co-executor, took from the said James Robertson a mortgage of certain negroes, to secure himself from the consequences of any maladministration by said James.

The bill is filed by plaintiffs, as residuary legatees of said William Robertson, against

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Douglas Robertson, surviving executor, and John Hill, representative of James Robertson, the deceased executor, for an account and settlement of the estate of the testator; but the only question presented for my decision now, is whether Douglas Robertson is liable for the devastavit of his co-executor.

The general doctrine is, that one executor is not liable for the acts of his co-executor; and I see nothing in this case, by which Douglas Robertson has adopted as his own any unlawful act of his co-executor. He has done nothing by which he enabled James Robertson to obtain possession and control of any assets of the testator, previously within the actual power of him, the said Douglas; he has been merely passive; and without more active concurrence in the acts of his co-executor, I find neither principle nor authority, upon which I can make him liable for assets not within his control, and for which he had not, by some act of his own, made himself chargeable. In my judgment, Douglas Robertson is liable only for the assets delivered to him by James Robertson.

It was argued, that the power to sell, conferred by the will in this case, upon the executors, was conditional only, and that the state of facts justifying the sale was not proved to exist, and that the sale was therefore an unlawful act, in which Douglas concurred. But it was within the discretion of the executors, and it is not for the plaintiffs to determine upon the existence of the

state of facts upon which the power to sell was conferred.

Of course the mortgage, above mentioned, from James Robertson to Douglas Robertson, must be allowed to avail so far as it may, for the reimbursement of the legatees for the devastavit of James Robertson.

The shares of the legatees who died before testator, fall into the residue. Let the commissioner take the accounts according to the principles of this decree.

The plaintiffs appealed, upon the grounds following:

1. The sale by the executors of William Robertson, of the personalty of his estate, was not "directed by his will," nor was

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*it authorized by "an order from the Court of Ordinary, or the Court of Equity." It was, therefore, not "valid in law or equity," and the defendant, Douglas Robertson, having concurred in such sale, became thereby responsible jointly with his co-executor, James Robertson, for the full value of the chattels thus unlawfully disposed of.

2. If the sale in question were lawful, still Douglas Robertson should be held responsible for the proceeds, as he co-operated and concurred directly with his co-executor in effecting it, and as by the account thereof, rendered by him to the ordinary, he announced it officially to be the joint act of his co-executor and himself, and admitted their joint liability in that behalf.

3. The assets wasted by James Robertson, "came to his hands," by the acts of his co-executor, Douglas Robertson, who ought therefore to be charged with their value.

[For subsequent opinion, see 4 Rich. Eq. 39.]

Carroll, for appellants.
Griffin, contra.

DUNKIN, Ch., delivered the opinion of the Court.

The testator, contemplating the necessity of a sale, in order to make a division of the slaves among the numerous legatees mentioned in the sixth and seventh clauses of his will, directs his executors to have them appraised and sold in a particular manner, and "to account with the respective legatees for the sales of the negroes." (a) The mode

(a) To a proper understanding of this case, the following clauses of the will of William Robertson, seem to be necessary:

"6th. In compliance with a promise made to my last wife, I will and bequeath unto Christiana Hatcher, Joseph Parker, Benjamin Parker, William Parker, Hezekiah Barnes and Tracy Barnes, now the wife of one Tally, the following negroes, viz: Old Andrew, Mary, Harriet, Chester, Jesse, Charlesey, John, Quincy, Jim, Phil, George, Peggy, Young Mary, Odin, to be equally divided between them and their heirs forever.

"7th. I will and bequeath the following negroes, viz:—Old Phil, Pompey, Young Andrew, Peter, Candis, Carolina, Creasy, Elbert, Au-

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of sale prescribed by *the testator being found impracticable, and the necessity of a sale manifest, the executors sold the slaves at public outcry, and both signed the sale-bill, which was returned by them to the ordinary. No objection is made to the fairness of the sale, or to the terms, or to the adequacy of the prices at which the property was sold, nor is it sought to rescind the sale. But the purchasers gave notes for the credit portion of the sale, and James Robertson, one of the executors, took the larger portion of them and kept the whole, for

drew, a boy about three years old, William and Kitty, to be divided as follows:—One share to my sister, Elizabeth Horn, if she be living, if not, to her children—one share to the children of my deceased brother, Henry Robertson—one share to the children of my deceased brother, Peter Robertson—one share to my sister, Temperance Robertson, if alive, if not, to her children—one share to the children of my deceased brother, John Robertson—one share to my brother Higdon Robertson, and one share to the children of my deceased brother, Nathaniel Robertson. If either of my brothers or sisters die before my death, leaving children, their chil-

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dren, respectively, are to take the *share of their parents; and in case the children of either of my brothers or sisters should die before my death, then the share hereby given to such children, shall be divided equally among my surviving brothers and sisters, and the children of such of my brothers and sisters who may have died, the said children taking the part, respectively, to which their parents would have been entitled if living.

"9th. I devise and bequeath all the remainder of my real estate, and all the residue of my personal estate of every kind and description, to the persons and in the manner mentioned in the seventh clause of this my will.

"10th. As it may be impracticable to divide the negroes mentioned in the sixth and seventh clauses of my will, among the legatees therein named, and as I desire to consult the future comfort of my negroes, I hereby direct and require my executors, after my death, to select three disinterested persons to appraise my said negroes, and my executors are hereby authorized and required to allow my said negroes to select their owners, who may be permitted to take them on a credit of twelve months, at the said appraisement, giving to my executors their bonds and approved securities for the money. In the said appraisement and sale herein directed, my executors are required to keep distinct, the negroes mentioned in the sixth clause, from the negroes mentioned in the seventh clause of this will, and account with the respective legatees mentioned in those clauses for the sales of the negroes therein mentioned."

The following is the reason, assigned by Douglas Robertson in his answer, why the executors sold the slaves in a mode different from that prescribed by the testator:

"As to the sale of the negroes mentioned in the sixth and seventh clauses of the will, this defendant answers, that nearly all of the said negroes, were either unwilling or unable to select persons who would take them, under the provisions of the will, at the appraisement, and as the legatees were very numerous and much scattered, a large portion of whom reside out of the State, and as, under the circumstances, the estate could not well have been kept together, nor actually divided, it was deemed best for all concerned, that the said negroes should be sold."

about five months, in his possession, when about one-half of them were delivered to the defendant, his co-executor. It is insisted that the defendant is liable for the sums received by his co-executor, James Robertson;—first, because the sale was not directed by the will, nor authorized by any decree of the Court of Ordinary, or Court of Equity. It must be borne in mind, that this is not a proceeding to invalidate that sale; and, in reference to any peculiar liability of the defendant, on that account, it is proper to remark, that what this Court would have authorized, if the application had been made, it

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*will now sanction when done. The necessity of the sale was felt by the testator. His regard to his slaves induced him to prescribe the particular mode of accomplishing his purpose. When this was found impracticable, the executors thought they might adopt the usual mode of making the sale. Strictly, this was not authorized by the will, although the executors might very well have misapprehended their power, and especially as no objection was made from any quarter. But again, it is said, that assuming the sale to have been both necessary and proper, both executors are liable, each for the acts of the other, because both concurred in the sale. In other words, that, as the sale was made by the authority of both, the defendant is responsible for any sums received by his co-executor, James Robertson, deceased. "Nothing is clearer, and I never knew it questioned," says Sir John Strange, in *Jacomb v. Harwood*, (2 Ves. Sen. 267,) "that one executor may release or pay a debt," &c. The notes must, from necessity, have been taken by one of the executors, or they might have been divided. But the possession of the notes was unimportant. Each had a right to receive the proceeds of sales. Without fraud, a purchaser might pay to either of the executors, whether he held his note or not, and his receipt would be a good discharge; and so it was expressly ruled by the Court of Law in *Gage v. Adm'r. of Johnson*, (1 McC. 492.) If an executor, having received funds of the estate, pays or delivers them over to his co-executor, or joins in a misapplication of them, or joins in a receipt which enabled his co-executor to receive them, he may be made responsible. But the general rule of the Court, as declared in *O'Neill v. Herbert*, (McC. Eq. 497,) is, that one executor is not liable for the assets which come into the hands of his co-executor; and the same rule was applied to joint administrators in *Gayden v. Gayden*, (Id. 435.) Where, as in this case, the sale is on credit, no means can well be devised by which one executor could prevent his co-executor from collecting the debts, even if he were so disposed, or had the right to do so. The case of *Mathews v. Mathews*, (McC. Eq. 410,) was cited for the

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appellant. That *was an application, to the Court of Equity, for the sale of land, in which both the executor and executrix joined. The purpose was to change the investment. The Court ordered the sale, and directed that the proceeds should be re-invested by the executor and executrix, and the investment reported to the Court. The executor received the proceeds—no re-investment was made, and, five years afterwards, he died insolvent. Chancellor HARPER, with much reluctance, held the executrix responsible. "It is to be observed" says he, "that, as executors, they had nothing to do with the land; there does not appear to have been any necessity to sell for the purpose of debts; and in procuring a sale of the land, they seem to have volunteered to act as trustees." Again; "being a party to the suit, Mrs. Mathews was bound by the decree. The decree is, that the executor and executrix shall invest and report to the Court, making it the duty of both to see to the investment. By consulting the records of the Court, she might, at any time, have seen that the executor had not reported any investment. If she had applied to the Court, at any time within five years, the investment by him would have been enforced." The decree was affirmed by the Court of Appeals. But the avowed reluctance of the Chancellor, as well as the reasons set forth, abundantly prove that as a general rule, each executor is only responsible for his own acts or defaults.

This Court concurs in the judgment of the Chancellor, and the appeal is dismissed.

JOHNSTON and DARGAN, CC., concurred.

WARDLAW, Ch. having been of counsel, did not sit at the hearing.

Appeal dismissed.

3 Rich. Eq. *139

*A. W. THOMSON, Ex'or of J. PALMER, v. E. M. PALMER and Others.

(Columbia. Nov. and Dec. Term, 1850.)

[*Principal and Surety* ⚭185¹/₂.]

Separate judgments were recovered on the same note against a principal and his two sureties; after the death of the principal, R. one of the sureties, paid the amount under a stipulation that the judgment and execution against the principal should be assigned to him, which was subsequently done: Held that R. was entitled to be paid, as a judgment creditor, out of the assets of the principal.

[Ed. Note.—Cited in *Ex parte Ware*, 5 Rich. Eq. 474.

For other cases, see *Principal and Surety*, Cent. Dig. § 530; Dec. Dig. ⚭185¹/₂.]

[*Executors and Administrators* ⚭111.]

Costs recovered in a suit at law, against the executor of an insolvent estate, are not to be paid out of the assets of the estate; if the ex-

ecutor, by mis-pleading, make himself personally liable therefor, he must take the consequences, and cannot charge them to the estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 449; Dec. Dig. ☞111.]

[*Injunction* ☞232.]

Where, after an order enjoining all the creditors of a testator from suing the executor, some of the creditors sued the executor, they were ordered to pay not only their own costs at law, but the costs of the executor also.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 519; Dec. Dig. ☞232.]

[*Executors and Administrators* ☞408.]

Where a bill is filed by the executor of an insolvent estate to enjoin creditors from suing at law and to have the estate administered in equity, and the choses, money, &c. of the estate are turned over to the Commissioner, the executor is only entitled to have a schedule and statement reported of what he has turned over; he is not entitled to credit for the choses turned over, except *prima facie*; for, if it should turn out that any of the choses are not good, through the laches or fault of the executor, he should be charged with the amount.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1615; Dec. Dig. ☞408.]

[*Executors and Administrators* ☞408.]

Nor is the executor entitled to commissions, as for paying away money in debts and legacies, &c. for choses and money turned over to the commissioner.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1615; Dec. Dig. ☞408.]

Before Johnston, Ch. at Union, June, 1848.

Johnston, Ch. This case comes up on the report and supplemental report of the commissioner, to which the plaintiff has put in eight, and the creditors of the testator two exceptions.

1. The plaintiff's 1st exception is, "because the commissioner has allowed Thomas Reeves's demand, the surety of the testator, to rank as a judgment debt, whereas justice to the simple contract creditors required that it should rank as a simple contract debt."

I have no hesitation in overruling this exception. By the evidence, it appears that Reeves and Williamson were sureties to a sealed note, given by Palmer to one Wells of Georgia. Wells sued all the parties separately, in the Federal district Court, and obtained judgments and executions. After

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Palmer's death, the *execution against Reeves being levied on his land, he paid the amount to the agent of Wells, under a stipulation that the judgment and execution against Palmer should be assigned to him, which was subsequently done.

It has been determined in the law courts of this State, that where a surety pays off an execution against his principal, under an understanding that the execution should be kept open for his benefit, the payment does not extinguish the lien, so far as it can operate in his favor. The law of this Court is,

that when a surety pays a debt of his principal, he has a right to have all the securities held by their creditor assigned to him; much more is he entitled to it where the payment was made, as in this case, upon the condition that the assignment would be made.

The lien now insisted on, was a subsisting lien at the death of Palmer, and what difference can it make to the other creditors, whether the creditor himself enforced it or claimed its benefit, or assigned it to another, that he might do so? The exception is overruled.

The 2d and 3d exceptions will be taken up with the creditor's 2d exception.

4th. The plaintiff's 4th exception is, "because the commissioner's report has overcharged the executor on the interest account, having charged compound interest, without a moment's rest." This exception proceeds upon a misconception of the scheme and calculations of the report, as will appear from an attentive examination of the report. The exception is overruled.

5th. The 5th exception is, "because the commissioner has not credited the executor with the cash, notes and bonds handed over by him to the commissioner, to the amount of several thousand dollars."(a)

The commissioner has misconceived the purport of the exception, in his judgment overruling it. The exception does not call for an account of the commissioner's administra-

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tion of the *funds, but merely asks that the executor be credited with the funds turned over. I do not think the executor is entitled to credit for the choses turned over, except *prima facie*. If it should turn out that any of the choses are not good, through the laches or fault of the executor, he should be charged with the amount. But he is entitled to have a schedule and statement reported of what he has turned over to the commissioner, and, in this view, the exception is sustained.

6th. The sixth exception is, "because the report does not credit the executor with full commissions," &c. The exception has been explained into an assertion that the executor is entitled to commissions, (as for paying away) for choses and money turned over to the commissioner. I do not think (as I have often ruled without an appeal) that this is paying away money in debts and legacies, &c. within the meaning of the statute, and the exception is overruled.

7th. The seventh exception will be considered with the 2d exception of the creditors.

The creditors's two exceptions remain for consideration. The first of them is, "because the executor of Palmer is not entitled to a credit for the judgment of the Bank

(a) For a full understanding of this and the 7th exception, see this case as reported, 2 Rich. Eq. 32. R.

against A. W. Thomson, as a judgment debt at the death of the testator, inasmuch as the debt upon which the judgment was recovered was upon a simple contract, and the judgment was recovered since the testator's death. This item, in the report, is set down at \$674.66, with \$20 costs." The exception does injustice to the report. The commissioner does not charge the estate with the judgment recovered against Thomson, as, in itself, a judgment against the testator, or ranking as a judgment against the estate at his death. But regarding the liability of the estate to Thomson as a simple contract liability, the commissioner allows him the lien of another judgment, which the commissioner conceives he held as collateral security to indemnify him on that contract. The facts are these, as stated by the commissioner in his judgment upon the exception. A note was discounted in the Bank in 1828, endorsed by

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John Anderson, Z. P. Herndon, M. B. Bo*gan and Daniel A. Mitchell, for about \$1500, and as security to his indorsers, Palmer, the testator, and his father, gave a confession of judgment for \$1500, with interest from 2d July, 1828. The execution under this judgment was lodged in the sheriff's office, July 5th, 1828, in the coroner's office, July 30th, 1828, and again in the sheriff's office, July 19th, 1831. On the 14th June, 1832, Herndon, one of the indorsers, made the following indorsement on the execution: "The judgment in this case having been given to secure the plaintiffs as indorsers of the defendants to the Bank, and the note upon which they were indorsers as originally made, having been taken out of the Bank and new indorsers given, leaving out my name, this is to certify that I have no other interest in the judgment, and assign to the remaining indorsers all my interest in the same, June 14th, 1832. Z. P. Herndon." There is the following indorsement on the execution, without date,—"I assign all my right and interest in the within execution to those who may indorse for the said D. and J. Palmer. (Signed) John Anderson." "This fi. fa. belongs to D. A. Mitchell, W. K. Clowny, John Rogers and A. W. Thomson," was also a memorandum in the hand writing of John Rogers, late clerk, who as well as Anderson, is dead. There is also the following indorsement, without date, "Received \$13.90, attorney's and my cost. (Signed) B. Johnson, Sheriff," Thomson took a confession from Palmer for \$909.69, April 17th, 1842, on a note dated January 1st, 1841. Judgment against Thomson was obtained on a note indorsed by him in Bank, dated October 12th, 1841, which judgment he paid off, amounting, as before stated, to \$674.66. The commissioner has allowed him the benefit of the first mentioned judgment to the extent of this payment, and I cannot say that there is not some intrinsic

evidence in the circumstances favoring this conclusion. Still, it must be remembered this is a claim touching the rights of other creditors of the estate, and should be well supported. It is true, every party to the transaction is dead, except Herndon, Thomson and Clowny, and the latter may be interested. Still I think there must be better evi-

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dence accessible. Has the *Bank been examined to shew that the indorsement of 1841 was in renewal of that of 1828? Upon the present evidence I should (but with great hesitation) incline to sustain the commissioner's conclusion. I could not say it was grossly erroneous. If creditors wish to investigate the matter further, they may go before the commissioner. If not, the exception is overruled.

2nd. The creditors's second exception is, "because the commissioner ought to have charged the estate with the costs on the suits at law, brought by the creditors against the executor, as a preferred debt, or at least of equal degree with the demands upon which the costs accrued. And if the estate is not chargeable, the executor is liable, personally, for costs. First, for the preferred debts, inasmuch as there were ample funds known to the executor to pay the debts; and, secondly, he is liable, on the grounds of his plea and defence in all the cases." Connected with this, is the plaintiff's 2d exception. "Because the commissioner has charged the estate of Jeffrey Palmer with \$382.12½, the costs of the plaintiffs, incurred in about twenty-five suits, which plaintiffs had sued at law after they were enjoined by the order of this Court, and most, if not all of them, had rendered their demands to the commissioner of this Court under the order;" also, his third exception, "because the funds of an insolvent estate are not liable for costs incurred by creditors suing the estate; but the creditors thus suing, must pay the costs out of their share of the funds of the estate;" and his seventh exception, "because the report should have appropriated a fund to pay the costs in this case, and the costs to which the executor was put in defending himself in some twenty or twenty-five cases, in which the commissioner has taxed the costs of the plaintiffs, as stated in his report."

The fact is, the commissioner has made no decision or recommendation, either as to the costs of the case or any other costs, and the exceptions are intended to elicit a judgment from the Court upon the subject. There is no difficulty as to the costs of this case. They must be allowed out of the es-

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tate, and the *commissioner is so instructed. With respect to the suits at law there is more difficulty. The testator died 14th July, 1842. The executor qualified 13th January, 1843. His first bill was filed 14th June,

1843, for leave to sell the real estate, in order to pay the creditors, on which of the same date, Chancellor Johnson passed an order that a rule be published for three months, requiring testator's creditors to bring in and establish their demands by the first of the succeeding December. What suits had been brought before this order does not appear, but there is a list of suits brought, seven in number, and on simple contract debts, the 6th and 23d September, 1843. To six of them, the executor pleaded the general issue, and gave notice of the plea of plene administravit, but did not put in the plea. To the seventh, which was a Summary Process, he pleaded the general issue and gave notice of the plea of plene administravit præter, and decree passed for plaintiff. On 23d February, 1845, writs were lodged in some other cases on preferred or specialty debts; in one of which, no plea was put in; in the other six, the plea was the general issue. None of these creditors were actually enjoined from bringing their suits, although they were required to establish them before the commissioner. I do not think they can legally be made liable for the costs. From the pleadings, the executor was, in most of the cases, liable for them personally. But I think, under the difficulties of his position, as disclosed in the previous stages of this litigation, his conduct must be held to have been that of a faithful trustee, and he is entitled to these costs out of the estate. In other words, the first alternative of the creditors's second exception, presents the true rule in this case.

It is ordered that the foregoing opinion stand as a decree on the several exceptions.

It is further ordered, that the report be recommitted, to be reformed according to this judgment.

In obedience to the above order of his Honor, Chancellor Johnston, re-committing

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the report to be reformed, the commissioner made a second report, which came up, on exceptions, before his Honor, Chancellor Dunkin, in June, 1849, who pronounced the following decree.

Dunkin, Ch. This cause was heard on the commissioner's report, prepared under the decree of Chancellor Johnston. The exceptions are substantially the same as those made to the former report, which were heard by Chancellor Johnston, and on which he has pronounced a decree. It seems to me to be a great abuse to put parties to the expense of two sets of exceptions, two reports of the commissioner, upon the same exceptions, and the trouble of investigating the matter, simply to ascertain that the points have been made, and have been determined by a preceding Chancellor, whose judgment is conclusive until reversed by a higher tribunal. A difficulty may sometimes occur as to the time at which the appeal should be taken, but no such difficulty exists in this

case, and, moreover, the practice to which the Court has adverted, affords no aid or protection, if the party or his solicitor has erred in judgment.

It is ordered and decreed that the exceptions be overruled, and that the report of the commissioner be confirmed and become the judgment of this Court.

The complaint appeals in this case from the decrees made by Chancellors Johnston and Dunkin, and will insist on the same grounds in the Court of Appeals, that were taken as exceptions to the reports of the commissioner made in the case.

The creditors also appealed, on the following grounds, viz:

1st. Because the executor of J. Palmer is liable, personally, for the costs of the suits at law, by his false pleas and unnecessary defence.

2d. Because the executor of Palmer ought not to be allowed the judgment of John Anderson and other v. Daniel Palmer and Jeffrey Palmer. There is evidence on the fl. fa. in this case that it has been satisfied, and

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there is no evidence *of any connection between this judgment and the note indorsed by the executor for J. Palmer, which was many years after.

Thomson, for complainant.

Herndon, for the creditors.

JOHNSTON, Ch. delivered the opinion of the Court.

Though the subjects embraced in this appeal are numerous, it is deemed necessary to take notice of only the three or four of them that were regarded of importance in the argument.

And, first, the claim of Reeves as surety of the testator. The opinion expressed in the decree of June, 1848, meets the approbation of this Court. We deem it unnecessary to add any thing to the reasoning of the Chancellor on this point: And merely refer, for additional authority, to the case of King v. Aughtry, (3 Strob. Eq. 149) in which a surety who paid off a joint judgment against himself and his principal, after the principal's death, was declared entitled to have it set up, in equity, against his estate.

With respect to costs. This Court is satisfied that the direction to allow the costs of this suit out of the estate was correct, and according to usage. With regard to the costs incurred at law, by both parties, it is necessary to distinguish between those incurred before, and those incurred after the 15th of June, 1843. It now appears that, after the order of the 14th of June, 1843, which was brought to the view of the Chancellor, (and which merely provided for calling in the creditors,) another order, dated the next day, was passed by Chancellor Johnson, enjoining them from proceeding at law. The creditors who sued after that

order, were in contempt; and, so far from being entitled to ask this Court to give them costs, are liable to an order that they pay all the costs, of both parties, in those suits: and it is so ordered.

With respect to costs of suits brought before the order of injunction, the determination must depend upon other principles. It is ruled at law, in the case of *Hutchinson v. Bates*, (1 Rail, 111) that the cost part of judgments obtained against insolvent estates, (such as this of *Palmer*, which with

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the addition of the *realty, is not good for hardly a tenth part of the debts) forms no part of the judgment against the assets. To allow them that effect, would not only entitle the suing creditor to take the proportion of assets properly assignable to his demand, but to absorb the proportions of other creditors, in payment of his costs.

Upon the principles of that case, the creditors who sued at law before the injunction, are not entitled to their costs out of the estate. If any of them are entitled to them against the executor personally, it must be owing to his mis-pleading, (of which the commissioner will enquire, on further reference;) and, in that case, he must bear the consequences.

The view now taken, shows that the allowance to the executor of his costs at law, out of the estate, was unnecessary and improvident, and so much of the decree is overruled.

The only remaining question relates to the judgment, the lien of which is claimed by the plaintiff, in consequence of the payments made by him to the Bank as surety of his testator. In the investigation, which the Chancellor allowed to be made at the instance of creditors, the burden of clearing up the transaction should have been thrown on the plaintiff; and it is so ordered.

It is ordered that the decree of June, 1848, be reformed according to this opinion, and in all other respects that it be affirmed: that the decree of Chancellor Dunkin be set aside; and that the reports be re-committed to the commissioner for further investigation upon the points above indicated, and to be reformed according to the foregoing directions.

DUNKIN and DARGAN, CC., concurred.
Decree reformed.

3 Rich. Eq. *148

*M. C. STACY, Ex'or of Robert Stacy, v.
JAMES L. PEARSON, GEORGE
BOBBITT et al.

(Columbia. Nov. and Dec. Term, 1850.)

[Discovery ⇐ 19.]

Where the bill is for discovery and relief, the plaintiff must shew, affirmatively, that his

right cannot be established at law, without the aid of the discovery which he seeks: and the discovery must be established by the answer, in order to entitle the Court to maintain the bill for relief.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. § 21; Dec. Dig. ⇐ 19.]

[*Discovery* ⇐ 6.]

But a party may have a bill of discovery, not only where he is destitute of other evidence to establish his case, but, also, to aid such evidence, or to render it unnecessary.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. § 7; Dec. Dig. ⇐ 6.]

Before Dargan, Ch., at Spartanburgh,
— Term, 1850.

The decree of his Honor, the Circuit Chancellor, is as follows.

Dargan, Ch. The complainant charges in his original bill, that the defendants, Pearson and Bobbitt, confederating together, by fraud and collusion, have possessed themselves of certain notes of Bobbitt, due to the testator, Robert Stacy, at the time of his death, and refuse to deliver them up. In his amended bill, he charges the same collusive and fraudulent possession of another note, due by the defendant Bobbitt, to the testator, for the sum of two hundred and fifty dollars. The notes are all specifically described, and the complainant seeks a discovery, and that the notes may be delivered up. The defendant, Bobbitt, has pleaded to the jurisdiction of the Court, or rather he has insisted upon that objection in his answer, on the ground, that if the facts stated are true, it is not a matter of equitable cognizance, and the complainant had adequate remedy at law. The complainant charged a fraud and collusion, and sought a discovery as to facts.

He had a right to a discovery, and the Court having entertained the bill for a discovery, had the right to retain it for judgment. The plea or objection to the jurisdiction is overruled. Has the defendant, Bobbitt, fraudulently possessed himself of his notes, due to testator, by collusion with one of the executors (his co-defendant, Pearson,) as charged in the bill? He admits in his answer, that the testator did hold against him, at a period not long antecedent to his

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death, the notes described in the complainant's original bill. But he says that these notes were, on a settlement between him and the testator, paid and taken up. He denies that the testator ever held against him a note like that described in the complainant's amended bill. But he does not deny that he owed the testator the sum of two hundred and fifty dollars, for borrowed money, which the complainant supposed and charged to have been secured by note.

It was clearly proved that Bobbitt owed old Mr. Stacy a considerable sum of money, equal, or about equal, to the value of his land, and that this indebtedness continued

up to a very short period before the testator's death. He told one witness that he had no means of paying this debt but by the sale of his land, and asked the witness to buy it. He seemed to consider the land as already belonging to Stacy, the elder, for he said that it was a cheap bargain at the price for which Stacy offered to sell it.

It was proven by one witness, that on a further advance by testator, in taking up a note of Bobbitt from a Mr. Swan, it was stipulated, that if Bobbitt failed to pay, old Stacy was to have his land. The notes were seen in testator's possession not long before his death. The evasions of this defendant tell strongly against him. He promised to shew, satisfactorily, that he had paid the testator all that he owed him. This he has failed to do. The land has not been disposed of, and is still his. He has not shewn how he became possessed of funds to discharge this (comparatively speaking) large indebtedness. I am perfectly satisfied from the evidence, that he still owes the three notes described in the original bill. He denied in the answer, ever having owed the testator such a note as that described in the amended bill. Yet, as I have remarked, he does not deny owing the sum of two hundred and fifty dollars, charged to have been borrowed from the testator. I cannot say that I am satisfied that he ever gave his note for this amount, but I am satisfied that he borrowed the money. He could not deny borrowing this sum, but evaded the question, and con-

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tended that he had paid *all that he owed. From his own admission, in the presence of Mr. Thomson and Mr. Peeling, it is impossible to resist the conclusion, that he borrowed money from old Mr. Stacy, on the Sunday previous to the Monday on which he paid two hundred and fifty dollars to Mr. Tucker, on the execution against him. The receipt for this money passed out of Bobbitt's possession into that of old Mr. Stacy. At least, there is strong ground for such an inference. For the receipt was produced upon the trial, by the complainant. There is some significance in this fact. It may have been left with the testator, in the confidence that evidently subsisted between the parties, as a memorandum in the place of a note.

It is ordered and decreed that the defendant, Bobbitt, account to the complainant, as the executor of R. Stacy, for the three notes described in the bill, with interest, and for the sum of two hundred and fifty dollars without interest, and that the commissioner state the accounts.

The evidence in support of the complainant's charges against his co-executor, James L. Pearson, is not so full and satisfactory.

I am strongly impressed that there may be something wrong in his conduct, in regard to the notes which he owed his father previous to his death. His answer does not

come up fully to meet the allegations of the bill in this particular. He claimed Bobbitt's notes as a gift from his father to his wife, and said that Bobbitt had got them to calculate the interest, and refused to deliver up or to pay them. These are the notes which Bobbitt says he has fully paid.

Confederates do, sometimes, fall out in the division of the spoil. I shall not conclude any thing upon this point at the present time.

It is ordered and decreed that the accounts of James L. Pearson, as one of the executors of Robert Stacy, be referred to the commissioner, and that the commissioner, in taking the account, inquire as to the indebtedness of said Pearson to testator at his death, as well as the estate since his death, and that he hear testimony on the subject.

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*It is also ordered, that the account of M. C. Stacy, one of the executors of R. Stacy, deceased, be referred to the Commissioner, and that he report thereon.

The defendant, Bobbitt, appealed, and moved this Court to reverse the decree, on the grounds,

1st. Because the Court had no jurisdiction of the case as made by the bill and answer, as there was a plain and adequate remedy at law.

2d. Because the bill is multifarious, setting up separate and distinct demands against the defendants, in which they had no interest in common.

3d. Because there was not sufficient proof that Bobbitt had not paid to testator the debts which he owed him, to overcome the oath of Bobbitt and the production of the notes taken up and cancelled.

4th. Because there was no proof that Bobbitt ever borrowed the two hundred and fifty dollars referred to in the amended bill, or if he borrowed it, that it had not been refunded.

5th. Because the decree was, in other respects, against law and evidence.

Bobo, for the motion.

Tucker, contra.

DUNKIN, Ch. delivered the opinion of the Court.

The allegation of the complainant is, that, the defendant, Bobbitt, was indebted to the testator on four promissory notes, which were unpaid at his death, and of which the defendant obtained possession by collusion with J. L. Pearson, the co-executor. On the subject of collusion, the Chancellor, expressing a strong impression that there was something wrong in the conduct of the executor, distinctly declares that he "shall not conclude any thing upon this point at this time."

He places the right of the complainant to implead Bobbitt in this jurisdiction, on the ground of discovery; and that, having jurisdiction for the purpose of discovery, the

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Court was at liber*ty to go on and give relief. Where the bill is for discovery and relief, the plaintiff must shew, affirmatively, that his right cannot be established at law, without the aid of the discovery which he seeks; and the discovery must be established by the answer, in order to entitle the Court to maintain the bill for relief. *Russell v. Clark's ex'rs*, (7 Cranch, 89 [3 L. Ed. 271].) *Laight v. Morgan*, (1 Johns. Cas. 429.) But a party may have a bill of discovery, not only where he is destitute, of other evidence to establish his case, but, also, to aid such evidence, or to render it unnecessary. *Mitf. Eq. Pl. by Jeremy*, 307; see also, *Story Eq. Pl.* 319, note.

In this case, the plaintiff's demand was purely of a legal character. He has obtained from the defendant the discovery which he sought, and all the circumstances disclosed by that answer, as well as those to which witnesses have testified, are peculiarly proper for the consideration and adjudication of the ordinary tribunal.

It is ordered and decreed that the plaintiff be at liberty to institute proceedings at law for the amount alleged to be due by the defendant, George Bobbitt, to the estate of the testator, R. Stacy, deceased; that the proceedings be prosecuted in the name of both the executors, as plaintiffs, and that the defendant, J. L. Pearson, be enjoined from releasing, or in any manner interrupting the recovery of said demand. It is further ordered, that the bill be retained until the determination of said proceedings at law, or until the further order of this Court.

The decree of the Circuit Court is modified according to the principles herein stated.

JOHNSTON, DARGAN and WARDLAW, CC. concurred.

Decree modified.

3 Rich. Eq. *153

*IRA ARNOLD, Adm'r of Robert Brownlee, v. GEORGE MATTISON.

(Columbia. Nov. and Dec. Term, 1850.)

[*Mortgages* ⇨38.]

If an instrument absolute on its face, can be converted, by parol, into a defeasible instrument, except where the omission to reduce the defeasance to writing was occasioned by fraud or mistake, the evidence must be very clear and convincing; and where the allegations of the bill are denied by the answer, there must be more than the testimony of one witness.

[Ed. Note.—Cited in *Lee v. Lee*, 11 Rich. Eq. 582; *Anderson v. Rhodus*, 12 Rich. Eq. 107; *Campbell v. Linder*, 50 S. C. 171, 27 S. E. 648; *Petty v. Petty*, 52 S. C. 55, 56, 29 S. E. 406; *Brown v. Bank of Sumter*, 55 S. C. 70, 32 S. E. 816; *Brickle v. Leach*, 55 S. C. 524, 33 S. E. 720; *De Hihns v. Free*, 70 S. C. 349, 49 S. E. 841; *Williams v. McManus*, 90 S. C. 493, 73 S. E. 1038.

For other cases, see *Mortgages*, Cent. Dig. §§ 109, 110; Dec. Dig. ⇨38.]

[*Equity* ⇨25.]

Where a grantor executes an absolute conveyance of his property to protect it against the claim of his creditor, reserving, by secret agreement, an interest in himself, neither he, nor his administrator, can come into Court to be relieved of the fraud.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 85; Dec. Dig. ⇨25.]

Before Johnston, Ch., at Abbeville, June, 1850.

The following is the decree of his Honor, the Circuit Chancellor:

Johnston, Ch. This is a bill for the surrender of certain slaves conveyed to the defendant by Robert Brownlee, the intestate of the plaintiff, by an instrument purporting upon its face to be an absolute bill of sale. It is alleged to have been intended as a mortgage; and proof was introduced of a parol stipulation, that it was to become defeasible by the re-payment of the money within seven years from its date.

I deem it sufficient to remark, that if an instrument, absolute on its face, can be converted, by parol, into a defeasible instrument, except where the omission to reduce the defeasance to writing was occasioned by fraud or mistake, the evidence must be very clear and convincing; and where, as in this case, the allegations of the bill are denied by the answer, there must be more than the testimony of one witness. (4 Kent, 143; part 6, sec. 58.) Neither of these conditions is fulfilled in this case. There is no circumstance in the case tending to show, that if this was a bona fide transaction, as between the parties, any defeasible conveyance, or anything else than an absolute conveyance, was or could have been contemplated.

The defendant Mattison, already held the oldest lien in his judgment, for the money already due him; and the advances which he was to make on Brownlee's account, (which,

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together *with what was already due him, were the consideration of the conveyance,) were to be paid on another judgment. These gave him all the lien he needed. Why, then, under the circumstances, convert the general lien of the judgments into the specific lien of a mortgage? What motive could there be for such a procedure? And, if no motive for a lien could exist, is not the inference natural and irresistible, that an absolute conveyance was designed? I can draw no other conclusion, if the transaction was not fraudulent. If fraudulent, however, the plaintiff is not entitled to a decree.

There are only two conceivable modes in which fraud could have entered into the transaction:

1. It may have been intended to convey the property to Mattison, as a cover against the debt of Robertson, drawing nigh to judgment, as testified by George W. Brownlee, coupled with a secret agreement, reserving

an interest in Robert Brownlee, the grantor. With this view, several circumstances in the case may harmonize. But if this was the nature of the transaction, neither Robert Brownlee, who was *particeps criminis*, nor his administrator, who stands in his shoes, can come to be relieved of his own fraud. It would be an encouragement to fraud, to allow a party to it to stand in the same condition of safety as if no fraud were intended, and in an equal condition, whether his fraud were successful or not. Equity will execute no corrupt agreement, but leave the parties in the condition they have prepared for themselves.

2. If, however, the fraud was of another character; if Mattison imposed an absolute bill of sale on Brownlee, who supposed it contained a defeasance—this is not the case made by the bill—and, therefore, no decree can be given on the evidence. But, as I have said, it is altogether improbable that these parties could have stipulated for a defeasible instrument with any other view than to defraud third persons, and upon that, I have stated my conclusions.

It is ordered that the bill be dismissed.

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*The complainant appealed, on the following grounds:

1. Because the circumstances inherent in the transaction, and the other evidence of the case, were sufficient to establish the fact, that the bill of sale in question was executed subject to a defeasance, to become void on the payment of defendant's judgment, and the amount paid by him on a judgment in favor of S. L. Maddox against the complainant's intestate, and Geo. W. Brownlee, and was intended by the parties as a mortgage only.

2. Because it is respectfully submitted, that it was not necessary to allege in the bill that the defeasance was omitted by fraud or mistake, but that the general allegation, that it was agreed that the bill of sale should only operate as a mortgage or pledge, was sufficient to entitle the complainant to the benefit of evidence showing either fraud or mistake.

3. Because, even if the bill of sale was executed upon a corrupt agreement to defraud creditors, it is respectfully submitted that the defendant could not avail himself of his own tort, in taking possession of the slaves after Robert Brownlee's death, who died seized of them, and the Court should not have protected him in such tortious possession.

4. Because the decree is in other respects contrary to the evidence and equity of the case.

Sullivan, for appellant.

Perrin & McGowen, contra.

PER CURIAM. This Court concurs in the decree of the Chancellor; and it is order-

ed that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN and DARGAN, CC., concurring.

Decree affirmed.

3 Rich. Eq. *156

*JOHN K. BAILEY and Others v. WYATT PATTERSON and Others.

(Columbia. Nov. and Dec. Term, 1850.)

[Wills ⇨506.]

Testator bequeathed as follows: "I give and bequeath to my daughter M. B., one dollar; I also give and bequeath to the heirs of her body, my negro girl Poll, at four hundred dollars; I give and bequeath to the said heirs of her body one-twelfth part of my clear estate, to be equally divided among them." At the death of testator, M. B., who was then living, had several children, some of whom were in esse at the date of the will, and some had been born afterwards; Held that the bequest of Poll was not to M. B., but to her children living at the death of testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1698; Dec. Dig. ⇨506.]

[Wills ⇨506.]

It is always open to inquiry whether a testator used the word 'heirs,' according to its strict and proper acceptation, or in a more inaccurate sense, to denote 'children,' 'next of kin,' &c.

[Ed. Note.—Cited in *Cloud v. Calhoun*, 10 Rich. Eq. 362; *Duncan v. Harper*, 4 S. C. 84; *Monaghan v. Small*, 6 S. C. 182; *McCown v. King*, 23 S. C. 238; *Lott v. Thompson*, 36 S. C. 44, 15 S. E. 278; *Shaw v. Robinson*, 42 S. C. 346, 20 S. E. 161; *Duckett v. Butler*, 67 S. C. 134, 45 S. E. 137; *Reeves v. Cook*, 71 S. C. 279, 51 S. E. 93; *Rembert v. Evans*, 86 S. C. 450, 68 S. E. 661; *Church v. Moody*, 98 S. C. 239, 82 S. E. 430.

For other cases, see Wills, Cent. Dig. § 1090; Dec. Dig. ⇨506.]

[Guardian and Ward ⇨43.]

Defendant,—though claiming as a purchaser, without notice, from the guardian of plaintiffs,—ordered to deliver up the slaves in dispute to plaintiffs and account for the hire.

[Ed. Note.—Cited in *Long v. Cason*, 4 Rich. Eq. 66; *Moore v. Hood*, 9 Rich. Eq. 325, 70 Am. Dec. 210; *McDuffie v. McLatyre*, 11 S. C. 560, 561, 32 Am. Rep. 500.

For other cases, see *Guardian and Ward*, Cent. Dig. § 53; Dec. Dig. ⇨43.]

Before Dunkin, Ch., at Kershaw, June, 1850.

The following is the decree of his Honor, the Circuit Chancellor:

Dunkin, Ch. The will of Jacob Champion, deceased, bears date in 1826, and a codicil was executed in 1832. About this time the testator died, and administration, with the will annexed, was assumed under the authority of the ordinary, by George W. Champion.

The testator left some twelve or thirteen children; one of the clauses of his will is as follows: "I give and bequeath to my daughter, Mary Bailey, one dollar; I also

give and bequeath to the heirs of her body, my negro girl Poll, at four hundred dollars; I give and bequeath to the said heirs of her body one-twelfth part of my clear estate, to be divided equally among them."

On the 21st November, 1834, James Bailey, the husband of Mary Bailey, and the father of the complainants, who are her children, was duly appointed their guardian, and gave bond as such. On the 26th November, 1834, James Bailey, as guardian, gave to the administrator, Champion, a receipt for "Poll and her child Sarah Jane, bequeathed to the

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children of Mary Bailey by *testator's will." He gave him a receipt as guardian, on the same day, for the hire of Poll up to that date; and a separate receipt for \$213.94, in full of the legacy bequeathed to the children of Mary Bailey, by said will." Mary Bailey on the next day gave a receipt to the administrator for "one dollar," the sum in full bequeathed to her in her father's will and testament.

Poll was nearly grown when the testator died: soon after she came into the possession of the guardian, she was regularly hired out by him; she was hired to the defendant for several years prior to 1841. On the 4th of March, 1841, he acknowledges, on a note of James Bailey to him, a receipt of \$65 by the hire of Poll; sometime after this period, James Bailey became insolvent, and left the State, but at what particular time was not proved. Poll remained in the possession of the defendant, and she had, at the time of filing his answer, six children, whose names are set forth in an exhibit with his answer; three of the complainants having become of age, applied to the defendant, as well in behalf of themselves, as of their co-complainants, for a delivery of the negroes, and an account of the hire—this being declined, the bill was filed on the 14th January, 1846.

The defendant, by his answer, admits that he is in possession of Poll and her children whom he claims under an alleged purchase from James Bailey, about the year 1841. He insists that, by the true construction of Jacob Champion's will, an absolute estate in Poll vested in Mary Bailey, and consequently, that her husband's title was perfect and indefeasible. He admits that he hired Poll from James Bailey for \$65 per annum, from 1837 to 1841, but he denies that he hired from him as guardian, or that he knew that he held the negroes as guardian. It may be premised that there was no proof of any sale by James Bailey, or of any purchase by the defendant; but if James Bailey had a good title under Champion's will, that enquiry might not be important in this issue, as he could hold by possession; and if the complainants are entitled under Champion's will, whether a sale was or was not made by their father, is, in my judgment, unimportant. But if the legal title had been in James

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Bailey, and *only an equity in his children, I do not think the circumstances established, would in any manner entitle the defendant to the protection of a purchaser for valuable consideration, without notice.

But in whom was, and is, the legal title?

It is quite clear that, in a strict sense, no person can sustain the character of heir in the life time of the ancestor, according to the familiar maxim *nemo est hæres viventis*—but it is always open to inquiry whether the testator used the word according to its strict and proper acceptation, or in a more inaccurate sense, to denote "children," "next of kin," &c. 2 Jarman, 13. The doctrine was very fully discussed in *Holeman v. Fort*, (3 Strob. Eq. 66 [51 Am. Dec. 665]). That was a gift by deed of certain slaves to "the joint heirs of Jas. D. Hoof and Ann Hoof," (both of whom were alive.) The deed was held to pass an immediate and absolute estate to the children of J. D. and Ann Hoof, living at the date of the deed; children subsequently born were excluded. It will be remarked in the will of Champion, that immediately preceding the bequest in question, the testator gives one dollar to his daughter Mary Bailey; this circumstance is relied on in *Darbison v. Beaumont*, (1 P. Wms. 230.) as indicating the sense in which he uses the words "heirs of her body," in the succeeding clause. In *Sims v. Garrol*, (1 Dev. and Bat. Eq. R. 393,) testator had, in a previous clause, made a devise and bequest to Joel Sims and he afterwards bequeathed the residue of his estate to "Joel Sims's lawful heirs." Judge Daniel says, "The testator takes notice that Joel Sims was alive at the making of his will; there can be no doubt, that the testator did not intend that the words 'lawful heirs' should be taken in their technical meaning, but he intended to designate a class of persons, who should take immediately on his (testator's) death." I think the words, "to be divided equally among them," also indicate that the words were used in their ordinary and not technical sense.

Those of the complainants who were alive at the death of the testator in 1832, are entitled to Poll and her issue; three of the complainants were in existence in 1826, the

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date of the will, and *were of age when the bill was filed. The Court infers from the evidence, that Jacob (the fourth child) was also alive in 1826, though he was not of age at the filing of the bill, and as the succeeding children, Polly and Nancy, were born at intervals of two years from the birth of Jacob, they were both alive at the death of the testator, in 1832. These six complainants are therefore entitled to the slaves, under the will of their grandfather.

It is, therefore, ordered and decreed, that the slaves mentioned and named in the exhibit of defendant's answer, together with

any issue thereof, since born, be delivered up, and that the defendant, Wyatt Patterson, account for the hire since the 1st of January, 1841.

The defendant, Patterson, appealed, on the grounds:

1. Because the defendant, Wyatt Patterson, purchased the said slaves from James Bailey, the guardian, without notice that he held them as guardian, and therefore his title to the said slaves is protected in Equity.

2. That by the true construction of Jacob Champion's will, an absolute estate in Poll vested in Mary Bailey, and consequently the title of her husband, James Bailey, to the said slaves was perfect and indefensible.

3. Because the sale of the said slaves was necessary for the support and maintenance of complainants, and the proceeds thereof were applied to that purpose.

Smart, for the motion.

Chilton & Hanna, contra.

PER CURIAM. We concur in the decree of the Chancellor: and it is ordered that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN and DARGAN, concurring.

Appeal dismissed.

3 Rich. Eq. *160

*E. R. CALHOUN and H. A. C. WALKER, Executors of George Holloway, Deceased, v. THOMAS FURGESON, Administrator of Rebecca Holloway, Deceased.

(Columbia. Nov. and Dec. Term, 1850.)

[*Charities* ⇨21.]

Bequest to certain persons, naming them, "trustees of the South Carolina Conference School, Cokesbury, Abbeville district, S. C., and their successors in office, as a fund in trust for the following specific use or uses," &c.; held, that the bequest was valid.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. §§ 44-50; Dec. Dig. ⇨21.]

[*Life Estates* ⇨11.]

Testator bequeathed the whole of his estate, consisting of land, slaves, horses, cattle, hogs, provisions, farming utensils, furniture, &c., to his wife for life, with remainder over; he died in August, 1846, and his widow, the tenant for life, died in May, 1847; the general condition of the estate was improved, while in the hands of the tenant for life, and it was, when delivered over to the remainder-men, in as good plight as when she received it, though there was an accidental deficiency of provisions; Held, that the representative of the tenant for life was not liable to account to the remainder-men for that deficiency.

[Ed. Note. Cited in *Glover v. Hearst*, 10 Rich. Eq. 335, 336; *Brooks v. Brooks*, 12 S. C. 443, 444, 446, 447, 450, 451, 454, 455; *Orr v. Orr*, 34 S. C. 280, 13 S. E. 467.

For other cases, see *Life Estates*, Cent. Dig. § 30; Dec. Dig. ⇨11.]

[*Life Estates* ⇨20.]

The principles upon which a tenant for life of personalty,—whether it be a specific chattel, or an entire estate given as a unity, and whether

or it be consumable in the use, or not consumable, reproductive, or not reproductive,—is liable to the remainder-man, considered.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. § 41; Dec. Dig. ⇨20.]

[*Charities* ⇨19.]

[A bequest to certain persons, named in the will, and styled, "trustees of the South Carolina Conference School, Cokesbury, Abbeville District, S. C.," for certain specific uses, well defined in the will, is valid, though it do not appear that the persons named were such "trustees," as in a court of equity a trust will never fail for want of a trustee.]

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 42; Dec. Dig. ⇨19; *Wills*, Cent. Dig. § 1077.]

[*Charities* ⇨47.]

[Equity will not allow a charitable trust to fail for want of a trustee, but will appoint one.]

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 85; Dec. Dig. ⇨47.]

Before Caldwell, Ch., at Abbeville, June, 1848.

The decree of his Honor, the Chancellor, is as follows:

Caldwell, Ch. This case comes up on an appeal from the decree of Mr. Lesley, the ordinary of Abbeville district, on the adjustment of the estates of George Holloway, and of his wife, Rebecca Holloway, between their legal representatives.

George Holloway, by his last will and testament, made on the 3d of August, 1846, devised and bequeathed as follows, to-wit:

"Item 2d. I will and bequeath to my dearly beloved wife, Rebecca, after the payment of my just debts, all my estate, both real and personal, during her natural life," &c.

"Item 4th. It is my will and desire, that at the death of my dearly beloved wife, Rebecca, all my estate, both real and personal, not otherwise disposed of by the provisions of my will herein before made, be sold in the following manner, to-wit: I particularly enjoin it on my executors to sell in families, and in no other, the negroes of my estate, but the balance of the property as they may think best."

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"Item 5th. I will and bequeath, at the death of my dearly beloved wife, Rebecca, all the residue and remainder of my estate, both real and personal, unto the Rev. William M. Wightman, (and others, naming them,) trustees of the South Carolina Conference School, Cokesbury, Abbeville district, S. C., and their successors in office, as a fund in trust for the following specific use or uses," &c. (a)

The ordinary held the bequest and devise good in remainder; but that the estate of Rebecca Holloway, the tenant for life, was not accountable to the remainder-man for \$756.00, the value of the provision crop made during the year before the death of the tes-

(a) The Reporter having been unable to procure a copy of the will, cannot state what were the uses expressed in it.

tator, who died the last day of August, 1846, and that her life estate was not accountable for \$527.00, the hire of the slaves and the rent of the land from the death of Rebecca Holloway, the tenant for life, who died in May, 1847, to the first of January following, when the property was taken into possession by the surviving executors.

The administrator of Rebecca Holloway appealed from the decree of the ordinary, on the grounds:

1st. "Because the bequest in remainder to William M. Wightman and others, as a fund, in trust, is illegal and void." I can see nothing in the terms of the will that can render it void, and its provisions are certainly much more definite in every respect than Burnet's will, (Attorney General v. Jolly, 1 Rich. Eq., 99-109 [42 Am. Dec. 349],) by which he devised and bequeathed the whole of his estate, real and personal, to his wife, during the term of her natural life, and after her death, "to the Methodist Church, of which she may be a member at the time of her death, to be appropriated to the uses and purposes which the Conference may deem most advantageous for said Church; more especially for the support of Sunday Schools, for the purchase of Bibles, religious tracts, and the distribution of the same among the destitute, and for the support of Missionaries." This was held a valid bequest to the Methodist Church, of

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which the tenant for *life was a member when she died, and that this Court can execute the trusts.

2d. "Because the said bequest in remainder is in trust to a supposed corporation which never had existence by such name. The School at Cokesbury, Abbeville district, was incorporated, but the gift was not directly to the School as a corporation, but to the Rev. William M. Wightman, Henry Bass, N. Tally, H. Spain, James Dannelly, H. A. C. Walker, James H. Wheeler, Mat. J. Williams, C. S. Beard, and T. R. Gary, trustees of the South Carolina Conference School, Abbeville district, S. C., and their successors in office, as a fund in trust for the following specific use or uses," &c. Whether these gentlemen were trustees or not of the School, cannot change the trusts of the will. If they were to decline to execute, or if no successors were appointed, it would be competent for this Court to appoint trustees to carry out the will. A trust never fails for want of a trustee, while equity exists. But there was no proof that they were not trustees, and the fact will be presumed, unless disproved.

3d. "Trust results to the next of kin of testator, as the whole bequest is void; and that the ordinary should have decreed to Thomas Fergeson, administrator, one-half of the estate of George Holloway, as representative of said Rebecca."

The objects of the trust are well defined

by the terms used in the will, and the mode of administering the charity is prescribed with sufficient clearness and certainty. Neither our common or statute law forbids such charitable donations. These grounds are, therefore, insufficient to invalidate the will.

The executors of George Holloway appealed from the decree of the ordinary, on the following grounds:

1st. "That the ordinary erred in not holding the estate of Rebecca Holloway, the tenant for life, accountable to the remainderman for \$756.00, the value of the provision crop made during the year before the death of the testator, who died the last day of August, 1846." The Act of 1789, (5 Stat.) provides that "the slaves which were employed in making a crop, shall be continued on the lands which were in the occupancy of the de-

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ceased, *until the crop is finished, and then be delivered to those who have the right to them; and such crop shall be assets in the executors or administrators hands, subject to debts, legacies and distribution; the taxes, overseer's wages, expenses of physic, food and clothing, being first paid," &c. His wife had the right to the use of his whole estate during her life, after payment of the debts; and the testator certainly did not intend that she should sell off the provisions raised on the plantation, and convert them into money to increase his estate, and that she should incur the expenses of supporting the property. It would seem that the testator intended that the property should support her and itself, so that she should not impair it. If she had made merchandise of the provisions raised in 1846, instead of using them, as contemplated by the testator, then it would seem there might be some claim on her estate as assets of the testator, in her hands as executrix. The case of Robertson v. Collier, (1st Hill Ch. 370,) distinctly recognizes the doctrine laid down by Justice Nott, in Patterson v. Devlin, (1 M'M. Eq. 459.) He says, "lands are sometimes given to one for life, together with slaves, stock of horses, cattle, plantation tools, and provisions, with a limitation over. In such a case, the perishable articles cannot be considered as belonging absolutely to the tenant for life, neither can they be sold, because they are necessary for the preservation of the estate. The tenant for life must therefore be considered as a trustee for the remainderman, and must preserve the estate, with all its appurtenances, in the situation in which he received it; he may therefore be required to give an inventory of the property, or security for its preservation, according to circumstances. The tenant for life will be entitled to the increase of the stock and the rents and profits of the land; but he must keep up the stock of cattle, horses, provisions, and implements of husbandry, in the condition in which he received them; for although some

of the articles may be consumed in their use, and others are wearing out by attrition of time—yet, when taken altogether, being reproductive, the estate must be made to keep up its own repairs.”

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*The words of the will being in the present case clearly within this principle, which I think must govern, the decree of the ordinary must be modified accordingly.

2d. “That the ordinary erred in not holding said life estate accountable to the remainder-man for the sum of \$527.00, the hire of the slaves and the rent of the land, from the death of the tenant for life, in May, 1847, to the first of January ensuing, when they were received into the possession of the executors.”

This ground in incompatible with the principle heretofore laid down, and is in conflict with the decision of the Court of Appeals in 1827, in *Leverett et al. v. Leverett et al.*, (2 McCord's Ch. 84.) and the more recent case of *Herbemont, adm'r. v. Percival*, in the Court of Law in 1840. (1 McMul. 59.) These two cases have given, I think, a correct construction to the Act of 1789, and any other view would be not only inconsistent with the intention of the statute, but would be unsettling the uniform practice that has been adopted in adjusting estates that come within its provisions.

It is therefore ordered and decreed, that the case be remitted to the ordinary, and that he hear testimony, if necessary, and that the account be modified agreeably to the view expressed in this opinion.

Thomas Fergeson, the administrator of Rebecca Holloway, appealed, and moved for a reversal of so much of the decree as declared,

1st. That Thomas Fergeson, as administrator of Rebecca Holloway, deceased, was liable to account strictly for the value of all personality of the estate of George W. Holloway, deceased, which came into her possession as tenant for life.

2d. That the bequest in remainder to William M. Wightman and others, was certain and valid.

Thomson & Fair, for the appellant.
Wilson, contra.

JOHNSTON, Ch. delivered the opinion of the Court.

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*The second ground of appeal was not pressed in the argument; and is clearly untenable, according to our decisions.

The only point made under the first ground, was that the decree should not have declared Mrs. Holloway, the life-tenant, liable to re-produce, at the expiration of her life-estate, the same amount of corn which

she received with the estate, or account for the value of the deficiency. (b)

It is important in the first place to determine whether the testator intended to give her the property devised to her for life, with a view to her enjoyment of it in kind, or whether the gift was made with reference to the value and not the specific enjoyment of it.

Where the benefit contemplated by the donor, is the mere value of the property; the long settled rule is so to dispose of the property, that the interest of both life-tenant and remainderman shall be protected, and neither be promoted at the expense of the other. This is accomplished by the sale of the property, giving the interest of the proceeds to the life-tenant during life, and turning over the capital to the remainder-man upon the life-tenant's death.

If the personal enjoyment of the property, itself, was intended; a sale of it cannot be ordered, because that would defeat this intention; but, in such cases, the tenant for life is to hold and enjoy the property given, under a liability, however, to render such an account for whatever part of it may not be forthcoming to the remainder-man, as the rules of law impose, respect being had to the nature and character of the property which has been lost.

Where the bequest is specific in terms, there can of course be no doubt as to the intention. There may be doubt where the bequest is residuary in form. Where that is the case, the general rule is to regard it as evidence that the intention was not to

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*confer the personal enjoyment of the property in kind, but the mere benefit arising from its value. But this rule is ancillary, only; and is employed solely for the purpose of discovering the true intention of the testator; and if, by the context of the will, or in any way from its face, the mind is persuaded (notwithstanding the residuary form of the bequest) that a personal enjoyment was intended, such will be the construction, and effect will be given to it with all its incidents.

The will of George Holloway, under which the questions, made in this case, arise, manifests an intention that his widow should enjoy the property, itself, given to her for life; and a directly different intention as respects the remainder-man. The direction that it be sold at her death, excludes the idea that it was to be converted before, or that it was to be taken from her; and the direction that

(b) See, for the doctrine applicable in such cases, *Porter v. Tonnay*, 3 Ves. 310; *Howe v. Dartmouth*, 7 Ves. 137; *Earns v. Young*, 6 Ves. 551; *Randall v. Russell*, 3 Meriv. 190; *Gillespie v. Miller*, 5 Johns. Ch. 21; *Westcott v. Cady*, (Id. 334; *Patterson v. Devlin*, (McM. Eq. 459); *Robertson v. Collier*, (1 Hill Eq. 370),

the proceeds of the property, and not the property itself, be given to the remaindermen, is inconsistent with the notion that they were designed to have any interest in it beyond the money to arise from the sale.

To these considerations may be added the relations which these two parties bore to the testator, and the consequent interest he may be supposed to have felt for them respectively.

There are other stray expressions throughout the will, not taken notice of in the decree; which, separately, may not have much influence, but which, taken together and added to the considerations already commented on, serve to strengthen the conclusion to which I have come.

This being the construction, then;—that the property was specifically given to Mrs. Holloway, we are prepared to enquire whether her estate is bound to account for the corn which she received.

This was but a part of the body of the property given her for life. That property consisted of land, slaves, horses, cattle, hogs, farming utensils, household furniture, &c.

The personal property falls under two general heads: (1) such as was consumable in the use of it, and (2) such as was not so consumable.

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*For instance, under the former head among other things must be reckoned, provisions,—including the corn which is the subject of litigation in this case. Under the second head might fall, among others, plate, furniture, &c.

But each of these classes may be further divided into two descriptions, according to their qualities, and distinguished as re-productive or not re-productive.

Thus; under the first head, of articles consumable in the use, may be ranked not only, those of corn, wine, &c.—which are wholly consumable, and entirely destitute of the quality of reproduction; but, also, flocks, which, besides sustaining themselves by natural increase, yield a surplus for consumption.

Again; under the second head, of property not consumable in the use, we have not only plate, furniture, &c.; which are perfectly incapable of increase; but, also, slaves, which while strictly inconsumable, are eminently re-productive by procreation.

Now, the liability of a life-tenant for these different kinds of property, separately considered, is regulated by law, according to the specific qualities of the property itself.

For property entirely consumable in the use, and entirely destitute of the power of reproduction, the life-tenant is not accountable at all. It is incapable of being limited in remainder, where it is given to be used in kind. The use of it necessarily consumes it, and there is nothing left upon which the limitation can attach. This is the doctrine

of all the cases: and necessarily so, because, upon principle, no other doctrine can be predicated of such property.

For property not consumable, but at the same time incapable of increase or reproduction, such as plate, &c. the liability of the life-tenant is restricted to the mere surrender of it to the remainder-man, who must take it with such deterioration as may have arisen from the reasonable use of it:—for any abuse, or for the wanton destruction of the property, the life-tenant is responsible.

For flocks and herds, consumable but re-productive, the rule is still different. The

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life-tenant is entitled to all the increase *beyond what is necessary to keep up the stock; and, therefore, is bound to the exercise of extraordinary diligence for keeping it up and delivering it over, undiminished, to the remainder-man. I will not say that he is bound, at all hazards, for the original stock; for the relation he bears to the remainder-man is that of trustee,—a relation of confidence—and though he is *prima facie* bound for the property, and the burden must be upon him to show diligence and integrity, in the performance of his duties,—yet it is not clear, upon principle, that he is liable if he does shew fidelity to his trust, and that the flock has perished, not by his fault, but by the act of God,—as by pestilence, earthquake, or other unavoidable providence.

A still different rule exists as to slaves: re-productive, but not consumable. The increase of these do not belong to the life-tenant, so as to enable him to appropriate them beyond the term of his life. They follow the status of the original stock slaves, and are his as long as the stock slaves are his:—during his life:—at his death both the stock slaves and the increase go over to the remainder-man, as they stand: and the life-tenant is only accountable for such as remain; unless he has diminished their number, or the value, by his misconduct. For loss occasioned by the act of God, he is not responsible.

Upon these principles the accountability of a life-tenant is governed, where these articles of property are given to him, as separate things. The property is taken up in detail, and the degree of his accountability is suited to the character of each article.

It must be observed, however, that the ground of accountability is the trust character of the life-tenant; and it is applied as the fundamental principle to each detached article of property, though it leads to different results, according to the qualities of the property itself.

If we were to take up the things comprised in the bequest to Mrs. Holloway, and consider them separately, it follows from what I have said that she must be excused from liability for the corn; which was consumable in the use.

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*But there is another method of considering the subject: in which the entire mass of property given to her may be regarded as one gift; and in the investigation of the subject in this way, also, the same principle of trusteeship applies.

This method appears to have been first broached by Mr. Justice Nott in *Patterson v. Devlin*, 11 *McM.* Eq. 459, and subsequently applied by Chancellor Harper, in *Robertson v. Collier*, 1 *Hill* Eq. 370.

Says Judge Nott:—"There is another view of the subject which deserves consideration and which is somewhat peculiar to the situation of this country. Lands are sometimes given to one for life, together with the slaves, stock of horses, cattle, plantation tools, and provisions; with a limitation over. In such a case, the perishable articles cannot be considered as belonging, absolutely, to the tenant for life;—neither can they be sold, because they are necessary for the preservation of the estate. The tenant for life must, therefore, be considered as a trustee for the remainder-man; and must preserve the estate with all its appurtenances, in the situation in which he received it." "The tenant for life will be entitled to the increase of the stock and the rents and profits of the land:—but he must keep up the stock of cattle, horses, provisions and implements of husbandry, in the condition in which he received them:—for although some of the articles may be consumable in their use, and others are wearing out, yet, when taken all together, being reproductive, the estate must be made to keep up its own repairs."

Chancellor Harper, after quoting these observations, adds:—"These views are so full and explicit, that little need be added to them. The principle is the same, though extended in its application, by which a tenant for life, in England, is forbidden to waste the estate; and is required to make ordinary repairs,—or any other tenant is required to keep up the original stock. The tenant for life is entitled to the use of the estate; but it is such use as a prudent proprietor would make of his estate. The profit of an estate is the nett income, after defraying all nec-

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es*sary expenses. Thus the relative rights of the tenant for life and remainder-man, will be the same whether the estate be sold and the proceeds vested, or retained in kind. If at the termination of the life estate, all the articles of the sort mentioned are not in as good condition as when he received it, the tenant must make good the deficiency."

I fully assent to so much of these opinions as place the responsibility of the tenant for life upon the footing of a quasi trustee, whose duty it is to preserve the estate for the remainder-man; and makes the test of his fidelity the care and attention which a prudent owner would exercise over his own

property. This is the true ground: and it applies not only to a tenant for life of an estate, as an entire subject, but to one to whom detached articles of property are given by the same tenure. Each is responsible for prudent and judicious management; and neither of them is at liberty to deteriorate the property by managing it for his own benefit, at the expense of the remainder-man.

But it seems to me, that the distinction which is justly taken in the cases of *Patterson v. Devlin* and *Robertson v. Collier* between an entire estate, given, as an unity, for life and limited in remainder, and the gift and limitation of specific articles of property, in the same way,—is not carried out by the decisions made in these cases;—by which the account is directed to be taken, not of the whole estate, as one subject, but of its component parts, in detail. Nor does it appear to me entirely consistent with the principle laid down; i. e.—that the fidelity and responsibility of the trustee are to be tested by his prudent management of the whole estate;—to make him responsible for particular parts, which may happen to be deficient notwithstanding such management; and, indeed, where the particular deficiency may have arisen from the prudent management of the whole estate. Nor am I satisfied that either reason or principle require that the trustee, though he may have, upon the whole, improved the estate, is responsible because he does not deliver it over, in the exact plight or condition, in which he received it.

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*There are I think subsequent decisions in which the doctrines of these cases have been modified: but they have not been referred to in argument, and I cannot find them.

I think the inquiry should be made into the particulars of the estate and their value, at the time the remainder takes effect, for the purpose of discovering whether that which is to go over is substantially the same estate which was received by the life-tenant, and of the proper value, and whether, upon the whole, it is in as good a plight (though not in the exact plight) as when the life-tenant took possession. If these conditions be fulfilled; where is the ground for charging the life-tenant?

One species of stock may have been diminished, while another has been increased: and so far from its being proof of ill husbandry, it may be evidence of real judgment to have made the alteration. Shall the remainder-man take the benefit of the improvement, and require an account of the minor loss which it occasioned?

Suppose, again, the implements of husbandry on the plantation, when the life-tenant took possession, were of a character utterly unsuited to the proper culture of the land: suppose there was a superabundance of plow-horses; suppose the wagons

and carts were deficient, and manure could not be collected or spread in requisite quantities; would it be bad husbandry,—or would it be injurious to the estate,—to convert the surplus horses into proper instruments for cultivating and keeping up the land, and at the same time diminish the expenses of the plantation? Will no other rule secure the fidelity of the trustee, than to confine him to pre-existing methods of culture, and exclude him from the advantage of all agricultural improvement, by requiring him to reproduce the plantation, with all its appurtenances, (though merely ancillary) in the precise shape in which he received it?

In a series of years, a severe drought may occur, and reduce the quantity of provisions produced. If the tenant should happen to die when such a crop has been produced:

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is he to be the *exclusive sufferer, though at the same time the whole estate goes over in an improved condition?

If the tenant is guilty of misconduct; if he has mis-managed for his own exclusive profit, to the injury of the estate, or the remainder-man: if he has sold any of the negroes; if he has planted nothing but cotton and sold that for his own benefit, neither raising nor purchasing provisions; such conduct is not faithful; it is not the management which a prudent owner of the property would have adopted,—and he must answer for it.

But if upon the whole, he has been faithful and diligent and judicious, and has not deteriorated the substantial parts of the estate, or the estate as a whole; he should not be made to suffer.

It is admitted in this case, that the general condition of the estate was improved while in Mrs. Holloway's hands, and that it was, when delivered over, in as good plight as when she received it, though there was an accidental deficiency of corn; and I do not think her representative was accountable for that deficiency.

It is ordered that so much of the decree as held him accountable for it be reversed. In all other respects it is affirmed.

DUNKIN and DARGAN, CC. concurred.
Decree modified.

3 Rich. Eq. 172

W. D. LEWIS v. D. B. PRICE and Wife, and Others.

(Columbia. Nov. and Dec. Term, 1850.)

{*Husband and Wife* ⚭151.]

Construction given to a marriage settlement; husband held bound, by the terms thereof, to support out of the settled property, the

wife's children by a previous marriage, in exoneration of their own property.

[Ed. Note.—Cited in *Shumate v. Harvin*, 35 S. C. 529, 15 S. E. 270.

For other cases, see *Husband and Wife*, Cent. Dig. § 586; Dec. Dig. ⚭151.]

{*Husband and Wife* ⚭59.]

An administration granted to husband and wife jointly, is the administration of the husband alone; the surety on the bond gives credit to him exclusively.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 277; Dec. Dig. ⚭59.]

{*Husband and Wife* ⚭11.]

The husband's marital rights will not attach upon the wife's distributive share, before it is severed from the bulk of the estate.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 49; Dec. Dig. ⚭11.]

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{*Husband and Wife* ⚭35.]

*In ordering a settlement of the wife's equity, the Court will conform to a previous settlement, agreed on by the parties, though it may have proved ineffectual.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 211; Dec. Dig. ⚭35.]

{*Executors and Administrators* ⚭477.]

The principles upon which the profits of a planting establishment are to be accounted for by an administrator, stated.

[Ed. Note.—Cited in *Johnson v. Pelot*, 24 S. C. 258, 58 Am. Rep. 253; *Bramlett v. Mathis*, 71 S. C. 127, 50 S. E. 644.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2062; Dec. Dig. ⚭477.]

{*Executors and Administrators* ⚭477.]

The accounts of an administrator directed, under very peculiar circumstances, to be taken with great liberality towards him.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2062; Dec. Dig. ⚭477.]

{*Executors and Administrators* ⚭132.]

An administrator, being also, as distributee, a tenant in common of the land, allowed credit, not for the cost of improvements put by him on the land, but for the value they imparted to the premises.

[Ed. Note.—Cited in *Johnson v. Pelot*, 24 S. C. 263, 58 Am. Rep. 253; *Shumate v. Harbin*, 35 S. C. 528, 15 S. E. 270; *Neal v. Bleckley*, 51 S. C. 533, 29 S. E. 249.

For other cases, see *Executors and Administrators*, Cent. Dig. § 437; Dec. Dig. ⚭132.]

{*Executors and Administrators* ⚭513.]

Where an administrator's return to the ordinary is seventeen years old, items vouched before the ordinary and passed by him as charges against the estate, may be regarded as proved, *prima facie*; of items not vouched, some evidence should be given, but that degree of evidence should be sufficient, which may be expected after such a lapse of time.(a)

[Ed. Note.—Cited in *Buerhaus v. DeSausure*, 41 S. C. 493, 19 S. E. 926, 20 S. E. 64.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2282; Dec. Dig. ⚭513.]

(a) The 28th section of the Act of 1789, (5 Stat. 112.) provides, "that executors, or administrators shall, annually," "render to the" "ordinary" "a just and true account, upon oath, of the receipts and expenditures of such estate, the preceding year, which, when examined and approved, shall be deposited with the inventory and appraisement," "in the" "ordinary's office," "there to be kept, for the inspection of such per-

Before Dunkin, Ch., at Darlington, February, 1850.

This case came before the Court on exceptions to the following:

Commissioner's Report.

The Commissioner, to whom it was referred to take testimony and state the accounts of

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the several administrators of Jesse Lewis, deceased, begs leave respectfully to report: Jesse Lewis died on 30th of October, 1832. On the 7th November, 1832, administration of his estate was granted to his widow, Martha Lewis, and one Wm. T. Mason; but it does not appear, and indeed is not pretended, that the latter ever participated in the management of the estate, the administration of which was assumed and conducted solely by Mrs. Lewis. On the 9th of January, 1834, Mrs. Lewis intermarried with the defendant, Daniel B. Price, who, on the 15th February, 1834, in conjunction with his wife, entered into a new bond with John N. Williams and John D. Price, as sureties, and received formal letters of administration of Jesse Lewis's estate. There is no evidence of a formal revocation of the first grant; and it is as well to mention here, that on the first reference held by me, on proof being made of the grant of administration to Mrs. Lewis and to Mason, the solicitor for the defendants, Mr. Haynsworth, objected to proceeding further, on the ground that Mason should be made a party to the bill. He had been gone for many years beyond the jurisdiction of the Court, and, as I now recollect the testimony, into parts unknown, and I had no

sons as may be interested in the said estate," &c. In *Wright v. Wright*, (2 McC. Eq. 196,) Judge Nott says: "It is incumbent on him (the personal representative) 'to shew, by satisfactory evidence and vouchers, in what manner, it' (the fund in his hand,) 'has been administered.' Those vouchers he ought to keep as his security; and the ordinary ought not to allow his accounts, when the vouchers are not produced, nor their absence accounted for. And it ought to appear on the face of the settlement, what was the nature of the evidence on which the return was accepted and allowed. And although the evidence with the ordinary is not conclusive, per se, in favor of an executor, it ought to be received for as much as it is worth;—and its value must depend upon a variety of circumstances:—the regularity of the accounts, the death of witnesses, loss of vouchers, and the lapse of time, must all be taken into consideration. In this case sixteen years have elapsed since the account was settled and allowed by the ordinary. It is not to be presumed that he suffered it to pass, without satisfactory evidence that it was correct. I think, therefore, that it ought to have been allowed by the commissioner. Executors are not less liable to loss of papers, by time and accident, than other persons. The settlement with the ordinary is intended as a security for the executor, as well as for the distributees; and, after a lapse of 16 years, ought to be a complete protection. It will, nevertheless, be subject to impeachment by the other side. If the defendants can shew any error or fraud, in the transaction, they are entitled to the benefit of it; but the burden of proof must lie on them."

R.

hesitation in overruling the objection, holding Martha Lewis, under the circumstances, liable to account. The administration of D. B. Price and wife continued until the 24th of November, 1844, on which day, they having failed to give new security, on the requisition of the ordinary, he revoked their letters. E. B. Brunson, the ordinary, then took the administration as of a derelict estate, until the 2d July, 1845, when it was granted to Wilson C. Bruce, who has exercised it until the present time.

Of the administration of Martha Lewis, and of D. B. Price and wife, no prepared statements of accounts have been offered to me by the parties; indeed, no memorandums have been kept by them with a view to it. From the confused state of the documentary testimony which has been offered to me, and the multiplicity of the points testified to by the witnesses, I may not be able to avoid serious errors and inadvertencies; and though the reference was kept open and protracted

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for a great length of time, *and ample opportunity of inquiry afforded, I am by no means persuaded that my minutes of testimony will afford to the Court the means of doing exact justice between the parties.

I proceed briefly to make such particular remarks as may be necessary to elucidate the details of Mrs. Lewis's accounts.

The estate of Jesse Lewis, deceased, which came into her hands to be administered, consisted of four negroes, to-wit: Doll, Margery, Mary and Louisa, which has since increased by the birth of three children to Louisa; choses in action, consisting of notes to the amount of one thousand and forty-two 11-100 dollars, of which twenty-five \$2-100 dollars was considered by the appraisers as doubtful; and accounts against sundry persons, amounting to four hundred and twenty-nine dollars; goods and chattels, household and plantation furniture, stock, &c., amounting, appraisement, seven hundred and two 37-100 dollars, inclusive of corn and fodder on the plantation, valued at one hundred and sixty-eight dollars.

During the year 1833, immediately succeeding her husband's death, Mrs. Lewis possessed herself of the real estate, being the house and lot at Society Hill, and the plantation, which latter she used and cultivated with the slaves, retaining the whole estate together, and having no sale of any part thereof. In the Fall of that year, she made, before the ordinary, the annual return required by law; but, as it was a very imperfect one, and in this Court is not conclusive, either for or against her, I have thought it best not to embarrass my statement by assuming it as a basis, though I am sensible that to reject it is greatly to her disadvantage, as she has not been able to establish before me payments which appear to have been satisfactorily vouched before the ordinary. After

the best consideration of the whole matter of which I was capable, I came to the conclusion that I should approach nearest the justice and law of the case, by charging Mrs. Lewis with reasonable rent of the real estate, and hire of the negroes, and allowing her compensation for the support of the children during the year 1833, and rejecting all payments, except such as clearly appear-

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ed to be for the debts of the *intestate. The propriety of this will be the more manifest, when it is stated that she is charged on the appraise-bill with the whole stock of provisions on the estate at the time of the administration, and that many of the accounts passed before the ordinary, in her return on the 30th December, 1833, were for plantation and family supplies, purchased during the current year. I have given to Mrs. Lewis a credit of certain notes and accounts, which satisfactorily appears could never have been realized. Though this would more properly have been done in connection with the testimony on the account of D. B. Price, I have preferred to credit them on Mrs. Lewis's account, as it does not affect the result, because I think she should be charged with interest on the amount of schedules, to the extent that they were good, from the 1st of January, 1834. It will be seen, then, that on the 1st of January, 1834, Mrs. Lewis, after being allowed all proper credits, stands charged with a balance on notes and accounts, amounting to twelve hundred and fifty-eight 19-100 dollars; a balance on hire of negroes and rent of real estate amounting to thirty dollars, and the whole amount of the appraisal, being seven hundred and two 37-100 dollars. On the intermarriage of Mrs. Lewis with D. B. Price, on the 9th January, 1834, these liabilities attached to her husband, and on his formal assumption of the administration, on the 15th February ensuing, they became, by the operation of law, funds in his hands. I proceed now to speak more particularly of the administration of D. B. Price: If on being appointed administrator, he had proceeded, within reasonable time, to sell the articles scheduled in the bill of appraisements, he might, by the production of the sale-bill, have discharged himself of the liability on the face of the appraisal-bill. But it can hardly be pretended that the sale of the miserable remnant, ten years afterwards, should be received to diminish in any way his liability. It is true there was an appraisal soon after his administration, but if liable on this, primarily, he is also liable as the husband of the first administratrix, for the difference between the two appraisements. I have therefore charged him with the whole amount of the first ap-

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praisement; *but as he had a right to a favorable time to make sale, I have not charged interest until the first of Janu-

ary, 1835. Besides these items, the subjects of annual charge against him are the negroes, the house and lot at Society Hill, and the plantation. As to the negroes, there is no great diversity in the testimony. I endeavored, by attentive consideration of all the evidence, to ascertain a fair average annual value of their hire. The result of this inquiry is, that the woman Margery was worth sixty-five dollars per annum; Mary forty dollars per annum; Louisa forty dollars per annum; the old woman Doll not more than the expenses of maintenance. In this estimate I have considered the facts in evidence, that the woman Louisa was, during the time, encumbered with the care of young children and the disabilities incident to child-bearing. The average annual hire of the negroes, then, would be one hundred and forty-five dollars. The house and lot at Society Hill was rented during the whole period of Price's administration, by the same individual, and from his testimony I have ascertained the average annual rent of the premises at forty-five dollars, and in this estimate I have made some, though a very small allowance, for certain alleged repairs, put on the house by D. B. Price, which, however, were very imperfectly substantiated. The fact of work having been done, there is no doubt of, but the proof as to the details and value was inconclusive.

The plantation was cultivated a portion of the time by D. B. Price, and some years was rented out.

The testimony satisfied me, that fifty dollars per annum was a fair average rent of the land for agricultural use, and for the whole premises, with the enjoyment of the domicile, which was erected by Mrs. Price, after her first husband's death, seventy dollars. D. B. Price claimed to be allowed on the reference a credit for moneys expended in erecting and improving the buildings on the plantation. But as the testimony induced me to think that at this period they do not enhance the value of the plantation, I have rejected the account. I have, therefore, thought it fair to charge him only with what

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the witnesses testified would *be the value of the plantation without the improvements.

I come now to that feature in the case which has most embarrassed me, the previous adjudication of which, seems to me indispensable to an exact stating of the accounts and ascertainment of the liabilities and rights of the respective parties.

Before the marriage of D. B. Price and Mrs. Martha Lewis, a deed of marriage settlement was executed by him, by which the interest of Mrs. Lewis in the estate of her then late husband, was conveyed to a trustee, John D. Price, the father of D. B. Price, in trust, that he should permit D. B. Price to use and enjoy the said property or interest

of Martha Lewis, conveyed for the purpose of maintenance and education of her children, by her deceased husband, being four in number; and D. B. Price, in consideration thereof, covenanted that he would support and educate the children without charge. It is now contended by D. B. Price and by J. D. Price, the trustee, that their understanding of the deed, when they executed it, was, that it conveyed the whole estate of Jesse Lewis, and that it was in consideration of the use and enjoyment of the whole, that D. B. Price covenanted to maintain and educate the children without further charge. The testimony exhibited is wholly insufficient, even if the inquiry beyond the clear expression of the deed were permitted, to show that the parties entertained at the time such a construction.

There are some obvious considerations which would seem to render it scarcely credible, that any man who regarded his obligations should have assumed such an undertaking; but I do not see how he is to avoid it, unless it should appear to the Court, that the children of Mrs. Lewis, not being parties to the contract, have no right to insist on its fulfilment, and it should interpose its authority to reform the contract, and save the mother from the destitution which the nurture of the children will cost her. But it is in reference to the liabilities of the sureties on D. B. Price's administration bond, that this marriage contract is first to be considered. There are two defects in the registration and execution of the deed.

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*1st. The affidavit to entitle its registration is as follows:

State of South Carolina, }
Darlington District. }

Personally appeared before me Martin Dewitt, one of the Justices of the Peace, James E. Brown, and made oath, that he did see Daniel B. Price sign and seal the above instrument of writing, for the use, purpose herein mentioned, and further he did see Abel Gandy subscribe with himself thereto. Sworn to before me this 1st day of April, 1834.

[Signed,] Jas. E. Brown.

Martin Dewitt, J. P.

2d. The schedule of property settled, required by law to be attached to the deed, is not signed by the parties. J. D. Price, one of the sureties, is a party to the deed, and can claim no benefit from the informalities in its execution or registration. But John N. Williams, the other surety, in my opinion has not had the constructive notice which is presumed from a proper registration, nor is there any evidence that he ever knew of the marriage settlement previous to the institution of these proceedings. It seems to me then, very clear, that the Court will protect him not only by subrogating Mrs. Price's interest

in the personality of the estate, to the extinguishment of D. B. Price's liability as administrator, but will also require the accounts of D. B. Price to be so stated with reference to J. N. Williams's liability, as that he shall have every credit to which he would have been entitled, if the marriage settlement had not taken place; under this impression, I have allowed D. B. Price, what seems to me a very reasonable charge, for the annual support of the children; and as D. B. Price himself is utterly insolvent, as he always has been; and, as I am satisfied that the other surety on his bond, John D. Price, is so nearly insolvent, that his liability is not particularly looked to by any of the parties, I have thought it necessary to state the account of D. B. Price, only with reference to what I considered the liability and the rights of John D. Williams. In establishing the annual allowance for board, clothing, tuition and medical attendance of Jesse Lew-

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is' children, at the *sum of one hundred and sixty dollars, I have fully considered all the facts which appear in the reported testimony.

The accounts of D. B. Price, stated in reference to these views, exhibit a balance against Price of four thousand one hundred and sixty-nine 68-100 dollars; of this amount, the share of Price and wife is thirteen hundred and eighty-nine 88-100 dollars, leaving a balance of two thousand seven hundred and seventy-nine 88-100 dollars, due to the children of Jesse Lewis, for which John N. Williams is liable. I recommend that the share of Mrs. Price, in the proceeds of sale of negroes of the estate of Jesse Lewis, lately made by order of the Court, be applied to said Williams's liability, also their share of the portion of J. F. Lewis, a deceased child.

The account of D. B. Price, stated with reference to his own liability, differs from the above in the exclusion of any allowance for the maintenance of the children of Jesse Lewis, exhibiting thereby a considerable annual balance against him for rent of land, and of house and lot at Society Hill, and hire of negroes, amounting in all, with interest on each balance, to the 1st January, 1850, to five thousand nine hundred and thirteen 60-100 dollars. For this, John D. Price is liable as the surety of D. B. Price, except for the sum of ten hundred and seventy-one 73-100 dollars, accruing from the rent of the plantation and house and lot. Of the sum above stated of five thousand nine hundred and thirteen 60-100 dollars, as due by D. B. Price, the sum of six hundred and sixty-three 65-100 dollars, is due to John D. Price as trustee.

The Commissioner begs the indulgent consideration of the Court for the imperfections of this report. The great anxiety of the parties to bring the cause to a final hearing, has determined him to present it in a very

immature condition, with the hope that it would bring before the Court, all the litigated points of the case, and that under the orders of the Court he may be able so to rectify it, as to do justice between the parties.

All of which is respectfully submitted.

Thos. C. Evans, Commissioner.

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*Marriage Settlement.

State of South Carolina, }
Darlington District. }

This Indenture of three parts, made this 9th day of January, in the year of our Lord one thousand eight hundred and thirty-four, and in the fifty-eighth year of the Sovereignty and Independence of the United States of America, between D. B. Price of the first part, Martha Lewis of the second part, and John D. Price of the third part, witnesseth, that whereas a marriage is intended to be shortly had and solemnized, by and between the said D. B. Price and Martha Lewis, and whereas the said Martha, by her marriage with her late husband, Jesse Lewis, now deceased, has become the mother of the following four children, viz. William David Lewis, Rachel Amelia Lewis, John Fountain Lewis and Elizabeth Catharine Lewis, all whom are now living; and whereas the said Martha is entitled to an undivided third part of the real and personal estate and choses in action, of which her said husband, Jesse Lewis, at the time of his death, was seized and possessed, and to which he was then entitled, as well an undivided third part of the increase, rents and profits thereof, since that time. And whereas, it hath been agreed, that the said D. B. Price, after the said intended marriage had, should receive and enjoy the said property belonging to the said Martha, during the said marriage, he appropriating so much thereof, as may be necessary to the purpose of boarding, clothing and tuition of the said children of the said Martha, with the physician's bills and other expenses, and making no charge against them for said purposes. Now this Indenture witnesseth, that in pursuance of the before recited agreement, and in consideration of the sum of one dollar by the said J. D. Price, trustee, to the said Martha paid, the receipt of which is hereby acknowledged, the said Martha, by and with the consent and agreement of the said D. B. Price, testified by his being made a party to and signing and delivering these presents, hath granted, bargained, sold and transferred, and by these presents doth grant, bar-

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gain, sell and transfer unto *the said J. D. Price, trustee, his heirs, executors and administrators, all and singular her right, title and interest, of, in and to her undivided third part of the real and personal estate and choses in action, of which the said Jesse Lewis at the time of his death was seized, possessed or entitled, and of, in and to the rents, increase, interests and profits thereof,

since that time; consisting of one tract of land situated in the District and State, aforesaid, on the north side of Black Creek, bounded on S. E. and N. E. by lands belonging to the estate of Adam Marshall, S. E. by William Lewis's land, and N. W. by John F. Wilson's land. One other tract of land in the district and State aforesaid, bounded by lands owned in 1822, N. by David Smoot, E. by S. Adams, S. by Lewis Hill, and W. by John Lide; one other tract of land in the District and State aforesaid, east side of Horse Branch, bounded by lands owned in 1826, N. by William Lewis and Thomas Smith, E. by S. Adams, and S. and W. by said Horse Branch; and one tract of land of one acre on Society Hill, and bounded in 1829 N. by M. Sparks's land, W. by Camden road, S. by a street, and E. lands late of the estate of George Wilds; also negro slaves Western, Mary and Louisa, with other articles of personal property described in the appraisement of the estate of the said Jesse Lewis, filed in the Orinary's office of the said District, a copy of which is hereunto annexed, with one-third undivided part of the notes and accounts due and owing to the said estate; to have and to hold the same in trust nevertheless, and for such purposes, and under such provisions and agreements as are hereinafter mentioned, that is to say, in trust for the said Martha and her assigns, until the solemnization of the said intended marriage, (paying from time to time one-third part of the taxes of the said real estate, to be by him collected out of the rents and profits thereof,) then in trust, that the said J. D. Price, trustee, his executors and administrators, (still paying the said third part of the taxes as aforesaid,) shall suffer the said D. B. Price to use, have, receive, occupy and enjoy all the interest and profits of the said property, (allowing the property itself to remain undivided,) so long as the said marriage

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shall continue *and the said D. B. Price shall maintain and educate the said children or the survivor or survivors of them, without making any charge against them or either of them; and shall also permit the said D. B. Price to use the principal of the said property, if the same shall be deemed necessary by the said trustee, his heirs, executors or administrators, for the purposes of Maintain and education, as above mentioned, provided the use, occupation, enjoyment, &c. of the said property shall not continue unto the said D. B. Price after the termination of the said marriage, longer than the time at which the eldest survivor of the said children shall arrive at the age of twenty-one years or marry, upon the happening of which event, or either of them, after the termination of the said marriage by the death of the said Martha, the said trustee, his heirs, executors or administrators to hold the said property, or the balance thereof,

which shall remain unexpended, to be equally divided and delivered to the survivor or survivors of the said children; but if the said Martha shall survive the said D. B. Price, then and in that case the said J. D. Price, trustee, his executors or administrators, shall re-convey to the said Martha, her heirs or assigns, all and singular the undivided third part of the property hereinbefore set forth, or so much thereof as shall remain unexpended, according to the true intent and meaning of these presents. In testimony whereof, we have interchangeably set our hands and seals, the day and year above written.

Signed, sealed and delivered/
in presence of {

James G. Brown, Daniel B. Price, [L. S.]
Abel Gandy. Martha Lewis, [L. S.]
John D. Price, [L. S.]

State of South Carolina,/
Darlington District. }

Personally appeared before me Martin Dewitt, Justice of the Peace, James G. Brown, and made oath that he did see Daniel B. Price sign and seal the above instrument

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of writing, for the *use and purposes herein mentioned, and further he did see Abel Gandy subscribe with himself thereto.

Sworn to before me this 1st day of April, 1834.

Martin Dewitt, J. P. James G. Brown.
Decree.

Dunkin, Ch. Jesse Lewis died intestate, about October, 1832. He left a widow and four children, the youngest of whom was an infant of very tender years. The widow administered on the estate. Subsequently, to wit:—9th January, 1834—she intermarried with the defendant, D. B. Price. On the 15th February, 1834, letters of administration were granted to Price and wife, they having entered into bond to the ordinary, with John D. Price, (father of D. B. Price) and John N. Williams, as sureties. On the 24th November, 1844, these letters were revoked, in consequence of the failure of Price to give new security as required by the ordinary. Wilson C. Bruce is at present the administrator. This bill is filed by one of the children of Jesse Lewis, deceased, for an account of his father's estate.

It is alleged that D. B. Price is insolvent, and that John D. Price, one of the sureties, is nearly so, and the scope and object of the bill is, to fix the liability on John N. Williams, the other surety.

The case was heard on exceptions to the commissioner's report, and the Court is very much aided by the careful investigation and lucid statement which is there exhibited. If there be error in the conclusions of the officer, it arises from the want of a previous adjudication of the principles on which the account should be adjusted.

At the time of Jesse Lewis's death, he had

a house at Society Hill, and a farm at some distance from it. According to the inventory and appraisement, made 7th November, 1832, there were two negroes, Mary and Louisa, at Society Hill, and furniture, &c. valued at two hundred and twenty-seven dollars, and at the plantation, two negroes, Doll and

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Margery, and crop of *corn, stock, &c. valued at three hundred and seventy-five dollars—making the personalty, exclusive of the negroes, worth six hundred and two dollars. In addition to this, there were more than one hundred small notes and open accounts, from thirty cents and upwards, but amounting, altogether, to fourteen hundred and seventy dollars, or thereabouts.

In 1833, the administratrix made a return to the ordinary, which, as the Commissioner reports, "appears to have been satisfactorily vouched to the ordinary," and, according to which, she had paid debts of the intestate to the amount of four hundred and eighty-six dollars ninety-eight cents. Supposing these to have been paid from the debts collected, and that all the notes and accounts were good, and that she was chargeable with them, there was a balance due by her, January, 1834, of nine hundred and eighty-three dollars.

At this time, D. B. Price became administrator, and continued in possession until 1844. At that time he transferred to his successor all the negroes, with their increase, and the furniture, &c. in the condition it then was. One of the children of Jesse Lewis died in 1836. The other three, so far as the Court understands from the evidence, were decently brought up by the defendant, in relation to nurture, clothing and education.

When it is borne in mind that neither the mother nor the step-father are bound by law to maintain the children of a former marriage, it would seem not very difficult in an ordinary case to adjust the extent of the liability of the surety on Price's bond, to the children of the intestate.

Supposing the four negroes to have been hired out, the Commissioner, on satisfactory testimony, has estimated the annual hire at one hundred and forty-five dollars, the rent of the house at Society Hill at forty-five dollars, and the rent of the plantation at fifty dollars—making the entire average income for the ten years, annually, two hundred and four dollars. The Commissioner fixes one hundred and sixty dollars "as a very reasonable allowance, annually, for the board, clothing, tuition and medical attendance of Jesse Lewis's children." But, in

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addition *to the above rent and hire, if the administrator be charged with the annual interest on all the debts, as well as the interest on the appraised value of the furniture and other personalty, the whole annual

income would be about three hundred and twenty dollars, of which the annual share of the children would be two hundred and fourteen dollars, leaving them an annual surplus of fifty-four dollars. But, as has been said, if it were an ordinary case and a stranger had been the administrator for ten years, and then had surrendered his trust, if he had, at that time, turned over to the children their patrimony undiminished in capital by the expenses of their maintenance and education, it would exhibit a fidelity, frugality and success which would be worthy of all commendation. On that principle, and charging the administrator with the full amount of the appraisement, as well as with every debt, great and small, he should, in 1844, have delivered to the children their negroes, with their increase, and have paid them about one thousand dollars in money. The severest judgment could have exacted no more from him. Assuming, as he did, the duties both of guardian and administrator, he was bound to attend to the decent support of the children, and to do so, would fully consume any interest he could make on their share of the property.

At the expiration of his stewardship, delivering over to the children their two-thirds, and to the widow one-third, he would have accounted faithfully. It is difficult to conceive, in such case, on what principle the children could ask more. The law requires fidelity and diligence in every one assuming a fiduciary relation, whether it be guardian, administrator or other trustee, and this must be exercised according to the circumstances of the case—and no two cases are likely to present the same features.

The interests of minors and other cestui que trusts must be protected, but at the same time, good and prudent men must not be discouraged from acting in such capacity. The Court had occasion to consider this subject in the recent case of *Pye v. Carr*, (2 Strob. Eq. 105,) and will not repeat what is

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there said. *The defendant, D. B. Price, though administrator, was not a stranger. He had married the widow in January, 1834. She, with her four children, were living at the place in the country. "The house was a log house, old and leaky. It was necessary to build a new house for the comfort of the family." (Brown's evidence.) "A new house, not fine but plain, ordinary," was built, at an expense of two hundred and twenty-five dollars.

There were four negroes: Doll was old, and not worth more than the expense of keeping her; the successor of Price paid fifteen dollars a year for keeping her. Mary was kept about the house, and so was Louisa, except one or two years; she was a breeding woman. Margery, the remaining negro, was hired out at sixty dollars, and the house at Society Hill was rented out at about for-

ty-five dollars per annum. The furniture about the house in which they lived, seems to have been of a plain character. In this way, the family lived together for seven years out of the ten during which Price was administrator. After that time the place was rented out. As has been stated, when his administration was revoked, in 1844, he gave up the four negroes, now become six, and he gave up the furniture, cattle, plantation, tools, &c. That for which he is properly accountable, as administrator, in reference to the rights of the children, is for the judicious and faithful discharge of his trust in the situation in which he was placed. It is not suggested that he was wanting in any thing towards them personally. They were well dressed and well provided, and received such education as seems to be customary. If there were nothing more in the case, the Court would think, on the testimony, that justice would have been done, if, in 1844, the children of Jesse Lewis had received their share of the lands and negroes, and their proportion of nine hundred and eighty-three dollars, leaving to the defendants, Price and wife, the residue of the land, negroes and cash. And it may be as well here to remark, that in ascertaining this cash balance, due by Mrs. Lewis, January, 1844, the Court has given her the benefit of the return made to the ordinary 30th December, 1833. In *Wright v. Wright*, (2

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McC. *Eq. 197,) it is said, that in passing his accounts with the ordinary, the executor or administrator should produce his vouchers, and that after a long lapse of time it is not to be presumed that the ordinary suffered the account to pass without satisfactory evidence that it was correct. "Executors are not less liable to loss of papers by time and accident than other persons; the settlement with the ordinary is intended as a security for the executor, as well as for the distributees." "The regularity of the accounts, the death of witnesses, loss of vouchers, and the lapse of time, must all be taken into consideration." In that case, a lapse of sixteen years was held to be a "complete protection" to the executor.

The Commissioner, in reluctantly declining to adopt the return of 1833, says he is "sensible that to reject it is greatly to her. (Mrs. Lewis's) disadvantage, as she has not been able to establish before me payments which appear to have been satisfactorily vouched before the ordinary."

This is a bill to subject the surety to liability, and there are circumstances in this case which seem to entitle the surety, in a peculiar manner, to the protection of the account passed with the ordinary in 1833.

The Court has said that in an ordinary case, justice would have been done to the children, if the defendant had, in 1844, transferred or surrendered to them their share

of the capital of their father's estate. But it remains to be inquired what law the parties have made for themselves—how far what would seem to be abstract justice has been controlled or modified by the acts or agreement of the parties. Mrs. Lewis, in January, 1834, being about to marry a young man without property, deemed it prudent to have a marriage settlement. An instrument was accordingly prepared and executed. The defendant, D. B. Price, insists that, according to the previous agreement, as also according to his understanding of the terms of the settlement, both then and now, the property of Jesse Lewis was to be kept together, and he was to have the use of it, and maintain and educate the children without charge.

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The subscribing witness to *the settlement testified that it was his own understanding of the instrument, that D. B. Price was to have the use of the whole property of Lewis's estate, and was to support the children, and that the parties put the same construction on it. On the other hand, the complainant submits, that by the true construction of the settlement, Price was only to have the usufruct of Mrs. Lewis's interest in the property, and out of this usufruct, her children, by Lewis, were to be maintained and educated by him (Price) without charge. All agree that, by the terms of the settlement, if Price survived his wife, the property was to pass to the children of the first marriage, when the eldest was of age.

It is hardly necessary to say that the parties must ordinarily be bound, not by their understanding of an instrument, but by the construction which the Court affixes to the terms which they at the time used. But with all this, it is no more than is due, as well to the intelligence as to the good faith of D. B. Price, to say that he very clearly proved what was his understanding, and that this would have been, under the circumstances, the only reasonable arrangement. Is the instrument susceptible of this construction? It is lawful to look at the condition of things about the parties, and the objects to which the terms relate. Mrs. Lewis had a very young family, living in the country, with an income barely sufficient to support them. She was interested in a third of her husband's estate; but it would have impaired very much their means of subsistence, if the property was not kept in common—at least, until her children were grown. The property was entirely too small to be susceptible of present division, without prejudice to her children—at least, so she seems to have thought. The leading purposes of the settlement seem, therefore, to have been, that the property should be kept undivided; that the children should be supported, and that their interest in their father's estate should not be impaired for this purpose, but that if any encroachment on capital was

necessary, it should be taken from her share, and that what was left of this share should be secured to her children in the event of her decease during the coverture. The deed

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transfers to the *trustee Martha Lewis's interest in her late husband's estate, real and personal, describing it as one-third part thereof, in trust, after the marriage, to "suffer D. B. Price to use, have, receive, occupy and enjoy all the interests and profits of the said property, (allowing the property itself to remain undivided) so long as the said marriage shall continue; and the said D. B. Price shall maintain and educate the said children, or the survivors or survivor of them, without making any charge against them or either of them; and shall also permit the said D. B. Price to use the principal of the said property, if the same shall be deemed necessary by the said trustee, his heirs, executors or administrators, for the purpose of maintenance and education as above mentioned."

It is then provided, that in the event of the death of the wife during the coverture, D. B. Price shall enjoy till the eldest child shall be of age or marry, and then that the trustee shall hold the said property, or the balance thereof, which shall remain unexpended, to be equally divided among the children. But if the wife should survive the husband, then the trustee was to re-convey to her "all and singular the undivided third part of the property hereinbefore set forth, or so much thereof as shall remain unexpended."

When it is remembered what was the actual condition of the family—of what the property of Lewis consisted, and then the express stipulation "to allow the property itself to remain undivided," it is very easy to account for the conclusion of Price, that he was to occupy and enjoy, subject only to the burden of maintaining and educating the children without charge.

It is difficult for the Court to determine what was precisely meant by this provision, that "the property itself was to remain undivided."

If it was meant that the whole property should remain undivided until the law might require a division, to wit:—when the eldest child was of age or married, and the children, in the mean time, be maintained and educated, and that any encroachment on capital for that purpose should be out of the

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wife's *share, then Price fulfilled his duty in keeping the family and the property together, as the period for the division had not arrived, when he surrendered the administration. On this construction Price acted, as is shown by his conduct. In the first year he expended, for the comfort of the family and in the improvement of the property, more than three times the amount of his wife's interest in the rent and hire which came to his hands. By the stipulation of

the contract, he was bound not to divide off his wife's share.

The income of the whole was barely sufficient to give them food and clothing and a very humble education. He managed the property well and judiciously, so far as the Court is able to judge from the evidence.

The Court is of opinion, that the instrument is susceptible of the construction which the parties seem to have all given to it. If it be said that the mother had no right to make such agreement, that may be true; but if the children insist on the benefit of the settlement, they must abide by the mother's act. Nor have they any just cause of complaint. At the end of ten years they received their capital unimpaired, although they have been maintained and educated; and they have also the capital of their mother's share secured by the terms of the settlement. On the other hand, the Commissioner has submitted an account predicated on the construction proposed by the complainant. The result is at once instructive and startling. It has been already stated that Lewis left but four negroes, one of whom was worthless, and the other three were females. He lived in the country with his family, where he had the usual furniture for such an establishment, together with the ordinary implements of husbandry and some stock. Besides this, he left nothing but the house at Society Hill, and the notes and accounts which have been mentioned. For the ten years that the defendant held the property, the children were properly maintained and educated. At the expiration of that time, every thing was surrendered in about as good a plight as it was received, except, perhaps that the furniture, &c, had suffered from

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*the abrasions of time and service. If the administrator had collected every note and account, great and small, good and bad, the amount would not much exceed fourteen hundred dollars. Yet the report of the Commissioner brings the administrator in debt, on 1st January, 1850, five thousand nine hundred and thirteen dollars sixty cents.

If the whole personal estate of Jesse Lewis had been exposed to sale, (including the choses in action) on the day after his death, it is very doubtful if it would have brought more than one-third of the sum thus reported. But Mrs. Lewis had paid nearly five hundred dollars of her deceased husband's debts.

As the defendant, Price, failed to account satisfactorily for the choses in action of Jesse Lewis's estate, the Commissioner was well warranted in charging him with the amount; but he is entitled to credit for the sums paid by Mrs. Lewis, while administratrix. This reduces the cash liability on 1st January, 1834, to nine hundred and eighty-three dollars. On this sum he is chargeable with interest since he surrendered the ad-

ministration, in November, 1844. The extent of his liability on the appraisement bill (as it is termed) must be referred back to the Commissioner. According to the construction which the Court gives to the settlement, Price was entitled to use the property as it was generally used. When he gave up the administration, he surrendered also, or purported to surrender, all that had not been consumed in the use. On this matter the Commissioner may report in detail what articles included in the appraisement of 7th November, 1832, were not turned over by the defendant in November, 1844, with any special remarks which he may think proper to offer.

The Court is of opinion that the interest which accrued to the wife of the defendant, by the death of her child, in 1836, is not affected by or included in the terms of the settlement, and that the same is subject to the satisfaction of any indebtedness which may be found to exist on the administration of Jesse Lewis's estate, by either of the parties.

Any further or final order is reserved until

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the hearing of the *Commissioner's report, to be prepared according to the principles of this decree.

The complainant appealed, on the following grounds.

1. Because his Honor decreed that, in making up the accounts of the administrators of the estate of Jesse Lewis, the account current filed by Mrs. Price in 1833, should be assumed as correct; and, whereas, it is submitted that the amounts therein charged as paid, were not vouched by sufficient evidence, and the account, as a whole, was discredited by the following among other facts established at the hearing: 1st. The items do not appear to have been paid on account of the estate, and were not, so far as we are informed by the evidence, vouched to the satisfaction of the ordinary, to whom the accounts were rendered. 2d. Many of the amounts charged, were proved by the administrators themselves to have been paid in discharge of the debts of Mrs. Price. 3d. There was no evidence of loss of vouchers or death of witnesses. 4th. Many of the individuals to whom payments were alleged to have been made, were within the call of the defendant, and were not examined to sustain the account; and one who was examined as to the sum of one hundred dollars or more, charged as paid him, proved that he had no such demand against the estate.

2. Because, supposing the account of 1833 correct as to the amounts paid by Mrs. Price, the general balance decreed to be due the estate is incorrect, as the rent of the house and lot at Society Hill, and the crops for 1832 and 1833, received by Mrs. Price, were not included in the estimate by the Chancellor.

3. Because, by the express terms of the marriage settlement, D. B. Price bound him-

self to support, maintain and educate the complainant and other children of Jesse Lewis, from the rents and capital of the portion of the estate to which his wife was entitled, and it is submitted that the Chancellor erred in allowing him to charge them in the aforesaid particulars, to the extent of the annual income of the whole estate.

4. Because, if it be conceded that Price was authorized to charge the whole expense of the

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support and education of the *children, estimated at one hundred and sixty dollars annually, in their own funds, there would be an annual balance against him of sixty or eighty dollars, from 1834 to 1844, besides interest; and it is submitted his Honor erred in ruling that his liability on account of the receipts of the annual income of the estate should be balanced by the support, &c. of the children.

5. Because D. B. Price was not entitled to charge for board, clothing and education of the children, inasmuch as he made no charge at the time; made no returns to the ordinary, and filed no account or statement of his receipts and disbursements on account of the estate with his answer, nor did any other of the defendants.

6. Because his Honor should have charged the defendants with the value of the articles set forth in the appraisal, with interest from 1834, inasmuch as many of the articles were consumed by the said Price in the use, or made away with, many were greatly reduced in value when sold by the said Price in 1844.

7. Because his Honor erred in ruling that D. B. Price was only liable in the balance found due by Mrs. Price from 1844, instead of 1834.

8. Because the said decree is, in other respects, contrary to evidence, law and equity.

Dargan, for complainant.

Moses & Haynsworth, contra.

JOHNSTON, Ch., delivered the opinion of the Court.

The erroneous results of the accounts, as taken, are forcibly pointed out in the decree; and lead irresistibly to the conclusion, that error exists somewhere in the proceeding.

But, though we are greatly disposed to exonerate the defendant, Price, as far as possible, from these results; we cannot consent to do so, by what appears to us to be a misconstruction of the marriage settlement.

Our opinion is, that, by a sound interpretation of that instrument, it can operate only

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upon the third part of the estate, to *which Mrs. Price was entitled; and that the children were to be maintained and educated out of the income, (and, if necessary, the capital) of that portion, only, of the estate; leaving the other two-thirds, with its income,

to be accounted for, by the administrator, as the property of the children.

Let us read such portions of the settlement as relate to this point, bearing in mind, at the same time, that Mrs. Price, the settler, had no power to dispose of any thing beyond her own property. After reciting the marriage contemplated between herself and Price, and that she had four children, and was entitled to a third part of her late husband's estate, with a proportionate share of the rents, profits and increase thereof,—the settlement proceeds to state, that "It hath been agreed, that the said D. B. Price, after the said intended marriage, should receive and enjoy the said property belonging to the said Martha, during the said marriage,—he appropriating so much thereof as may be necessary to the purpose of boarding, clothing and tuition of the said children,"—"with the physician's bills and other expenses—and making no charge against them, for said purposes." Here we have an exact description of the property to be settled, and an annunciation of the objects and terms of the settlement. Then follows the conveyance of the property by its owner, in which she conveys, to the trustee, "all and singular her right, title and interest" in "her undivided third part of the real and personal estate and choses" of her late husband, and of "the rents, increase, interests and profits thereof," since his death: in trust, that J. D. Price, the trustee, "shall suffer the said D. B. Price," the husband, "to use, have, receive, occupy and enjoy all the interests and profits of the said property." Now, what property can this expression refer to, other than that, before described, as the property, or share, of Mrs. Price, which she had conveyed to the trustee, and, as to which alone, he, as legal owner had power to suffer, or allow, the use to the husband? The instrument immediately proceeds, after thus speaking of the use of the said property, in a parenthetical form, to throw in the provision, "(allowing the prop-

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erty, itself, to remain undivided.)" This *evidently refers to the said property: i. e. to the thirds of the widow, which she had granted, and of which the trustee was to allow the use to the husband.

But, to continue. It was to be kept together and the use of it allowed to the husband, "so long as the said marriage shall continue," i. e. during the joint lives of the married parties. But it "shall not continue unto the said D. B. Price after the termination of the said marriage," i. e. if he shall become the survivor by the death of his wife, "longer than the term at which the eldest of the said children shall arrive at the age of twenty-one years, or marry." What is to be done with it in that event? The instrument answers, it is "to be equally divided, and delivered to the survivor, or survivors, of the said children."

Until that time it is "to remain undivided." The reference is constantly to the same property; and that is the widow's share. This the husband is to have the use of; and the stipulation is, that, having this use—"the said D. B. Price shall maintain and educate the said children," "without making any charge against them, or either of them;" and, lest the income of the settled property might not suffice, for accomplishing this purpose, the trustee is to "permit the said D. B. Price to use the principal of the said property." (This certainly cannot refer to the general estate, over which the trustee had no control.)

And the deed closes by a provision which shows that, throughout, the widow's share alone was in the mind of the parties. The provision is, that, if Mrs. Price should survive her husband, the trustee should re-convey her third to her, or what might remain of it, unexpended.

Thus it appears, from a fair reading of the deed, that the husband, so far from being entitled to charge either the principal or income of the children's own shares, was bound to exonerate these shares from all charge, by employing the income, and, if necessary, the principal of his wife's share, which was settled, for their maintenance and education.

We think this settlement was good as between the parties and the trustee. The informalities pointed out by the Commissioner

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*might possibly vitiate it as against John N. Williams, the surety to the joint administration of D. B. Price and wife; but if it were set aside, it could not benefit this surety. A joint administration granted to husband and wife, according to the case of *Spann v. Stewart*, (1 Hill Eq. 326,) is a grant to the husband alone; though according to *Adair v. Shaw*, (1 Sch. & Lef. 243,) it would be different with respect to an administration in the wife *dum sola*, and conferred by operation of law upon the husband, by her marriage to him.

Where administration is granted to husband and wife jointly, the administration is that of the husband alone. The bond given by Price and wife, to which Mr. Williams became surety, was the bond of Price alone, and Williams lent credit to him exclusively. Putting the settlement out of the question, Mr. Williams is entitled to go against this property, only in case Price's marital right has attached upon it. But the Court of Errors determined, in a case lately decided in Charleston, that where the wife's share was never severed from the bulk of the estate (as in this case) the marital right could not attach. The Court would execute the equity of the wife—and, I suppose, would, in so doing, conform to intentions expressed in a previous settlement agreed on by the parties, though it may have proved ineffectual.

The Court is satisfied, however, with the decree that the interest of Mrs. Price in the

share of the deceased child, or children, should be subjected.

We come, now, to consider how the account should have been taken, in regard to the two-thirds of the estate belonging to the children.

The only distinction we can discover between this case and those which generally occur, is, that this estate was a planting estate, and that the account filed by Mrs. Price is now 17 years old.

Undoubtedly the profits of a planting establishment are not to be judged of, in all cases, by estimates in detail of the hire of the slaves and the rents of the land. The

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hire of such slaves *as are actually hired out, and the rent of such lands as are actually let out, must be accounted for according to the proceeds of the hiring or letting. But when the property is kept together, (unless we have an account of its actual profits,) the profits must be made out by general estimates. And, as in *Rainsford v. Rainsford*, Rice Eq. 343, and in *Pye v. Carr*, 2 Strob. Eq. 105, where the increase of the property itself is the result of its not having been used with exclusive reference to the production of profits, we must allow the increase to stand, to a certain extent, in the place of profits.

In the account before us, we think it would be allowable for the Commissioner,—while he may receive evidence of the probable hire and rent of the particular parts of the estate,—at the same time to receive general estimates of the profits of the estate, as a whole, reference being had to its condition: and that credits should be allowed for all probable expenses of such an estate:—(excluding, of course, in this case, the expenses of the family.)

And we think, that in such a case as this, where such liberality was extended to the children, by the mother and step-father, as to exonerate their estates from the expenses of nurture and tuition, the account should be taken with great liberality towards the parents. Doubtful charges against them should be excluded; they should not be held to a strict account; and the lowest liability of which the evidence, reasonably interpreted, is capable, should be established against them.

If I understand, aright, that part of the case relating to the building and rent of a dwelling house: there should be some reform of the report in that subject. I understand the administrators have been charged for the rent of the premises, as improved by them: while, at the same time, they are denied credit for the value of the improvements. I think rent is not allowable for premises which the tenant has rendered capable of yielding rent, if they did not yield rent before: and that, by parity of reasoning, the tenant is not chargeable, for so much of the

rent of the premises, as his improvements
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have contributed *to produce. At the same time I am content,—in this case,—that the tenant should have credit, not for the cost of the improvements, but for the value they imparted to the premises.

Upon the subject of the return to the ordinary, there is much difficulty.

Where the Commissioner is satisfied, that the items were vouched before the ordinary, and passed by him, as charges against the general estate, in the nature of expenses thereof, I think he may venture, at the end of 17 years, to regard these charges as proved prima facie. But it appears, on the face of the return, that only part of the items were vouched. Of those not vouched the Commissioner should require evidence; but that degree of evidence should satisfy him, which may be expected to be produced after such a lapse of time.

I had forgotten, at the proper place, to make an observation in regard to the furniture. I do not think it was evidence of un-

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faithfulness, in these administrators, under the circumstances of this case, that they did not sell this property. Yet, if they thought proper to retain it, and make use of it, they must reproduce it in as good condition as they received it, or account for the value of such of it as was lost, or for the injury of it, as the case may be. But, I do not think they should be made liable, in such case as this, for interest upon it.

Let the case be remanded to the Circuit Court, and the report to the Commissioner, to make up the accounts on the principles of this decree. We do not regard the points made in the 3rd and 7th grounds of appeal, concluded in the decree.

Decree modified accordingly.

DUNKIN and WARDLAW, CC., concurred.

DARGAN, Ch., having been of counsel, did not sit in the case.

Decree modified.

CASES IN EQUITY,

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT CHARLESTON, SOUTH CAROLINA—JANUARY TERM,
1851.

CHANCELLORS PRESENT.

HON. JOB JOHNSTON,
" B. F. DUNKIN,
" G. W. DARGAN,
" F. H. WARDLAW.

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*HUGH R. SWINTON v. GEO. W. EGLESTON et al., Executors of Hannah Swinton.

(Charleston. Jan. Term, 1851.)

[1. *Parties* ⌘29.]

Testatrix, who died in 1843, bequeathed "twelve shares of the dividends of" certain stock to her executors "in trust to pay over the interest on said stock to my slave named Minda, for and during her natural life," with remainder over; by another clause of the will, she bequeathed as follows: "I desire that all the property, not specified in this my will, whatsoever, howsoever and wheresoever it may be found, which I now hold, or hereafter I may hold," "shall go to my infant nephew, H. S., to him and his heirs forever." H. S. filed his bill against the executors and remainder-man, claiming that the legacy to Minda, during life, was null and void, and that it fell into the residue to which he was entitled: *Held*.—That the legacy to Minda was void under the 4th section of the Act of 1841.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. § 50; Dec. Dig. ⌘29.]

[2. *Wills* ⌘858.]

That, being void, it fell into the residue, and that H. S. was entitled to it under the terms of the residuary clause of the will.

[Ed. Note.—Cited in *Logan v. Cassidy*, 71 S. C. 205, 50 S. E. 794.

For other cases, see *Wills*, Cent. Dig. §§ 2173-2183; Dec. Dig. ⌘858.]

[3. *Wills* ⌘267.]

That the next of kin of testatrix had no such interest as required them to be made parties to the bill.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 615, 617, 618; Dec. Dig. ⌘267.]

[4. *Wills* ⌘858.]

[A residuary bequest of personal property "not specified in this my will" includes lapsed legacies.]

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 2173; Dec. Dig. ⌘858.]

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*Before Dunkin, Ch., at Charleston, June, 1850.

This case will be sufficiently understood from the opinion delivered in the Court of Appeals.

Pope, for the appellant.

Simons, contra.

WARDLAW, Ch., delivered the opinion of the Court.

Hannah Swinton, the testatrix, died in 1843. Her will, dated February 27, 1832, contains the following clauses: "I give and bequeath twelve shares of the dividends of my five per cent. stock of the state of South Carolina, unto my executors, in trust always nevertheless, that they shall pay over the interest on said stock to my slave named Minda, for and during the time of her natural life, quarterly, as they shall receive the same in equal shares; and at the death of my said slave Minda, the said five per cent. stock and dividends of the said State, shall go to the Sabbath School of the Circular Church, No. one; and I charge my executors to fulfil the foregoing bequest in favor of the said Sabbath School, and if it should not be

incorporated then, I do hereby make them trustees, if necessary, for that purpose; and if the said Sabbath School should not exist at the time when the said legacy shall accrue, then, the said stock and dividends shall go to the Circular Church in Charleston, forever." "I desire that all the property, not specified in this my will, whatsoever, howsoever, and wheresoever it may be found, which I now hold, or hereafter I may hold, shall go to assist in educating the children of my deceased brother, James Swinton, until the youngest is twenty years old, then I desire that it shall go to my infant nephew, Hugh Ralph Swinton, to him and his heirs forever; but in the case," &c. The context by the minute specification of her estate, and the careful mention of all persons, whom she supposed to have any claim upon her bounty, manifests the purpose of testatrix to dispose of her whole estate, and not, as to any part of it, to die intestate.

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*It is clear, too, from the will, that the plaintiff is a favorite legatee, for, in addition to several immediate bequests, he takes in remainder, in several instances, property given to others for life. There is, in the will, no other disposition of the residue, except that contained in the clause above recited.

The plaintiff states in his bill, that he is the youngest child of James Swinton, and is over the age when the residue was appointed to vest in him; and he claims, that the legacy in trust for the slave Minda, is null and void by the 4th section of the Act of 1841 (11 Stat. 154,) and falls into the residue, to which he is entitled. The sum in controversy is small, consisting of the dividends of \$1200, in the 5 per cents. of State stock, for the life-time of Minda, from the death of the testatrix, or the attainment of twenty years by the plaintiff whichever was the posterior event.

The plaintiff in his bill made no parties defendants except the executors, and they, in their answer, operating to this extent as a demurrer, objected, that all the parties in interest were not parties to the suit. At February Term, 1850, Chancellor Dargan made the following order: "On hearing the bill and answer in this cause, it is ordered, that the complainant have leave to amend his bill, by adding new parties thereto, as follows, to wit: the corporation of the Circular Church, the next of kin of the testatrix, Hannah Swinton, and Sabbath School No. 1, of the Circular Church, if the same should be incorporated and if not incorporated, the said Sabbath School shall be represented by the parties defendants before the Court, as the trustees of the School, being declared such by the will, in the event that the said school shall not be incorporated." The plaintiff finding it inconvenient to

comply with this order, as the next of kin were numerous and widely dispersed, brought the matter before Chancellor Dunkin, at June term, 1850, and moved to rescind so much of the former order as required the next of kin of testatrix to be made parties: and this motion was refused by the Chancellor.

The appeal is from this order and this refusal on the ground that the next of kin of testatrix are not necessary parties in this

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*suit. The Chancellor on circuit at the last term, pursued the course required by principle and comity, in dismissing a motion to modify the order of his predecessor, where no change of circumstances demanded a change of discretion. The motion was in the nature of an appeal, from one to another, of co-ordinate authority. But in this Court, we may deal with the whole matter, according to the doctrines and practice of equity. The general rule, as to parties in equity, is, that all persons having an interest in the object of the suit, ought to be made parties. The reasons of the rule are, that the Court may completely determine the rights of all persons interested,—that future litigation may be prevented,—and that the orders of the Court may be safely executed by those upon whom they operate. Departures from the general rule are sometimes allowed by the discretion of the Court. As in a suit which affects the personal estate, the legatees may not be necessary parties, although having interest in the object of suit, inasmuch as they are represented in the person of the executor or administrator, and their rights thus sufficiently protected. So, where the next of kin are proper parties, it is not indispensable that all of them should be expressly brought in, for if one or more of them be named as parties all may attend the accounting before the master, and be heard by counsel in the Court. (Calvert, 11, 20, 51; Sp. Eq. 430.)

Whether, in this case, the next of kin of testatrix have an interest in the object of the suit depends upon the subordinate questions, whether the plaintiff is constituted, by the terms of the will, general legatee of the residue; and whether the legacy in trust for a slave falls into the residue.

That a gift of the residue may have a limited operation, is unquestionable, where the words of the will and the manifest intention of the testator require such construction. Even general words sufficiently broad to cover the whole, may be confined in their operation by connection with other parts of the will. In *Attorney General v. Johnstone*, (Amb. 577,) Lord Camden held that, where testator had expressed doubt if there would be any residue, and then mentioned it as a

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small remainder of about £100, *the gift of the residue did not include lapsed legacies

amounting to £20,000. So, in *Davers v. Dewes*, (3 P. Wins., 40,) testator gave Chevely House to his wife for life, declaring that he would dispose of the goods and furniture, in Chevely House, after his wife's death, by a codicil to his will; and then bequeathed to his wife the residue of his personal estate, whatsoever, not before disposed of, or reserved to be disposed of by his codicil; and afterwards made two codicils without disposing of his said goods and furniture: Lord King held, that the testator had not given to his wife all the property which he had not disposed of by his will, or which he might not dispose of by his codicil, but expressly excepted, out of the residuary bequest, the property reserved to be disposed of by his codicil; that the goods and furniture, so expressly excepted and reserved, did not pass to the wife. In commenting upon these two cases, in *Bland v. Lamb*, (2 Jac. & W. 405,) Lord Eldon speaks of them as deciding, that the words employed described only the actual surplus of what the testators had at the dates of their wills, and, while admitting that such construction may be adopted where the intention is clear, discredits some of the opinions expressed in these cases. In our own case of *Peay & Pickett v. Barber*, (1 Hill Eq. 97,) general words of residuary bequest were restricted to particular classes of property upon the construction of the whole instrument. Judge Johnson there properly insists on the fact, that our law distributes undivided residue among the next of kin, whereas in England it goes to the executor, as justifying Courts, here, in following more closely the intention of testators to restrict the residue than the policy of England would warrant. Still in that case, as in all our cases on the subject, the general doctrine is recognized, that the words of a residuary clause operate upon all the property of the testator, at the time of his death, within the scope of the words. The ambulatory character of a testament is not to be restrained by construction in doubtful cases. See *Garrett v. Garrett*, (2 Strob. Eq. 272,) correcting some expressions, apparently of contrary tendency, in the same case, as reported 1 Strob. 79. This general doctrine is

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*founded upon such artificial reasoning as this: when one bequeaths all his property, he shows that he did not mean to die intestate as to any part; not meaning to die intestate as to what he had at the time of making his will, he does not mean to die intestate as to what he should have at the time of his death; he gives property away from the residuary legatee, only for the sake of the particular legatee, and as against all others, the residuary legatee is presumed to be the object of testator's bounty. The application of the doctrine does not depend upon any express or particular intention of

the testator, for it may be well argued in all cases, that a testator, having no presence, contemplates only the state of his property existing at the date of his will; and that, by a gift of the residue, he means only a gift of his actual property left out of other dispositions. Still, the residuary legatee takes every thing not effectually given to others, of the whole property at the death of the testator, however great may be the hardship of particular cases. (*Bland v. Lamb*, 5 Mad. 412; 2 Jac. & W. 405; *Cambridge v. Rous*, 8 Ves. 25; *Leake v. Robinson*, 2 Mer. 392.) In the case before us, it is argued, that the words, "not specified in this my will," except from the gift of "all the property, whatsoever, howsoever, and wheresoever it may be found, which I now hold, or hereafter I may hold," all the property in any wise mentioned in the will. But these words, "not specified in this my will," mean no more than not bequeathed; i. e. not effectually bequeathed. They add no limitation to the term, rest or residue which standing by itself strictly means, although very different effect is given to it, that only which is not otherwise disposed of, or mentioned. (*Clowes v. Clowes*, 9 Sim. 403, (16 Eng. Ch. R. 404,) is an express authority. There the testator had given to two nieces for life £20 and £30 a year out of the interest of certain stock, and the question was, whether the capital of the sums so given passed to the widow, under this bequest: "I bequeath all my household furniture, and all my property of every kind not specified above to my dear wife:" V. C. Shadwell held, that testator meant by "all my property not spec-

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ified above," interest not *bequeathed in property which he might have before mentioned, and that the widow was entitled to the capital. In *Roberts v. Cooke*, (16 Ves. 451,) a residuary bequest of personal property, "not hereinbefore specifically disposed of," was construed to comprehend lapsed legacies. The plaintiff, then, must be considered general legatee of the residue.

In the first three sections of the Act of 1841, gifts and trusts, providing or intended for the emancipation of slaves, are declared not only to be void, but to enure to the benefit of the next of kin; but the 4th section, which is the only one that speaks of gifts to slaves, says nothing about the next of kin; and while, in terms too plain for disputed construction, it declares every bequest in trust for the benefit of any slave to be void, it leaves the consequences to be determined by the general law. If it be true that void legacies fall into the residue, the plaintiff is entitled to the bequest in trust for *Minda*; and this general proposition is clearly settled by the cases. Lord Hardwick says, in *Durour v. Motteaux*, (1 Ves. sen. 321,) turning upon the mortmain Act; "a will is made in which several legacies, and the residue

of the personal estate, are given away; one of the personal legacies is void by law; the Court cannot say for that reason, contrary to the express will, that testator intended to die intestate: for giving the residue over includes every thing, let it fall in by reason of that legacy's being void, or lapsing, or dying in the life of the testator." See *Shanley v. Baker*, (4 Ves. 732.) In *Kennell v. Abbott*, (4 Ves. 802,) a legacy given by a woman to her supposed husband, who was not her husband, and therefore void, was decreed to the residuary legatee. In *Leake v. Robinson*, where the legacy was void for the remoteness of the limitation, Sir Wm. Grant says: "It must be a very peculiar case in which there can be at once a residuary clause and a partial intestacy, unless some part of the residue be ill-given. It is immaterial how it happens, that any part of the property is undisposed of, whether by the death of a legatee, or by the remoteness and consequent illegality of the bequest. Either way it is a residue: i. e. something upon which no other provi-

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sion of the *will effectually operates. It may in words have been before given; but if not effectually given, it is, legally speaking, undisposed of, and consequently included in the denomination of residue." In *Bauskett v. Breithaupt*, (1 Rich. Eq. 471.) Chancellor Harper, discussing the consequence of a legacy void under the Bastardy Act of 1789, says: "it is hardly necessary to refer to authority for a doctrine so well established, as that a general residuary clause will pass everything that is not effectually disposed: if a legacy lapses, or is void, it will go to the residuary legatee."

It does not seem to us, that the next of kin of Hannah Swinton have any such interest, as requires them to be parties to this suit; and it is ordered and decreed that so much of the order of February, 1850, as requires them to be made parties, be rescinded.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

Motion granted.

3 Rich. Eq. 208

HASTIE & NICHOL V. R. L. BAKER and Wife and Others.

(Charleston. Jan. Term, 1851.)

[*Husband and Wife* §151.]

A deed of marriage settlement provided, inter alia, that the trustees should permit the husband "to receive the rents, income and profits" of the settled estate, (which was large) "for the joint maintenance of himself and wife during their joint lives, but not subject to his debts:" during the coverture, the husband contracted a debt for supplies furnished him for the use of himself and family, and the creditor filed a bill against the husband, wife and trustees for payment of this debt out of the settled estate, and the husband desired that it should

be so paid: *Held*, that the settled estate was not liable; that the husband, having ample means, for the joint support of himself and wife, from the rents, income and profits of the estate, could not, by contracting a debt for such support, subject the estate, (as to a debt due by the estate) to the payment thereof.(a)

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 586; Dec. Dig. §151.]

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*Before Dargan, Ch., at Charleston, February, 1850.

The decree of his Honor, the Circuit Chancellor, is as follows.

The deed of marriage settlement between Robert L. Baker and Isabella, his wife, contained a provision, by which the trustees were to permit the said R. L. Baker to receive the rents and profits of the whole estate for the joint use and maintenance of himself and the said Isabella, during their joint and natural lives, not subject, however, to the debts, contracts, or engagements of the said R. L. Baker. The deed proceeded to provide, in this connection, that if any creditor of the said R. L. Baker should attempt to charge the said income or profits with any debt of the said R. L. Baker, then, from the issuing of any process so to charge the same, the estate was to be held in trust, for the sole and separate use of the said Isabella. The interest of R. L. Baker in the estate, under the operation of these provisions, was a shifting use. If any creditor has, or shall attempt to make the income or profits liable for the debt of R. L. Baker, the use has, or will, according to the fact, be transferred, and the said Baker be divested of all right, thenceforward, in the profits and income of the estate. This shifting of the use however, would be prospective, and would not operate to divest the rights of Baker in any arrears of profits or past income, that might be in the hands of the trustees. And his creditors would be entitled to be subrogated to all his rights, (whatever they might be) in the profits and income of the trust estate. But it was intimated on the trial, that such an account in this instance would be fruitless, and, therefore, that remedy was not sought.

The complainants, however, deny that they have sought in this bill, to make the profits

(a) The reporter believes that he has stated the only point which was adjudged by the Court of Appeals. It would seem, from the ground of appeal, that the only question taken before that Court was, as to the liability of the settled estate for the demand treated of in the decree as No. 2;—from the facts stated in the circuit

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decree, *that no question could have arisen, as to the liability of the estate for debts contracted by Mrs. Baker; and, as the decision was that the estate was not liable at all for that demand of the plaintiffs, that no question could have been considered, as to the validity of Mrs. Baker's appointment as against the plaintiffs.

For a full understanding of the case, reference must be had to the case of *Roux v. Chaplin*, (1 Strob. Eq. 129.)

and income of the estate of Mrs. Baker liable for his debt, but contend that they have

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sought to *make the corpus of the estate subject to its own liabilities: to debts of Baker, it is true, but, nevertheless, according to their shewing and position, debts which, by the equities of the case, attach upon the corpus as well as the income of the estate. This is the ground upon which the complainants have filed their bill and rest their claim for relief. That the corpus could never be made subject to the payment of Baker's debts as such, none will deny. And it is quite clear, that an attempt by a creditor to make the income liable, would eo instanti, shift the use, so as to deprive Baker and his creditors in any of the after accruing income and profits. The only ground, therefore, on which the complainants could pretend to rest their claim, would be the assumed liability of Mrs. Baker herself, or some equity attaching through her upon her separate estate.

There are three debts for the recovery of which the complainants have filed their bill. They are particularly described in the report of the Master, and referred to as No. 1, No. 2, and No. 3. No. 1 is a debt contracted by Mrs. Baker with the complainants before her marriage, for goods, wares, and merchandise from their store. There can be no doubt but that the trust estate is liable for this debt. Not only is the income but the corpus itself is liable.

The defendants, Thomas B. Chaplin and Saxby Chaplin, contend, that so much of the trust estate as has been conveyed to their use, is not liable for any of the debts which the complainants set up in their bill, because, they say, they are purchasers for valuable consideration, being within the consideration of the marriage contract. I dissent from this as a legal proposition. They are, it is true, the issue of the wife by a former marriage. But the only persons who are within the marriage consideration, so as to have a right to enforce the contract as purchasers for valuable consideration, are the husband, the wife, and their issue. *Osgood v. Strode*, (2 P. Wms. 145). All others provided for, either directly or by contingency, are volunteers, and their claims are void as against the demands of the pre-existing creditors of the party settling the property.

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*Though such provisions are voluntary, they are not fraudulent in the main, and where they are made bona fide, they would be enforced against subsequent purchasers, as was done in *Jenkins v. Keymis*, (1 Levinz. 150, 237).

The conveyances by Mrs. Baker in favor of the Chaplins, are voluntary, and are invalid against the claims of her creditors, that existed antecedently to the execution of the marriage contract. Such creditors have a general lien upon the whole estate, and there

is no right to restrict them in the recovery of satisfaction to any particular portion of the estate, at the option of Mrs. Baker, or of any other of the parties interested. But in order not to disturb, unnecessarily, any of the family arrangements, and with the view of respecting the rights of all parties, so far as it can be done consistently with the paramount right of the creditors, I shall direct that this debt of the complainants shall be satisfied out of the sale of the negroes assigned for that purpose, by the deed of June, 1845, which it seems has never been carried into effect.

The complainant's remedy as to this debt (No. 1) is not to be limited to that property, if, by any misadventure, it should not be forthcoming.

The next claim of the complainants which I will consider, is that which is described and referred to in the Master's report as No. 3. It arose in this way:—it was a debt of Thomas B. Chaplin, and was secured by a sealed note, and Mrs. Baker was the surety. Suit was brought upon the note in the Court of Common Pleas against Thomas B. Chaplin, and judgment recovered and entered up thereon. In the estimate of the amount due upon this note, a mistake occurred, and the judgment was entered up and execution was lodged for less than the amount actually due upon the note. The property owned by Thomas B. Chaplin was sold by the sheriff of Beaufort district, to satisfy this and other executions against him. The amount due upon the face of the execution was satisfied by the sale, and some portion of the proceeds of the sale was applied to junior executions, and the whole amount of this debt would

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*have been satisfied by the sale of the property of the principal, but for the mistake which has been alluded to. The amount remaining due upon the note, which was not carried into the execution is, according to the Master's report, and up to the date thereof, £106.32. The failure to collect the whole debt from the principal, has, therefore, evidently arisen from the mistake and laches of the creditor, and I think that this would have the effect of discharging the surety.

There is another objection to this claim. The complainants have come to this court to correct the mistakes of the court of law in entering up its judgments and issuing its executions. It is the province of the court of law, as well as the court of equity, to correct its own errors. And the jurisdiction of the court of law is most ample for this purpose. The complainants should have made application to the Court where the judgment was rendered, to reform its errors, and to correct the execution.

The judgment rendered by the court of law is fully satisfied. And that, as the case stands, is a satisfaction of the claim. The complainant has no right to open the judg-

ment of the court of law for a re-hearing before this Court, and to obtain further redress than that which has been afforded by the tribunal where it was originally heard.

For these reasons, my judgment would have been against the allowance of this claim. But Mrs. Baker, though she objected in her answer to the payment of the balance due upon this debt, on this trial waived all objections, and consented that it should be paid out of the trust property, provided it was paid out of the negroes assigned for the payment of debts by the deed of June, 1845. As she has an unlimited power of disposing of the trust property, and consents that a decree shall be entered against her for the balance of this debt, on the condition above named, the Court is indisposed to interpose an objection which she has waived. It is accordingly so ordered and decreed.

I come now to the consideration of the debt or claim of the complainants, which is

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referred to and described as No. 2. in the Master's report. Its present form is a judgment against R. L. Baker. The cause of action is a store account against R. L. Baker, due the complainants, and run up against Baker after the marriage. It does not seem that any credit was given to Mrs. Baker or the trustees. The complainants charge, that the account was for supplies furnished Baker for the use of himself and family. Mrs. Baker, in her answer, does not deny this allegation, and Baker, in his answer, admits its truth. I shall consider the question arising on this claim, as if the statements of the bill in relation thereto were true and established by the evidence.

A strong objection which strikes my mind in limine, against the admission of the claim, is founded upon the provisions of the deed of marriage settlement. By these, Baker was to be permitted to receive the whole profits and income of the estate for the joint support of himself and wife during their joint lives. The estate was very large, and the income was certainly sufficient to afford a proper maintenance to Mrs. Baker. And if he, misapplying the income and profits, instead of appropriating them for her support, chose to contract debts in his own name, and on his personal liability, for her support, I do not perceive any imaginable ground of equity by which to charge her separate estate with such debts. If A. places funds in the hands of B. for certain specified purposes, to purchase family supplies for example, and B. appropriating the funds to his own use, buys the supplies in his own name and on his own credit, there is no legal or equitable obligation on A to pay for the same. This is precisely the case here; Mrs. Baker has supplied her husband with the most ample means of furnishing her with supplies for her support. He, or the trustees, or both together, have done one of two things; they

have either furnished supplies in an extravagant manner, and beyond what the income of the estate would warrant, or the funds dedicated to this purpose have been misapplied. In neither case is there any equity against the wife's separate estate, to pay a debt contracted by the husband in his own name for the support of the family.

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*If it was the trustees who misapplied the income, it was equally the husband's laches and misapplication, for he had the right to receive and control the whole income. It does not appear that Mrs. Baker had any knowledge of the fact, that the supplies in question were furnished by the complainants on a credit. For all that appears, she may have supposed that the current expenses of the family were defrayed out of the current income of the estate.

But I will go farther, and say, that supposing this debt to have been contracted personally by Mrs. Baker, in her own name, on her own credit, and for her own use, still I think that the complainants would have no right to enforce it against her separate estate. There is an essential difference between the law of South Carolina and that of England, in regard to the power which a married woman possesses over property secured to her separate use. The general rule in both countries, is, that a married woman is incapable of binding herself by her contracts. In a Court of common law jurisdiction, her legal existence is considered to be so blended with that of her husband, as to place her under the most perfect disability of entering into contracts. Such contracts are null and void, though the wife be living apart from the husband, and in the enjoyment of a separate estate. This is the doctrine of the common law. It was shaken by the decision in *Corbett v. Poelnitz*, (1 T. R. 5); but it was re-affirmed and re-established in all its pristine vigour in *Marshall v. Rutton*, (8 T. R. 545). Such a thing as a judgment or decree in a court of law or equity, against a married woman, founded upon her contracts made during coverture, to operate against her in personam, is unknown to the law of England and of South Carolina. There has been some modification of the strict rule of the common law, so far as to make valid certain acts of the wife, in reference to her separate estate. In regard to her power of disposing of her separate property, she is, in England, considered as a feme sole, and she is only restricted in the exercise of the *jus disponendi* by the limitations expressed or implied in the deed or will by which the separate

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*estate is created. She may sell it as her interest prompts, or her affection or fancy dictate. It is now settled, that she may convey it to her husband, or assign it for the payment of his debts. She may encumber it with her own debts, and, by her contract,

give a specific lien upon it. Such a contract, however, creates no personal obligation on the wife, but only affects her separate estate. It cannot strictly be considered a contract, but rather the execution of a power, and depends for its validity upon the source whence the power is derived. Where there is no restriction upon the exercise of the power, the English law implies all these proprietary rights as belonging to a married woman in reference to her separate estate, from the mere fact of its having been given to her sole and separate use.

But the law, as it has been expounded in South Carolina, is essentially different in regard to her power of disposing of her separate estate. Here the *jus disponendi* is not implied from the fact that the estate has been given for her sole and separate use. Her power of alienation, or creating encumbrances, rests solely on the reservations to that effect in the deed or will, and they are valid or invalid, accordingly as the instrument under which she enjoys the estate allows such an exercise of power and control. *Ewing v. Smith*, (3 Des. 417 [5 Am. Dec. 557]); *Frasier's Trustees v. Hall* and others, (1 McC. Eq. 275); *Clark v. Makenna* and wife, (*Cheves Eq.* 163). To borrow an illustration from natural science, such conveyances by a feme covert, are but developments (from a rudimentary state) of the provisions of the original deed; and they are so far identified that they stand or fall accordingly as they may or may not be a legitimate growth from the germinal power. And to render the appointment of a married woman valid in South Carolina, not only must the power be reserved, but the form which is prescribed must be pursued in its execution.

By the terms of the marriage settlement, Mrs. Baker possessed very large, though not unlimited, powers of disposing of the whole trust estate. Her powers were without limit, as to the objects for which she might make

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the disposition, but restricted *as to the form. Even as to the form, her powers were very large. She had the right to dispose of it by will. But *inter vivos*, she could only dispose of it by a deed or instrument in writing, executed in the presence of two witnesses. By an instrument executed after this form, I have no doubt but that she may have given a specific lien by way of mortgage, or charged the trust estate in favor of any creditor she might owe. The deeds of February, 1844, and June, 1845, were obligatory upon her, and would be enforced. But there was no provision in the deed of marriage settlement, that either the corpus or the income should be subject to the payment of her debts, so as to bring the case within the principle of the case of *Clark v. Makenna*, (*Chev. Eq.* 163).

Even in England, this claim would not be sustained, though the debt had been contract-

ed by Mrs. Baker. In conformity with the doctrine of the wife's disability to bind herself by her contracts, the Court of Chancery there acts upon the principle that the general personal contracts of the wife do not affect her separate estate. She may alien and encumber at pleasure, and that without a power reserved for these purposes, as we have seen. But the intention to alien and encumber must be manifest. When she encumbers, or gives specific liens, it must be by contract expressed or implied. If she contracts debts, and does no act indicating an intention to charge the separate estate specifically with the payment of them, the Court of Equity refuses to enforce their payment out of the trust estate; *Duke of Bolton v. Williams*, (2 Ves. Jr. 138); *Jones v. Harris*, (9 Ves. 498); *Stuart v. Kirkwall*, (3 Madd. 387; 3 do. 94; 3 do. 418).

In *Magwood & Patterson v. Johnston* and others, (1 Hill Eq. 232,) it is said, that the equity on which a creditor comes into this Court to render a trust estate liable to the payment of his debt, is this, that he has advanced his money or given credit to effect the objects of the trust at his own expense, and having accomplished the objects of the trust at his own expense, he has a right to be put in the place of the *cestui que trust*, or be re-imbursed out of the trust fund.

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*If, by any misfortune affecting the income of the estate, Mrs. Baker had been deprived of the means of a comfortable support, and the complainants had furnished her with necessary supplies on the credit of the trust estate, the case of the complainants might have been sustained, on the doctrine laid down in the case last cited. But the case is entirely different. The exigency did not exist. The means of support were ample.—They were placed at the disposal of the husband for the support of his wife. And he, misapplying the funds, obtained the supplies on his personal contract and credit. There is no equity in favor of this demand of the complainants, and as to it, their bill must be dismissed.

It is ordered and decreed, that the complainants recover and have satisfaction for their debt described as No. 1, in the Master's report. It is also ordered and decreed, that this debt have a lien on the whole trust estate not already alienated for the payment of debts, or for valuable consideration; that the negroes conveyed in the deed of June, 1845, be primarily liable for the payment of this debt; that the Master sell so many of said negroes as will be sufficient to pay this debt, as also that described as No. 3 in the Master's report, and the costs of this suit. That the sale be for cash, and that the Master pay over the amount due to the complainants, and the costs, to the respective parties entitled to the same.

Defendant, Baker, appealed, and insisted

that the debts contracted by Mrs. Baker, particularly during the time that she was separated from him, ought to be paid out of the settled estate, and that the appointment of Mrs. Baker, so far as it went to defeat the rights of those creditors, should be set aside. And he craved relief from personal liability for those debts which were thus contracted to his injury.

Petigru & King, for Baker.

Martin, for creditors.

Treville, for Mrs. Baker and family.

PER CURIAM. This Court concurs in the

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decree of the Chan*c*llor: and it is ordered that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.

3 Rich. Eq. 218

LOFTUS C. CLIFFORD and Wife v. J. HARLESTON READ.

(Charleston, Jan. Term, 1851.)

[Execution ⇨ 265.]

Defendant purchased at sheriff's sale, the estate of tenant for life in certain slaves: tenant for life died in July, and defendant delivered the slaves to the remainderman in December: *Held*, that defendant was liable to account to the remainderman, for the hire of the slaves, from the death of tenant for life, until they were delivered to the remainderman.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 53; Execution, Dec. Dig. ⇨ 265.]

Dunkin and Dargan, CC., thought the case within the provision of the last clause of the 23d section of the Act of 1789;—Johnston and Wardlaw, CC., that it stood as at the common law.

Before Dargan, Ch., at Charleston, February, 1850.

Dargan, Ch. By a deed of marriage settlement, bearing date 15 April, 1818, between Samuel Colleton Graves, and Susan McPherson, the latter conveyed to trustees, certain lands and negroes, in trust for the use of the said Samuel Colleton Graves, and Susan, his intended wife, during their joint lives; remainder to the use of the survivor; remainder to the use of the issue of the marriage. The marriage was duly solemnized, and the complainant, Caroline M. Clifford, was, at the death of her last surviving parent, the only surviving issue of the marriage. Susan McPherson, afterwards Susan Graves, survived her first husband, the said Samuel Colleton Graves, and afterwards intermarried with Nathaniel G. Cleary. The life estate of Mrs. Cleary, in the settled property, was liable, and sold for the debts of Cleary, and the defendant, J. Harleston Read, became the purchaser of a portion of the ne-

groes at sheriff's sale, in the life-time of Mrs. Cleary. He exhibits with the answer a schedule of the said negroes, (which he pur-

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chased and *became possessed of, in April, 1840,) and also of those that remained in December, 1848, when these latter were delivered up to the complainants as remaindermen.

Mrs. Cleary survived her husband, and on the 19th day of July, 1848, she departed this life, when the right of Mrs. Clifford to the possession accrued, (as the only person entitled in remainder,) according to the terms of the deed of marriage settlement. Mr. and Mrs. Clifford, the complainants, have also entered into a marriage contract, by which all her estate, including her interest in the property embraced in the marriage settlement of her parents, was conveyed to certain trustees, in trust, inter alia, for the joint use of the complainants during their joint lives, etc. Why the trustees have not been made parties to a bill for an account of the trust property, I am unable to perceive. Nor do I see how the complainants could have been allowed to proceed with their case, had the defendant taken the objection. If, however, the trustees would be entitled to recover on the demands now sought to be enforced, it would have been only for the purpose of paying over the amount recovered to the complainants for their joint use; and as the defendant has not thought proper to object, on the ground that the trustees have not been made parties, I will proceed to consider the case on its merits.

The negroes that were in the possession of the defendant, were duly delivered up by him in the December succeeding the death of Mrs. Cleary, the life tenant, who died on the 18th day of July, 1848. And this bill is brought for an account of the hire and profits of the said negroes, during the time that intervened between the death of Mrs. Cleary, and the time when they were surrendered to the persons entitled in remainder. The defendant contends, that as Mrs. Cleary died after the 1st of March, he, as the owner of the life estate, is exempt from liability for this account, by virtue of the provisions of the Act of 1789. (P. L. 494; 5 Stat. 111.)

At common law, the right of the remainderman to the possession and enjoyment accrued, eo instanti, upon the death of the tenant for life; and such still is the rule

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which must prevail, *except so far as this rule is modified or disturbed by the provisions of the Act. To that Act, as in derogation of the rights of property, I am disposed to give a rigid construction, and not to extend its operation beyond the cases embraced within its provisions, and which may fairly be supposed to have been contemplated by the Legislature.

The first class of cases provided for by the clause, is entirely different from the present. It contemplates a case where the owner of the life estate himself dies, and not where, as in this case, by an assignment and transfer of the life estate, the owner of that life interest becomes a tenant per autre vie. Where a person shall die after the 1st day of March, the slaves of which he or she was possessed, whether held for life or absolutely, and who were employed in making a crop, shall be continued on the lands that were in the occupation of the deceased, until the crop is finished, and then delivered to those who have a right to them, etc. The Act proceeds to declare that the crops, the product of the labour of such slaves, shall be assets in the hands of the executors, or administrators, subject to debts, legacies, and distribution. It means, by a necessary implication, the debts, legacies, and distribution of the estate of the decedent, the tenant for life. Here is a prolongation of the life estate beyond its natural period, and a substantial value added to it beyond that given by the will or deed which creates it. And to the same extent it is in derogation of the rights of the remainder-man. And I should doubt the constitutionality of this provision of the Act, in reference to estates in remainder that existed and were vested interests at the ratification of the Act. In regard to such estates, would it not have been a violation of the rights of property, and a taking from one person his estate, and giving it to another; and that too without any compensation? But in regard to estates of this character, created since the passage of the Act, that objection does not apply, for it would be consistent even for the Legislature to declare that there shall thereafter be no estates in remainder, and that the tenant for life shall in all cases be entitled to the fee. The Legislature has

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not so declared, and *of course never will; but it has declared, that under certain circumstances, an estate for life in slaves shall extend beyond the duration of that life, upon which it was made to depend by the instrument which creates it. The object of the Act was to promote the agricultural interests, and the mischief to be remedied was the withdrawal of slaves engaged in agricultural labours, from the possession of the executors or administrators of the deceased tenant for life, after the plans of the year had been definitely formed, and the crops in the course of cultivation. It is easy to conceive of the injury that would result to individuals, and through them to the community at large, by such sudden changes in the possession and control of property, situated as in cases contemplated by the Act. The purpose might have been more justly effected, by giving compensation to the remainder-men, as in another class of cases provided for by the same

Act. But in the case of a deceased life-tenant, the law gives no compensation to the remainder-man. This is the case of *Leverett v. Leverett*, (2 McCord Eq. 81,) and *Herbement v. Percival*, (1 McM. 59.) The first of these cases has been questioned. If one of these is questionable, the other is equally so; for they are precisely the same. Each of them is a case where the tenant for life died in possession of the slaves, and the slaves were employed in agricultural labours. It seems to me that it would be difficult to adopt any other construction of this part of the Act, than that which our Courts have given in the cases cited. The language of the Act is, in my judgment, unequivocal. See also the case of *Freeman v. Tomkins*, (1 Strob. Eq. 53.)

The case of the defendant, as I have already remarked, does not come within the provisions of that part of the clause which I have been discussing. But, if it comes under the operation of the Act at all, it comes under the following member of the clause: "And if any person shall rent or hire lands or slaves of a tenant for life, and such tenant for life dies; the person hiring such lands or slaves shall not be dispossessed until the crop of that year is finished, he or she securing the rent or hire when due."

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*It perhaps may admit of considerable doubt, whether the case of the defendant comes even within this provision of the Act. He did not hire the slaves from the tenant for life; nor was the hire due and outstanding, but he purchased the whole life interest, in the year 1840, at sheriff's sale, and the consideration was paid in cash. The disposssession of the tenant for life was involuntary. The Act seems to contemplate a hiring by the tenant for life, and a case where the hire is still unpaid. The possession is to be extended on the condition, that the hire is to be secured by the person who has the possession. Whereas, if the hire has already been paid to the tenant for life, or he has had the benefit of it, his estate might be insolvent, and be unable to make good the damages, which the inroad of the Act makes upon the rights of the remainder-man. The case certainly does not fall within the words of the Act, according to their ordinary acceptation. It, however, comes within the mischief intended to be remedied; and a sale by the sheriff of the estate of the life-tenant, may be considered a sale by the life-tenant himself: and an assignment of the whole remaining term may be considered a hiring. And if the consideration be paid in advance for a term beyond the duration of the life estate, the party in possession may be required to secure so much of the hire of that year, when the life estate determines, as may be due to the remainder-man. I shall therefore consider the case as embraced within that provision of the Act last quoted.

Considering the case in this point of view, I think it clear, that the defendant is liable to account for the hire of the negroes, from the 18th of July, 1848, when the tenant for life, Mrs. Cleary, died, to the day in December following, when they were delivered up to the remainder-man. I shall not construe the Act as abridging the legal rights of the remainder-man, further than I am bound to do by the clear import of its language. I shall not presume that the law intended to deny him the possession of his estate, after the accrual of his rights, without just compensation. More particularly am I constrained to take this view, when I reflect that the

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policy intended to be subserved by the Act, can have its full operation, without the infliction of this glaring injustice. He who holds the life estate, may be relieved from the injury arising from the sudden and unforeseen termination of his possession, and the consequent loss or diminution of his crops, while in the course of cultivation and gathering, consistently with a just compensation to the remainder-man for the abridgement of his right of possession. If the plain import of this part of the Act was, (as it is in the preceding,) that there should be no compensation to the remainder-man for the abridgement of his rights, as a judicial magistrate I would of course have no alternative but to enforce what the Legislature had enacted. But the phraseology of these provisions is essentially different. In the latter, it is declared that the person who hires slaves from the tenant for life, "shall not be dispossessed until the crop of that year be finished, he or she securing the rent or hire when due."

The securing the hire is the condition on which the possession is to be prolonged beyond the termination of the life estate. To whom is the hire to be secured? Not to the original life tenant, upon whose life the estate depends; for she has already parted with her entire interest for the current year. Is it to be secured to the person who is in the possession, who has hired or purchased from the life tenant, and who is still living? He is the very party who is to give the security for the hire, and therefore the provisions cannot have been intended for his benefit. The question is between him and the remainder-man. For whose benefit then is the hire to be secured? As it cannot possibly be for the benefit of the party who is required to secure the hire, it follows necessarily, that he must owe it to some other person; either to the original tenant for life, under whom he holds, or to the remainder-man. It cannot be to the original tenant for life, (Mrs. Cleary in this instance,) for she had long before disposed of all her estate in the slaves, and at the time of her death did not have the possession. Besides all this;

considering her as having hired the slaves to the defendant during the current year, (in which she died,) and the hire to have

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been outstanding and due, when she hired them, it was by a contract which would still be of force after her death, and her executors or administrators would have no right to modify that contract, or to call upon the hirer to give security, when the original contract of hiring did not impose that condition. The law would not, and could not, interpose for the purpose of giving to the contracts of deceased persons, a greater efficiency in the way of securing their fulfilment or payment, than they had stipulated for in their lives. The only alternative construction of this part of the Act is, to suppose that it means to secure to the remainder-man his fair proportion of the hire, during the year in which the tenant for life dies, and the remainder falls in. This, I think, is the plain, and indeed I may say necessary, implication of the words of the Act. And such is the judgment of the Court.

It is ordered and decreed, that the defendant do account to the complainants for the hire of the negroes, embraced in the marriage settlement deed of Samuel C. Graves, and Susan, his wife, and described in the schedule, from the death of the said Susan, on the 18th July, 1848, to the time when he delivered them to the complainants or their trustees. It is ordered that it be referred to one of the Masters, to take the account.

The defendant appealed, on the following grounds, viz:

1. That his Honor, the Chancellor, erred in ordering an account to be taken of the hire of the negro slaves purchased by defendant, at the sheriff's sale, as the life estate of Mrs. Cleary, from her death, on 18th July, 1848, until delivered up by defendant.

2. That the Chancellor erred in decreeing that the said negro slaves did not come under the provisions of the Act of 1789, in such manner as to entitle the purchaser of the life estate to hold them free from wages until the end of the year.

3. That the Chancellor erred in decreeing the complainants to be entitled to wages for the said negroes, from the death of the tenant for life, until delivered up by defendant, inasmuch as the said negro slaves were field negroes, engaged in the cultivation of the crop, at the time of the death of the tenant

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for life, *and as such should have been decreed to the purchaser of the life tenant's interest until the growing crop was made, without wages.

4. Because the decree was, in other respects, contrary to the correct construction of the Act of 1789, and to equity.

DeSaussure & Son, for appellant.

Munro, Brewster & Dunkin, contra.

DARGAN, Ch., delivered the opinion of the Court.

The duty of announcing the judgment of the Court, in this case, has been devolved upon me. I have fully discussed the questions, made in this appeal, in the circuit decree, and deem it unnecessary to add anything to the views which I have therein expressed.

It is ordered and decreed that the circuit decree be affirmed and that the appeal be dismissed.

DUNKIN, Ch., concurred.

JOHNSTON and WARDLAW, CC. We concur in the result. Our opinion is, that the case at bar does not fall within the Act of 1789, or either clause of it; but is a *casus omissus*; and that the rights of the remainder-man stand as at common law.

Appeal dismissed.

3 Rich. Eq. 225

THE SACKETT'S HARBOUR BANK v.
WALTER BLAKE and Wife et al.

(Charleston. Jan. Term, 1851.)

[1. *Corporations* ⚡235.]

By the general Act of New York, authorizing manufacturing incorporations, "for all debts due and owing by any such Company, at the time of its dissolution, the persons then composing such Company, shall be individually responsible to the extent of their respective shares of stock in the said Company, and no further;" the defendant had been a stockholder in such a Company, in New York, at the time of its dissolution, and the Company was then indebted to the plaintiffs; the Company being insolvent, and all other stockholders having paid debts of the Company to the extent of their liabilities, the plaintiffs filed a bill against defendant, seeking payment of their debt: *Held*,

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*1. That by the Act of New York, the defendant was liable, over and above the stock held by her, to a sum equal to the amount of the stock.

[Ed. Note.—Cited in *Parker v. Carolina Savings Bank*, 53 S. C. 591, 31 S. E. 673, 69 Am. St. Rep. 888.

For other cases, see *Corporations*, Cent. Dig. §§ 894, 895; Dec. Dig. ⚡235.]

[2. *Corporations* ⚡265.]

That, under the circumstances, plaintiffs could maintain their bill without joining the other stockholders as defendants.

[Ed. Note.—Cited in *Terry v. Martin*, 10 S. C. 266.

For other cases, see *Corporations*, Cent. Dig. § 1110; Dec. Dig. ⚡265.]

[3. *Corporations* ⚡235.]

That defendant was not liable to creditors for interest on the amount for which she was liable over and above the stock held by her.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 894, 895; Dec. Dig. ⚡235.]

Before Caldwell, Ch., at Charleston, June, 1849.

The decree of his Honor, the Circuit Chancellor, is as follows:

Caldwell, Ch. The bill states that the Sackett's Harbour Bank was incorporated by an Act of the State of New York, and was doing business in its corporate capacity before the year 1842. That in November, 1836, a charter of incorporation was granted by the same State to certain persons, constituting them a corporation, by the name of the Jefferson Woollen Company, which became a body corporate in law and fact, and commenced business as a corporation in the village of Dexter, in Jefferson county, in the said State; that Ann Stead Izard (who afterwards intermarried with Walter Blake) became a member of said corporation, which afterwards made two promissory notes for value received, one for four thousand dollars, payable to E. Kirby, or order, four months after date, at the Sackett's Harbour Bank, dated Dexter, May 26th, 1842, and signed by E. Kirby, agent, and endorsed by E. Kirby, Wm. Lord & Sons, Keyes & Hungerford; the other for one thousand dollars, payable to E. Kirby, or order, sixty-three days after date, dated Dexter, July 24th, 1842, signed by E. Kirby, agent, and endorsed by the same persons as the former. These notes were discounted at the Banking house of the plaintiffs, and endorsed by E. Kirby, and the amount thereof paid and advanced, less the legal discount, and afterwards when they severally became due, they were presented for payment and protested for non-payment. That in 1843, the real and personal estate and effects belonging to the Jefferson Woollen Company, were sold under execution against it, by the sheriff of Jefferson county, and the Company then and there become legally dis-

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solved. Several of the executions against the company have been returned by the Sheriff *nulla bona*, and the Company was then, and is now, altogether insolvent.

The general Act of New York, authorizing manufacturing incorporations, was passed 22d March, 1811, and provides, "that the stock of such Company shall be deemed personal estate, and be transferable in such manner as shall be prescribed by the laws of the Company; and that for all debts that shall be due and owing by the Company, at the time of its dissolution, the persons then composing such Company shall be individually responsible to the extent of their respective shares of stock in the said Company, and no further; and that it shall not be lawful for such Company to use their funds, or any part thereof, in any Banking transaction, or in the purchase of any stock of any Bank, or in the purchase of any public stock whatever, or for any other purposes than those specified in such instrument as aforesaid."

That the said Ann Stead Izard became a member of said corporation, in February, 1837, and subscribed for seventy shares, and

became a stockholder to that extent, (or seventy shares of the capital stock,) each share being then valued at one hundred dollars, and that she remained owner of the said shares, and a member of said Company, till the 8th of June following, when, in contemplation of a marriage with Walter Blake, she assigned and transferred the said seventy shares in the capital stock of said Company, amongst other property to John Julius Izard Pringle, and Benjamin Huger, in trust, to apply the income thereof to the joint use of Walter Blake and herself forever, and after the solemnization of said marriage, during their joint lives, with certain other limitations, &c. The said deed contains a proviso, that the trustees shall not be answerable for any losses or damages which may happen in the execution of any of the trusts, or in anywise relating thereto, unless the same shall happen by or through their wilful default respectively. That the contemplated marriage took place after the 8th of June, 1837, and the seventy shares were transferred

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to the trustees, who *therefore became, and were, members of the said corporation, and so remained until after the legal dissolution of the same.

The bill charges, that the trustees, or the said Walter Blake, and Ann Stead Blake, became and were liable to the plaintiffs for the amount of the said several notes, with the legal interest thereon. That the said Jefferson Woollen Manufacturing Company has no assets to pay plaintiffs' demands, and is hopelessly insolvent, and the plaintiffs have no means of procuring payment of the debt, but by seeking a remedy against the individual stockholders under the law of 1811; that plaintiffs have applied to the other stockholders of the Company for payment, and have been informed, that they have already paid to the other creditors of the Company the full amount for which they were liable; and the bill charges, that there is no other member of the corporation known to them from whom a recovery or contribution for their demand can be had, and that neither the said trustees, or Walter Blake, or Ann Stead Blake, have paid any demand of any creditor of the Jefferson Woollen Company, or have made contribution towards the same. The bill prays for a discovery as to the facts alleged, and for an account of the assets, and of the debts of the Company, and that the assets may, if any, be applied to pay the plaintiffs, and that plaintiffs' demand, or such part as may remain unpaid, may be paid by defendants according to their legal liability, and general relief, &c. The bill was filed 3d June, 1847. The answer of Walter Blake and Ann Stead Blake, his wife, states that they are strangers to the matters stated in the bill concerning the incorporation of the Sackett's Harbour Bank; that they are informed that the Jefferson

Woollen Company was incorporated under the provisions of the Act of the Legislature of New York, relative to incorporations for Manufacturing purposes, passed in 1811. That the seventy shares were taken in Mrs. Blake's name, and that she was governed by the advice of the late Gen. Eustis, who had intermarried with her aunt, in whose family she lived; that she had no information as to the condition of the Company, nor the liabilities attending the acquisition of stock

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therein, except it was *understood that the Company was duly organized by respectable persons, and that by the true construction of the Act, the members were liable for the payment of their several subscriptions, and no more. The defendants knew nothing of the relation between these corporations as debtor and creditor, except what they have learned from the statement of plaintiffs' bill. The defendants admit they intermarried on 16th June, 1837, and the fortune of Mrs. Blake was settled by being conveyed to the trustees for the uses of the marriage, and her interest in the Company was transferred to the trustees, but whether any certificate for her shares in the Jefferson Woollen Company, which were paid for out of her funds, partly before and partly after her marriage, were ever issued, they do not know; they do not know whether all the subscribers paid up their subscriptions; the dividends or interest have been received by defendants, or as they believe, by the trustees, on account of said shares. They have heard that the Jefferson Woollen Company has ceased after becoming insolvent, but they do not know what has become of the assets, nor what debts are owing by the Company, nor to what amount the members of the Company should contribute in order to pay off such debts. Neither do they know how much the several members of the Company have contributed, nor whether they have contributed equally or in proportion to their shares, in paying off the debts of the Company, though they are informed and believe, that one member of the Company, Mrs. Patience Izard, has paid a certain sum towards the debts of the Company, over and above her subscription; they do not know whether the plaintiffs have resorted to any other member of the Company for contribution, or received satisfaction from any member of the Company for their supposed liability to the debts of the corporation; nor the measure of such satisfaction; and if the plaintiffs have chosen to pass by the members of the Company, who are in their neighborhood, and single out these defendants to bear the whole burden of their claim, these defendants hope their rights may not be prejudiced by the election of the plaintiffs. Defendants do not admit,

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but deny, that the *members of the incorporation, called the Jefferson Woollen Com-

pany, by reason of any local or other law, or by changes made in the New York judiciary, are liable in their private characters for the debts of the Company, but if liable at all, they insist that the liability, according to the rules of equity and justice, is confined to the measure of a just contribution. They deny that the plaintiffs have shown any right to sue in this Court.

The material allegations of the bill have been established by the testimony of witnesses taken by commission, and the principal question is, is Mrs. Blake's estate, in the hands of the trustees, liable for the plaintiff's debt? At common law, it is a well settled principle, that the debts of a corporation must be paid out of the corporate fund, and that the individual members are irresponsible beyond the amount of their respective interests therein; this extraordinary privilege and protection to the members of a corporation, constitutes the distinguishing characteristic between them and the individuals comprising a partnership, but it is constitutional and competent for the Legislature, in granting a charter of incorporation, to prohibit and withhold this protection, and to make those who become members of the corporation liable for the debts of the body corporate.

The State of New York, in 1811, adopted a general law on the subject of incorporations for manufacturing purposes, and the Jefferson Woollen Company was incorporated under its provisions. The introduction of this new rule of responsibility, removed, in a great degree, the distrust of the community in such corporations, and gave additional security to their creditors, who, at common law, were left unpaid when the corporate funds were inadequate to discharge the debts. It would seem, that before the creditors can pursue their remedy under the Act, the corporation must be dissolved, as the individual members are only made liable "for all the debts that shall be due and owing by the Company at the time of its dissolution." The first inquiry is, has the corporation been dissolved? The question, as to what constitutes a dissolution, has often been considered and adjudged; when a corporation ceases to act, and indicates no intention to

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*resume their functions in a corporate capacity, when it becomes indebted for more than it is worth, and permits all its corporate assets to be sold, and executions against it are returned nulla bona, and becomes utterly insolvent, such acts would be sufficient to frustrate the object of its institution, and is equivalent to a surrender of its corporate rights. Although there be no formal judgment of ouster or dissolution pronounced, yet the acts of the Company have produced a practical dissolution, so that a creditor may maintain a suit against the individual stockholders, under the Act of 1811. All these questions have been repeatedly discussed and

decided, by the judicial tribunals of New York, and the construction which has there been given to the Act must govern us, unless it be palpably absurd or unconstitutional. The general comity that exists between States, to regard the construction that each State gives to its statutes, is founded upon both reason and policy; but we are bound to adopt that construction by a higher authority than mere courtesy; the Supreme Court of the United States has long since established the principle, that the decisions of the State tribunals respectively, in the construction of their statutes, shall uniformly be adopted; the propriety and expediency of this, is manifest in cases where the decisions of the State Courts become rules of property.

The only remaining inquiry is, what Court is entitled to exercise jurisdiction. This question has also been decided in New York, and the Court of Chancery has been held to be the proper tribunal. Independently of the more ample and adequate powers with which this Court is armed in cases of account, partnership contribution, and discovery, there is a peculiarity in this case that demonstrates that this Court ought to exercise jurisdiction; the individual member of the corporation against whom the remedy is sought, is a married woman, and her estate is in the hands of trustees under a marriage settlement, and can only be reached by proceedings in equity. From the evidence, it appears the defendants are liable to the creditors for the sum of seven thousand dollars, against which they are enti-

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tled to set off *the sum of twenty-three hundred and fifty dollars, (\$2350) to which must be added interest to the time of the dissolution of the Jefferson Woollen Company, on the 29th April, 1843. The defendants were creditors for this aggregate of principal and interest at the dissolution, and they are, therefore, only liable for the balance after deducting that amount from the seven thousand dollars, with interest from the 29th day of April, 1843. It is, therefore, ordered and decreed, that it be referred to the Master to ascertain and report the balance of principal and interest due to the plaintiffs, and that the said balance be paid by the said defendants out of the trust property of the marriage settlement aforesaid, to the said plaintiffs, in satisfaction of their demand, and that the defendants do pay the costs of this suit; the said costs to be allowed and paid out of the trust property aforesaid.

The defendants appealed, on the following grounds.

1st. That under the seventh section of the general manufacturing law of 1811, the members of the Jefferson Woollen Company were only liable to the extent of stock subscribed.

2d. That the plaintiffs had no right to

sue the defendants without joining all the stockholders.

3d. That the plaintiffs had no right to a decree against the defendants for any thing more than contribution, after the accounts necessary for the purpose had been stated.

4th. That the decree is erroneous in charging the defendants with interest on the sum of \$4,272, from 29th April, 1843, because neither the sum of \$7000 dollars, nor the balance of that sum, carry interest.

Petigru, for appellants.

Northrop, contra.

DUNKIN, Ch., delivered the opinion of the Court.

The Court concurs with the Chancellor that in giving construction to the Statute of 1811, the decisions of New York should be followed. It has been ruled by the Court of Errors in that State that "every stock-

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holder in a company of this description incurs the risk, under the Statute of 1811, of not only losing the amount of stock subscribed, but is also liable for an equal sum, provided the debts due and owing at the time of dissolution are of such magnitude as to require it;" and, again, "the statute declares their liability without reference to the amount they have paid in on their stock." *Briggs v. Penniman*, (8 Cowen, 387).

We think, too, that the state of facts disclosed by the evidence, authorised the complainants to maintain their bill, without joining the other stock-holders as defendants.

The question of interest presents more difficulty. Strictly speaking, no contract existed between the complainants and the defendants. The defendants are no parties to the notes, nor is their liability measured by the amount of those notes. The contract is with the corporation, which has an existence as separate from the individuals who compose it, as those individuals have from each other. The defendants might not have been members of the corporation when the debt was contracted, or when the notes were dishonored. They are rendered liable by the stringent provisions of the statute, and by nothing else. This fixes their liability, and measures the extent of it. "For all debts due by the company at the time of its dissolution, the persons then composing such company shall be individually responsible to the extent of their respective shares of stock in the said company, and no further." According to the construction given to this clause by the New York adjudications, this amounts, substantially, to a forfeiture of so much beyond the original subscription—so much beyond the contract of the parties, which was only to pay a stipulated sum according to the number of shares subscribed. But this extraordinary liability cannot be enforced, un-

less required for the satisfaction of the debts of the corporation. It cannot be exceeded, although ninety cents in the dollar of those debts remain unsatisfied. If the defendants had entered into a bond in the penalty of seven thousand dollars, conditioned to pay the debts of the corporation, or to do any other act, the recovery is never

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permitted to exceed the penalty. *Bonsall v. Taylor*, (1 McC. 503,) was the case of a common money bond, where this principle was recognized. And in *Strobel v. Large*, (3 McC. 112,) in an action on a bond for the performance of covenants, the verdict of the jury assessing damages beyond the penalty was set aside nisi. In both these cases, the penalty was to secure the performance of the party's own contract. The Statute of 1811 imposes a liability for the default of another, and expressly provides that it shall extend "no further." No recovery could be had against these defendants alone until it had been established that the corporation was dissolved,—that the debts were unpaid, and that the other stock-holders had paid in full to the extent of their liability. Those facts having been established, the complainants were entitled to a decree "to the extent of the shares of the stock held by the defendants, and no further." This was seven thousand dollars. But if they had been compelled to pay to other creditors, or had made advances to the company (according to *Briggs v. Penniman*) to the amount of five thousand dollars, only two thousand dollars could be recovered. The Master has fixed the amount already paid by the defendants, at twenty-seven hundred and twenty-eight dollars, leaving the sum of four thousand two hundred and seventy-two dollars as still due, in order to make up the sum of seven thousand dollars.

It is ordered and decreed, that the defendants pay to the plaintiffs, out of the trust estate, the sum of four thousand two hundred and seventy-two dollars, together with the costs of these proceedings; and that the decree of the circuit Court be modified accordingly. In all other respects the decree is affirmed.

JOHNSTON, DARGAN and WARDLAW, CC., concurred.

Decree modified.

3 Rich. Eq. *235

*ISAAC TELFAIR, Executor of Ann Timothy, Deceased, v. M. L. HOWE et al.

(Charleston. Jan. Term, 1851.)

[Wills ⚡863.]

Testatrix bequeathed as follows:—"I direct my executors to pay over the residue of my estate," &c. "to the American Bible Society of New York, and to the American Missionary

Society of New York, to whom I leave or bequeath it:" the American Bible Society of New York was a body corporate; and no such Society as the American Missionary Society was in existence or ever had an existence: *Held*, that the American Bible Society was not entitled to the whole of the residue; and that, as to the moiety intended to be bequeathed to the American Missionary Society, the testatrix had died intestate, and the same was distributable among her next of kin.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2187; Dec. Dig. ☞ 863.]

[Wills ☞ 627.]

If the American Bible Society of New York and the American Missionary Society of New York were both in existence, and were capable of taking an estate in joint-tenancy, by a proper construction of the terms of the bequest,—regard being had to the different objects of the two societies,—no such estate was intended to be created.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1452–1459; Dec. Dig. ☞ 627.]

[Corporations ☞ 434.]

A corporation cannot take an estate in joint tenancy, either jointly with another corporation, or with a natural person.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1770; Dec. Dig. ☞ 434.]

Before Dunkin, Ch., at Charleston, June, 1850.

Dunkin, Ch. By the 25th clause of Mrs. Ann Timothy's will, it is provided as follows, viz.:—"I direct my executors to pay over the residue of my estate, or bonds, or money, to the American Bible Society of New York, and to the Missionary Society of New York, to whom I leave or bequeath it."

The Master has reported that no such society is in existence, as the Missionary Society of New York.

The question is presented, whether the American Bible Society of New York are entitled to the whole of the bequest, or whether a moiety is not distributable among the next kin of the testatrix.

The testatrix seems, in former clauses of her will, to have disposed of the whole of her real estate, and from this circumstance, as well as from the terms of the gift, it is very clear that the bequest was intended to apply only to personalty.

In cases of joint tenancy, the general rule is, that if the devise fail as to one of the devisees, from its being originally void, or subsequently revoked, or by reason of the

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decease of the *devisee in the testator's lifetime, the other, or others, will take the whole. But the rule is different as to tenants in common, whose shares, in case of the failure or revocation of the devise to any of them, descend to the heir at law. (2 Jarman on Wills, 167). The rule is equally applicable to bequests of chattels, to money legacies, and residuary bequests, as to a devise of real estate, (*Id.* 159). But even in case of devises to individuals, the Courts have manifested a strong disposition to give such construction to the devise as would create a tenancy in

common; and "this anxiety (say the authorities) has been dictated by the conviction that this species of interest is better adapted to answer the exigencies of families than a joint tenancy." Any expressions importing division or referring to devisees as owners of distinct interests, or simply denoting equality, will have this effect. In *Marryat v. Townly*, (1 Ves. sen. 103,) Lord Hardwicke says: "It happens luckily to assist the Court, that the drawer of the will has inserted directions for the trustees to convey, and wherever there are such directions for the trustees in whom the legal estate is vested, the Court has held it in its power to mould it so as best to answer the intent of the testator." If there were no more in the case under consideration, the Court might be well warranted in the conclusion from the character of the donees, that when the testatrix directed her executors to pay over the residue of her estate, or bonds, or money, to the American Bible Society, and the New York Missionary Society, she intended the amount to be paid to them in equal proportions, for the purposes of their respective institutions, and that it was, therefore, a tenancy in common.

But I do not find that this doctrine has ever been applied to corporations. Littleton says "if lands be given to two men, and to the heirs of their two bodies begotten, the donees have a joint estate, &c.; but if lands be given to two Abbots, as to the Abbot of Westminster, and to the Abbot of St. Albans, to have and to hold, to them and their successors, in this case they have presently at the beginning, an estate in common, and not a joint estate. And the reason is, that

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every Abbot, before that *he was made Abbot, was but as a dead person in law, and when he is made Abbot, he is as a man personable in law only to purchase and have lands, or tenements, or other things, to the use of his house, and not to his own proper use, as another secular man may, and, therefore, at the beginning of their purchase, they are tenants in common; and if one of them die, the Abbot which surviveth shall not have the whole by survivor, but the successor of the Abbot which is dead shall hold the moiety in common with the Abbot that surviveth," &c. Co. Lit. Lib. 3, cap. 4, sect. 296.

In the Commentary, Lord Coke says,—"In this case of the two Abbots, in respect to their several capacities, albeit the words be joint, yet the law doth adjudge them to be severally seized." And the &c. of Littleton implies (he says) that the doctrine is equally applicable to every body, politic or corporate, whether regular or secular. They take in their politic capacity, and are tenants in common, because they are seized in several rights, &c. And so is the rule, if lands are

given to an Abbot and a secular man, they have an estate in common *causa qua supra*.

In Mr. Hargrave's note on these sections, he remarks, "Here joint words are construed to make several estates in respect of the several capacities of the donees. In a former part, vesting at several times, makes joint words to operate severally."

It was suggested in the argument, that these rules were only applicable to devises of real estate, and that such was the dictum of Lord Coke. It is true, Lord Coke says, if goods be granted to a bishop, or to an abbot and a secular man, they are joint tenants, because they take not in their politic capacity. But, says Mr. Hargrave, "in a former part, Lord Coke explains the reason of this to be, that no chattel can go in succession in the case of a sole corporation, no more than a lease for years to one and his heirs can go to heirs, but there are exceptions to this rule," &c. However this may be, it is very certain that the legatees in this case can take only in their corporate capacity, and fall directly within the reasoning of Littleton's text.

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*The joint words used in this bequest must, therefore, be construed to make several estates, in respect of the several capacities of the donees. Generally, a lapsed legacy falls into the residuum, but here, a part of the residuum itself is the lapsed legacy; in such case, as was held in *Page v. Page*, (2 Stra. 820,) it is regarded as undisposed of, and must go to the next of kin of the testatrix.

It is declared that the parties who are next of kin of the testatrix, as set forth and admitted in the pleadings, are entitled to the moiety of the residue of her estate, ineffectually bequeathed to the New York Missionary Society.

The defendant, the American Bible Society of New York, appealed from the decree, because, it is respectfully insisted, the Chancellor erred in so construing the will of Mrs. Timothy, as to declare that the parties who are next of kin of the said testatrix, are entitled to the moiety of the residue of her estate ineffectually bequeathed to the New York Missionary Society.

[For subsequent opinion, see 4 Rich. Eq. 254.]

Memminger, for appellant.
Porter, contra.

DARGAN, Ch., delivered the opinion of the Court.

The question made in this appeal arises under the 25th clause of Ann Timothy's will; which is in these words:—"I direct my executors to pay over the residue of my estate, or bonds, or money, to the American Bible Society of New York, and to the American Missionary Society of New York, to whom I leave or bequeath it." From the Master's report it appears, that no such society exists,

as the American Missionary Society of New York: and it has not been shewn, indeed it is admitted that no such society ever had an existence. On the part of the Bible Society it is contended, that the clause in question creates an estate in joint tenancy; and that there being no such society in existence as the American Missionary Society of New York, the said Bible Society is entitled to the whole legacy given in that clause by virtue of the *jus accrescendi*. The circuit decree negatives the construction, which would make the estate given in the 25th

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*clause, a joint tenancy, and from the circuit decree on this point, an appeal has been taken.

The estate in joint tenancy presents some of the most artificial rules of subtle distinctions of the ancient common law. It was once highly favored in England, (Master of the Rolls in *Morely v. Bird*, 3 Ves. 630) doubtless for reasons that were feudal in their character, and influential in their day; but which have long since ceased to operate. For whatever may have been the causes which led to the origin of this estate, or which recommended it to our rude and warlike ancestors of the feudal period, it is undeniable that, at this day, it has grown into disfavor in English and American Courts: more especially in Courts of Equity.

The learned Judge in the case already cited, says that "the ancient law on this subject still prevails. And unless there are words to sever the interest taken, it is at this moment a joint tenancy, notwithstanding the leaning of the Courts lately in favor of a tenancy in common. A legacy of a specific chattel, a grant of an estate, is a joint tenancy. It is true, the Courts, seeing the inconvenience of that, have been desirous, wherever they could find any intention of severance, to avail themselves of it: and their successive determinations have laid hold of any words for that purpose."

Many distinctions prevail in the Court of Equity, in reference to this estate, that are not recognized at law. Thus, where two or more persons are engaged jointly in trade, and have debts due to them as partners, though at law they are joint tenants, and, on the death of one of them, the legal estate, at law, vests in the survivors—in equity the right of survivorship is not allowed, and the survivors are obliged to account to the representatives of the deceased partner: or, if two persons purchase real estate jointly with the view of carrying on trade, it is in equity a case, not of joint tenancy, but of tenancy in common. *Lake v. Craddock*, (3 P. Wms. 158). And, if money is laid out jointly upon an estate held in joint tenancy, with a view

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to *its improvement, that, in this Court, is a severance, *Lyster v. Dolland*, (1 Ves. Jr. 434).

The common law institutions of property

have undergone many mutations in the progress of ages. Some of its harsher and most inconvenient rules have been abolished by the Legislative power: and others have been gradually and insensibly modified by the course of judicial decisions, and moulded so as better to conform to the convenience and sentiments of modern society. The most prominent, and I may say the most odious feature or incident of this estate (the right of survivorship) which in almost every instance defeats the intention of the testator, was abolished by our Act of Assembly of 1791. The Act did not abolish joint tenancy itself, but only this feature of the estate. It provided, in substance, that where two or more persons are seized or possessed of real or personal estate in joint tenancy, and one of them dies, the right of survivorship should not be allowed, but the share or interest of the deceased joint tenant should go to his heirs at law or legal representatives. This left the rules of the common law in force where the deceased tenant for life had not been seized or possessed in his lifetime. In *Herbement v. Thomas*, (Chev. Eq. 21,) the question turned upon the construction of the words "seized or possessed," which occur in the Act. The testatrix had given a legacy to six persons (her nieces) in words which, at common law, would have constituted them joint tenants. It happened that some of the legatees had died in the lifetime of the testatrix: and the question was, whether the survivors took the whole legacy by virtue of the *jus accrescendi*, or whether the shares of the deceased joint legatees lapsed under the provisions of the Act of 1791 into the residuary estate. It was clear, that at common law, where a devise or bequest is given to two in joint tenancy, and the devise or bequest fail as to one, from its being originally void, or from its being revoked by the testator, or from the death of one of the devisees or legatees in the testator's life, the right of survivorship exists, and the survivor takes the whole

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as joint tenant. *The decision of the Court was that, as the will was ambulatory until the testatrix's death, and no right or title could vest in the legatees until that event had occurred, they could not be considered as having been "possessed" of any estate under the will, and the case by a fair interpretation of the Act, could not be regarded as embraced within its provisions. This decision has recently been followed by that in *Ball v. Deas*, (2 Strodt. Eq. 24 [49 Am. Dec. 651]), where the same construction prevailed. The Act may, therefore, be considered as having received a settled interpretation in this particular. The Act of 1791, therefore, does not conflict with the claims advanced by the appellants.

I have before adverted to the tendency, or leaning, (as the phrase is) of courts in modern times,—particularly Courts of Equity,—

to avail themselves of any strong equitable circumstances, or of any words employed by the testator in his will, that would imply a severance, to give such a construction, as would make the estate a tenancy in common, and not a joint tenancy. It is always a question of construction, and the object is to get at the intention of the testator; which must, however, be done in conformity with established rules of interpretation. The right of survivorship, as I have said, in almost every instance defeats the intention, and if the Court can perceive, either in the words or implication of the will, an intention not to create a joint tenancy, it will carry that intention into effect. Thus, in *Marryat v. Townly*, (1 Ves. sen. 103, cited in the circuit decree), Lord Hardwicke, in construing an estate a tenancy in common, and not a joint tenancy, laid great stress upon the directions of the testator, that the trustees, in whom the legal estate was vested, should convey it to the devisees.—"Wherever," says his Lordship, "there are such directions for the trustees, in whom the legal estate is vested, the Court has held it in its power, to mould it so as best to answer that intent of the testator."

We will suppose the American Missionary Society of New York to have had an exist-

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ence. This testatrix believed so, *when she executed her will. When she, by the 25th clause, directed her executors to pay over the residue of her estate, &c. to the American Bible Society of New York, and to the American Missionary Society of New York, did she mean that they should pay it over to the two societies on their joint receipt and discharge? Or would the receipt of one, have been a discharge as against the claims of the other? I do not think the testatrix could have so intended. In what respect are directions for the executors to pay over, different, in their effect, upon the construction, from directions for trustees to convey? In the latter case, we have seen Lord Hardwicke holding, that such instructions entitle the Court to mould the construction "so as best to answer the intent of the testator."

The objects of the American Bible Society of New York, and of the American Missionary Society of New York, (supposing the latter to have existed,) were entirely different. The purpose of one was the distribution of Bibles; that of the other was the promotion of Missions. They could not co-operate in the same field of labor, and the same work of Christian and benevolent enterprise by the possession of a joint fund without a severance or division: or without departing from the objects of their organization. The testatrix must be considered as implying in her donation, that which would have been the immediate and inevitable result, if the fund could or had come into the joint possession of the two societies: namely, a divi-

sion or separation of their interests. In no other way could the fund have been dedicated to the use which the testatrix designated: and she ought to be considered as having intended a division in the first instance. Such would be my conclusion, if the two societies to whom the testatrix bequeathed the residuum of her estate, had been, by the common law, entitled to take, as natural persons are entitled to take in joint tenancy.

But there is another insuperable impediment in the way of law and authority to the success of this appeal. The Bible Society of New York is a corporate body. It is clear

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that, by the *principles of the common law, none but natural persons can take in joint tenancy. A corporation cannot take this estate, either jointly with another corporation, or with a natural person. The reason assigned in the early writers is, that they hold in different capacities and in different rights. Lord Coke, in his commentary upon the passage quoted in the circuit decree from Littleton, gives, very clearly, his views as to the reasons which gave rise to the distinction between natural persons and corporate bodies in this particular. He says—"The &c. in the end of this section implieth, that so it is, if any body politic or corporate, be they regular as dead persons in law (whereof our author here speaketh) or secular: as if lands be given to two bishops, to have and to hold to them two and their successors: albeit the bishops were never any dead persons in law, but always of capacity to take, yet seeing that they take this purchase in their politic capacity, as bishops, they are presently tenants in common, because they are seized in several rights: for the one bishop is seized in the right of his bishoprick of the one moiety, and the other is seized in the right of his bishoprick of the other moiety, and so by several titles and in several capacities: whereas joint tenants ought to have it in one and the same right and capacity, and by one and the same joint title." (Co. Litt. Lib. 3, cap. 4, sect. 296). Authorities to this effect might be multiplied to a great extent; I cite some of them. 2 Saund. 319; Justice Windham's Case, 5 Co. 8a; 2 Cru. Dig. 491; Finch, 83; Willion v. Berkeley, Plow. 239. A modern writer (2 Crabb on Real Prop. § 2311, m. p. 945) says, the Queen cannot hold an estate in joint tenancy. She is not seized in her natural capacity, but in her royal and politic capacity, in jure corone, which cannot stand in jointure with the seizen of the subject in his natural capacity. He asserts the same doctrine in regard to all corporate bodies. I doubt very much, if a single case, either English or American, can be adduced, where a corporation or body politic has been held to be seized or possessed of an estate in joint tenancy.

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*It is ordered and decreed that the appeal be dismissed, and the circuit decree rendered on the hearing at June Term, 1850, be affirmed.

JOHNSTON, DUNKIN and WARDLAW, CC. concurred.

Appeal dismissed.

3 Rich. Eq. 244

F. CROSSBY and Others v. ABRAM SMITH and Others.

(Charleston. Jan. Term, 1851.)

[Descent and Distribution ◊48.]

Testator bequeathed the whole of his personal estate to his wife for life, the same "to be equally divided, at my wife's decease, among all my children;" "one reserve I wish my executors to enforce; that is, if either of my lawful heirs should die, leaving issue behind them, before a distribution should take place, as I have before mentioned, for their issue or heirs not to come in for their parent's share of my property;" testator left eight children, three of whom died before the tenant for life, leaving issue. Held, that the issue of the three deceased children were not excluded by the terms of the will, but that they were entitled to the shares their parents would have taken had they survived the tenant for life.

[Ed. Note.—Cited in Tindal v. Neal, 59 S. C. 14, 36 S. E. 1004.]

For other cases, see Descent and Distribution, Cent. Dig. § 131; Dec. Dig. ◊48.]

[Descent and Distribution ◊48.]

A man may dispose of his property by will as he pleases; but if he makes no disposition of the property, he cannot exclude those, whom the law appoints to the succession, by a mere declaration that they shall not take.

[Ed. Note.—Cited in Seabrook v. Seabrook, 10 Rich. Eq. 505, 513; Beaty v. Richardson, 56 S. C. 188, 34 S. E. 73, 46 L. R. A. 517.]

For other cases, see Descent and Distribution, Cent. Dig. § 131; Dec. Dig. ◊48.]

Before Johnston, Ch., at Beaufort, February, 1850.

The decree of his Honor, the circuit Chancellor, is as follows.

Johnston, Ch. This is a very perplexing case, and arises out of circumstances, whose original obscurity has been greatly increased by the lapse of time.

Samuel Smith, the common ancestor of the litigating parties, died in the latter part of 1815, leaving a will, executed by him the 15th of September of that year, to which I shall hereafter advert, and leaving a widow, Sarah, and eight children, to wit: five sons, Abram, James, Charles, William and Benjamin; and three daughters, Nancy Mew, (a widow) Elizabeth, who intermarried with one Buler, and Mary, now wife of Dr. Dupont.

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*The testator was, at his death, possessed of a tract of land, containing about one thousand acres, and of about sixteen slaves, besides cattle and other personalty.

His will, which was attested by only two witnesses, and was, therefore, insufficient as to the land, was in the singular terms following:

"First. I give and bequeath unto my beloved wife, Sarah Smith, all my property, both real and personal, and stock of every description, which I was possessed of at my decease, during her natural life.

"Secondly. I give and bequeath unto my two youngest sons, Charles and James, one negro girl, by the name of Charista, her and her increase.

"Thirdly. I give and bequeath unto my three sons, Benjamin, Charles and James, the plantation and tract of land, whereon I did reside, for to be equally divided among the three; and the remaining part of my property to be equally divided, at my wife's decease, among all my children; excepting that I do reserve out of the last mentioned property, fifty dollars to my daughter, Elizabeth, and fifty dollars unto my daughter, Mary, as an equivalent for their not having had any land given them, over and above the others; on account of the others having land given to them, as William, Nancy, and Abram had.

"It is my will and desire, that all the property be kept together, during my wife's lifetime; (if her death take place before my youngest son, James, should arrive at the age of eighteen years, it is my will, that it should be kept together, until he arrives at that age); and then, the distribution to take place, as before mentioned.

"One reserve I wish my executors to enforce: that is, if either of my lawful heirs should die, leaving issue behind them, before a distribution should take place, as I have before mentioned, for their issue or heirs not to come in for their parent's share of my property.

"I do appoint my wife, my son, William, Abram Smith's my true and lawful executors to carry my said will into full execution, according to my will and desire."

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*The will was admitted to probate the 2d of October, 1815, and William Smith qualified as executor. Sarah Smith qualified as executrix, the 27th of November following, and took possession of the property, and continued in the possession of it until sometime in 1831. In that year, all the children of the testator being alive and of full age, a division was made of the negroes; though Sarah Smith, the widow, who was entitled to a life estate in them, was still alive. It was made by consent of all parties, though the terms of it are, as might very well be expected from the lapse of time, and the death of witnesses, quite obscure. It appears, however, that Charista and her children were first set aside, and divided by the two sons, Charles and James, between themselves. Then the grown slaves, Stephen, Rose, and Nelly, were set aside, and retained by the

widow. The rest were appraised by three persons, chosen for that purpose, and divided, with reference to their value, among the eight children of the testator.

The widow remained in the possession of the land, and the three negroes; who increased before her death to thirteen. On the 11th of September, 1844, she executed a voluntary deed, by which she conveyed Rachel, one of this stock, with her future increase, to George H. Smith, a son of her son, William, in trust, to permit her to have the use and profits of the property during her life, with an absolute reversion of it to himself upon her death. With this exception, she remained in possession of the slaves, retained by her in the division of 1831, with their increase, until the 2d of August, 1848, when she died intestate.

At the time of her death, all her children, who were also the children of the testator, were alive, except three of her sons, Charles, Benjamin and William, who predeceased her:—the first leaving five, and each of the other two, leaving six children.

Immediately before the death of the widow, Abram Smith, who had hitherto neglected to qualify under his appointment, as one of his father's executors, came from Alabama, where he resided, and on the 10th of July, 1848, (the month preceding his mother's death) qualified, and obtained letters testa-

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mentary: *and, upon his mother's death assumed control of the thirteen negroes in her possession at her decease, claiming them as parcel of his father's estate, and divisible under his will among his then surviving children, in exclusion of the issue of Charles, William and Benjamin, the three sons who died during the life of the widow and life-tenant.

James Smith, the other surviving son of the testator, took out letters of administration on his mother's estate, but represented the negroes as no part of it; and gave bond corresponding only to some inconsiderable articles of property, which he regarded as constituting the whole estate.

In this state of affairs, the children of the deceased sons, Charles, William and Benjamin, filed this bill against the surviving children of the testator.

The object is, to be let into a share of the thirteen slaves, with their increase, and also to a rateable share of their hire, since Abram Smith interfered with them; and to have partition of the lands.

There is no doubt about the latter. The will was not sufficient to extend to it, being attested by only two witnesses. The land is, therefore, intestate property, and the parties may, upon application, have a writ for the partition of it. Such I understood to be their impression at the hearing, and, therefore, nothing was said in argument upon the subject of the realty.

The contest related exclusively to the negroes.

The plaintiffs in this bill represent, that the division of 1831 was made under an agreement of the following character:—that the children were to take, and did take, the slaves allotted to them, absolutely, and in advance of, and by way of substitution for, the division which the will directed to be made at their mother's death; and that, in consideration of being allowed by her to have this anticipated enjoyment of their rights, they agreed, that she should retain the three negroes, left in her hands, as her absolute property in perpetuity. If this was so, there is no doubt, in my judgment, that the children being all of age at the time, were competent to make such a stipulation: and the

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*consequence must be, that the slave, conveyed to George H. Smith, was well conveyed, and that those, remaining in Mrs. Smith's possession, must be distributed among all the parties, as part of her intestate estate.

The plaintiffs further contended at the hearing, that, even if the slaves retained by Mrs. Smith did not become her absolute property, but remained as parcel of the testator's estate, they, as issue of the three deceased sons, were not effectually excluded from an interest in them.

All of the defendants, except Dupont and wife, insist, that by the partition of 1831, the slaves allotted to the children were intended to be, and were, vested in them absolutely; but that those retained by the widow were retained by her for life only, being merely reserved from the partition, and subject to be partitioned at her death under the will; which, they further contended, excluded the issue of pre-deceased children from participating in them.

Dupont and wife, while they agree that the children of William, Charles and Benjamin are excluded by the will, and the interest in the property confined to the surviving children of the testator, deny that any part of the property divided in 1831, was intended to vest absolutely in any of the parties, (widow or children) who received it; and contend, that all the property was to be brought back, and fully and effectually divided under the will upon the widow's death.

It is reasonable to suppose, indeed it is stated in some of the pleadings, that, in consequence of the unequal increase, and improvement in value, of the slaves received by the children, it may now be to the advantage of some of the parties to have a re-partition of them; and, hence the different grounds assumed by the defendants.

I shall first dispose of the construction of the testator's will.

Do the words of the will intend to exclude, and do they effectually exclude, the issue of such of the testator's children as died before the expiration of his wife's life estate?

I was, at the hearing, possessed of some

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such notion as this:—*that, by the words of the will preceding this very extraordinary clause, under which the issue are supposed to be excluded, a life estate is given to the widow, followed by a plain remainder to all the children, without any condition or contingency, and, therefore, importing to be a vested remainder in all of them. If such a remainder had been created, without more, the interest in it must have attached, upon the death of the testator, in all the children, all of whom were then alive; and upon their subsequent death, their shares would have passed by operation of law to their children, as an incident of the property given. This would certainly have been the result, if the extraordinary clause referred to had not been subsequently inserted in the will. The question, then, was upon the effect of that clause. It does not (in express terms at least) revoke the shares previously given to the children, or any of them. Nor does it limit the shares of any of them, who might happen to die before the period of division among them, to the survivors. But leaving their interests precisely in the condition in which they were placed by the words which created them,—it simply declares that their issue, whom the law declares entitled to their property, upon their death, shall not take it.

A man may give his property to whom he pleases; but when he does give it, he has no right to arrest the operation of the law upon the property as given. A man may dispose of his property as he pleases; but he has no right to say, that the law shall not operate, where, and so far as, he makes no disposition. A man may make a will, if he pleases, or let it alone; but if he makes one, it is active, only as far as it disposes of his property: it is inoperative where it attempts a repeal of the law, applicable to the dispositions actually made.

If a testator should content himself with a single clause, cutting off his heirs, (as the phrase is,) and declaring that none of his kin should have any of the property,—without declaring to whom it should go—his will would be simply nugatory, and no will. Being no legislator, his attempt to repeal the law would be a mere usurpation, and only innocent, because ineffectual.

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*There are many authorities upon this subject, if authority were needed. Some of them are referred to, I think, in *Hall v. Hall*. The subject is also slightly considered in the first report of *Gordon v. Backman*, where the testator, to fortify an attempted emancipation, and to take away the right of the next of kin to defeat it, cut them off by his will. The emancipation was judged of by the direct dispositions relating to it; and the next of kin, notwithstanding the attempt to exclude them, took the property.

But, though I have struggled to sustain the plaintiff's claim, I am afraid I should be going too far, if I were to apply this principle to this will. It is impossible to say, that the testator did not intend to exclude the issue. His words, though obscure and singular in many respects, are clear enough upon this point. The intention must prevail, if the law will allow it: and the construction must be upon the whole will, taken in at one view; and not upon its parts considered separately. Taking the clause referred to, in connexion with the preceding dispositions, I am reluctantly compelled to admit (but not without some hesitation) that the better construction of the whole is, that the children, intended in the prior clauses, were children who should survive the wife.

Then, it becomes necessary to consider the character of the division made in 1831.

What was the intention of the parties? Was it their intention to take any portion of the slaves divided on that occasion—either that allotted to the children, or that retained by the widow; and if so, which of these portions,—out of the operation of the testamentary clause, by which it was subject to division at the widow's death?

In the obscurity of the testimony, as to what was expressly agreed upon, it may be useful to look, in the first place, to the condition of the parties and of the property at the time, as represented by the witnesses.

It is said that the widow was ninety years old, or upwards, in 1848, when she died. She

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must, therefore, have been over *seventy, when this division of 1831 was made. It appears that most of the negroes were young, many of them incapable of laboring, and that the few, who by age were capable, either could not, or for want of a better control than their aged mistress was able to exert, would not, make crops adequate to the support of themselves and the young negroes.

It is natural to suppose that, under these circumstances, she should desire to be relieved of the supernumerary and unproductive slaves, and to retain the others—thus increasing their efficiency towards her own support.

Her children are represented to have been in circumstances, which, though perhaps not strictly needy, were far from warranting them in taking the young negroes, and assuming the expense of rearing them, unless they received them as their own property.

The division was effected (except as to Clarista—who, by-the-bye, had two children, at least, as clogs upon her,) by leaving the most efficient, and probably most reliable, negroes, in the hands of their aged mistress—as was said by some of the parties, "for her support:"—while the young and inefficient and expensive class were appraised, and divided among the children.

Not a witness is able to recollect any ex-

press agreement among the parties: and this observation applies as well to the only one of the three appraisers now living, as to the rest of the witnesses examined.

At this distance of time, what are we to make of this?

Are we to suppose that the children took, or would have taken, the young negroes, and incurred the expense and trouble, represented with so much probability of truth in some of the answers, of raising them—to be brought back at any uncertain time to be re-partitioned? If the negroes, which they got, were not to be charged to them as their own, why were they appraised?

In a transaction of this age, and where there is so little express testimony, and the parties have chosen to leave it in obscurity, when they might have made it clear, I think

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the *safest course is to hold them to have done, what it was prudent and natural for them to have done under the circumstances:—and I shall conclude, that the children took the negroes as their absolute property.

Were those retained by the widow, intended to be released to her, as her absolute property?

If her delivery of those which she gave up to the children, could, under the circumstances, be considered as a purchase of those which she retained—if she lost any thing by the transaction—we might be led to answer this question affirmatively. But it was a relief to her. She made every way by the transaction, though she retained the three negroes under the tenure, for life only.

These three were not valued. They were not brought into the division. They were simply retained. If none of them had been given up by her, all would have remained in her hands, subject to the will. Part were given up. In the absence of any stipulation, and in the absence of circumstances to render any change of tenure probable, what are we to conclude, but that those retained, were retained subject to the will?

My conclusion is, that Mrs. Smith never obtained any addition to her interest for life in the slaves left in her hands in 1831.

That her alienation of those, covered by the deed of 1844 to George H. Smith, was unauthorized and should be set aside; and that those slaves, together with those remaining in her hands at her death, are subject to partition among the children of the testator, who survived her: and it is so decreed; and let a writ go for the partition of them.

It is further ordered, that the writs of ne exeat and injunction mentioned in the pleadings, (if any were granted) be dissolved.

And that the parties have leave to apply for a writ for the partition of the land, as intestate property of the testator, among all his distributees.

Each party to pay his own costs,

The complainants appealed, on the following grounds.

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*1st. Because his Honor decreed that, by the partition of the negroes of the estate of Samuel Smith between his widow and children, the widow took only a life estate in the portion allotted to her, and that the same was distributable at her death amongst the surviving children of the said Samuel Smith, according to the provisions of his will: whereas, it is respectfully submitted, that by the said partition, the children surrendered whatever right they may have had, under said will, to the negroes allotted to the widow, Sarah Smith; that the same became her absolute property, and were distributable at her death, as her estate, of which she died intestate.

2d. Because his Honor decreed, that by the following clause of testator's will, "if either of my lawful heirs should die, leaving issue behind them, before a distribution should take place, as I have before mentioned for their issue or heirs not to come in for their parent's share of my property," the issue of such testator's children as died in the lifetime of the widow, were effectually excluded, and that the shares to which such children would have been entitled, were bequeathed to the surviving children.

Whereas, it is respectfully submitted, that there is no limitation to survivors in said will, and that said clause is simply nugatory and inoperative; and the issue of deceased children not thereby excluded.

3d. Because, it is respectfully submitted, that said clause of exclusion is void for vagueness, uncertainty and remoteness; and is contrary to the policy of the law.

4th. Because a distribution of testator's estate had taken place before the death of any of his children, with their consent, when they were of full age and free to contract; and the period limited in the said will, at which the said clause of exclusion was to take effect, had passed by before the death of any of testator's children.

5th. Because the decree of his Honor is, in other respects, contrary to law and the evidence.

F. W. Fickling, for appellants.
Treville, Martin, contra.

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*WARDLAW, Ch., delivered the opinion of the Court.

This Court is satisfied with the reasoning and conclusion of the circuit decree, as to the character of the partition made in 1831.

The remaining question in the case is, whether the will of Samuel Smith gives the residue of the estate to his surviving children, in exclusion of the children of his three sons who died after the death of the

testator and before the death of the widow, when the estate was to be distributed. The negroes retained by the widow in 1831, with their increase, constitute the subject of dispute: and the decision turns on the construction of the following clauses of the will:—"the remaining part of my property" (after the life estate in the wife, and some small legacies,) "to be equally divided, at my wife's decease, among all my children;" "one reserve I wish my executors to enforce, that is, if either of my lawful heirs should die, leaving issue behind them, before a distribution should take place, as I have before mentioned, for their issue or heirs not to come in for their parent's share of my property." The former clause, considered separately, plainly gives to all of the children living at the death of the testator, as tenants in common, a vested remainder, which, upon the subsequent death of any of the children would pass, not to the surviving children, but to the legal representatives of the children so dying. The latter clause, palpably manifests the intention of testator to exclude from all share the descendants of such of his children as should die before the period appointed for the distribution of his estate;—but it stops there. It contains no revocation of the shares previously given to the children dying before distribution, but rather recognizes their title by the use of the terms "their parents's shares." It does not give such shares to the surviving children, nor to any other person whatsoever. The language is simply that of negation and exclusion, and not of disposition. The expression of the purpose not to give to one person, imports no purpose to give to another. It is true, that the construction must be upon the whole will, and not upon the clauses consider-

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ed separately, but *the addition of a cipher makes no increase of the sum; and a clause, containing no gift, cannot transport a gift to another clause. According to this, the clauses, construed in connection, leave the objects of testator's bounty precisely as they were described in the former clause, unless the naked declaration in the latter clause, that those whom the law appoints to the succession shall not take, be effectual to exclude them. On that point the principle is well stated in the circuit decree: "A man may dispose of his property as he pleases, but he has no right to say, that the law shall not operate, where, and so far as, he makes no disposition." "Being no legislator, his attempt to repeal the law would be a mere usurpation, and only innocent because ineffectual." If a deed of settlement gave one a general power of appointment as to the estate settled, and provided that, in the absence of appointment, the estate should go to persons therein named: the title of these persons would not be defeated, if the only thing

In the shape of appointment, were the expression, by him having the power, of his dissatisfaction, however strong, that they should enjoy the estate. So the law authorizes a proprietor to regulate the disposition of his estate, after his death, by positive donations, but itself appoints to the succession, if he does not declare the objects of his bounty: and his disapproval, by itself, shall not defeat the operation of the law. Negative words do not amount to a gift.

In *Goodtitle v. Pugh*, (3 Bro. P. C. 454,) the will contained words of exclusion in reference to the son and heir, and others which were construed by the Court of King's Bench to be a disposition in favor of the persons who were next to the son in the line of descent,—yet the House of Lords determined that the son was not excluded.

In *Sibley v. Cook*, (3 Atk. 573,) Lord Hardwicke says; "If a man devises a real estate to J. S. and his heirs, and signifies or indicates his intention that if J. S. die before him it should not be a lapsed legacy, yet unless he has nominated another legatee, the heir at law is not excluded, notwithstanding the testator's declaration. So in the bequest

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of a personal *legacy to A. though the testator should show an intention that the legacy should not lapse in case A. die before him, yet this is not sufficient to exclude the next of kin." See *Elliot v. Davenport*, (1 P. Wms. 88).

In *Gordon v. Blackman*, (1 Rich. Eq. 63,) the testator, in pursuance of his purpose to emancipate his slaves, had expressly excluded his next of kin, and the Court said: "It is not in the power of a testator to oust his next of kin of their rights under the law of the land, but by giving another direction to his property by legal and valid provisions; as, for instance, by giving the property to some other person, or directing that it shall be employed for some lawful purpose inconsistent with the rights of his kinsman." The same doctrine was asserted in *Lanham v. Meacham*, (MS. Col. May, 1850) 4 Strob. Eq. 203.

We are led to the conclusion, that the Chancellor was right in the opinion entertained at the hearing: which he afterwards abandoned with reluctance and hesitation.

It is ordered and decreed, that a writ of partition be issued, to divide the land described in the pleadings, and the negroes retained by the widow, Sarah Smith, at the partition in 1831, with their increase, among the parties; so that the five children of Charles Smith shall take among them one-eighth part; the six children of Benjamin Smith among them one-eighth part; the six children of William Smith among them one-eighth part; and each of the five children of the testator one-eighth part: that the matters of

account be referred to the Commissioner: that the costs be paid out of the estate to be divided according to the interest of the parties: and that the circuit decree be so modified, and in all other respects be affirmed.

JOHNSTON and DUNKIN, CC. concurred.

DARGAN, Ch., absent at the hearing.
Decree modified.

3 Rich. Eq. *257

*Ex parte H. W. KUHTMAN, Adm'r. of L. C. A. Schepler.

(Charleston, Jan. Term, 1851.)

[*Public Lands* ⇨ 169.]

A grant takes effect from its date, and not from the time it is actually delivered to the grantee.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. § 504; Dec. Dig. ⇨ 169.]

[*Public Lands* ⇨ 169.]

In 1793, grants of certain lands were issued to A. and B. jointly, but were not delivered: A transferred his interest to B. and, in 1817, after B's death, the Legislature, by Act, directed the Secretary of State to deliver the grants to the representatives of B. which was accordingly done: *Held*, that the grants took effect from their date in 1793.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. § 504; Dec. Dig. ⇨ 169.]

Before Johnston, Ch., at Colleton, February, 1850.

In September, 1793, grants of the Walterborough, or Island Creek Lands, were made out in the names of Robert Goodloe Harper and James Booth Thompson, but were never delivered to them. On the 13th June, 1797, R. G. Harper transferred his interest in these lands to J. B. Thompson, who, in March, 1799, died intestate and without issue, leaving his widow, Elizabeth, who sometime thereafter intermarried with Hugh McBurney, and his father, James Thompson, his heirs at law. In December, 1799, James Thompson died intestate and without issue, leaving his widow, Ann Thompson, as one of his heirs, and his next of kin unknown. In December, 1817, the Legislature passed an Act, entitled "An Act to authorize and require the Secretary of State to deliver up certain grants in his office," in these words: "whereas, Hugh McBurney and Elizabeth McBurney, representatives of James Booth Thompson, deceased, have petitioned the Legislature, setting forth that the said James Booth Thompson and Robert G. Harper, Esquire, did, in the year 1793, obtain grants of certain tracts of land, lying and being on the waters of Island Creek, in the parish of St. Bartholomew's, which grants are yet remaining in the office of the Secretary of State, who does not conceive himself authorized to give them out:

"Be it enacted by the Senate and House of Representatives, now met and sitting in

General Assembly, and by and with the authority of the same. That the Secretary of

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State be, and he *is hereby authorized and required, to give out and deliver the said grants to the representatives of the said James Booth Thompson—provided, nevertheless, that nothing in this Act contained, shall be taken to deprive any other person or persons, of any legal right or title whatsoever: And, provided, also, that the said representatives of James Booth Thompson, shall, on the payment of fifty dollars for every acre lot, or a greater or less sum in proportion to the quantity of land held by any person or persons, now residing in the Village of Walterborough, convey to the person or persons so possessed of a lot or lots, a fee-simple estate to the same." (6 Stat. 78.)

The grants were delivered under this Act to Hugh McBurney and Elizabeth McBurney, both since dead. Extensive sales of the Walterborough or Island Creek lands were made some years since, by order of the Court of Chancery, and funds to a large amount, arising from such sales, were in the hands of the Commissioner. The petition in this case, prayed the appropriation of one-half of these funds as assets of the estate of James Thompson, towards the payment of a judgment of L. C. A. Schepler against James Thompson, established by a decree in "D. W. Johnson, et ux. et al. v. Charles H. Lemacks, administrator of James Thompson," filed with the petition.

On the coming in of the Commissioner's report, establishing the facts above stated, and after argument of counsel in behalf of the known representatives of James B. Thompson, who came in under an order of Court, directing proper parties to be reported, the Court made the following order.

Johnston, Ch. On hearing the report of the Commissioner in this case, and argument of counsel, on motion of Mr. Carn, solicitor for the petitioner, it is ordered and decreed, that one-half or moiety of the funds, in the hands of the Commissioner, reported as derived from the sale of the Walterborough lands, originally granted to James Booth Thompson and Robert Goodloe Harper, belongs to the estate of James Thompson, and is applicable to the payment of the judgment of L. C. A. Schepler, set up in the decree made in the case of D. W. Johnson

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*and wife et al. v. Charles H. Lemacks, administrator of James Thompson, referred to and filed with the pleadings in this case.

And it is further ordered, that the Commissioner do pay to the petitioner, H. W. Kuhlman, as administrator of L. C. A. Schepler, the said half or moiety of said funds belonging to the estate of James Thompson, as aforesaid, as well as one-half or moiety of

any other funds which may come into his hands, derived from the sale of the lands aforesaid, until said judgment, together with the interest which has accrued, or may accrue thereon, has been fully paid and satisfied, and that he pay the costs and expenses of this suit out of the fund.

And it is further ordered, that the Commissioner do receive from George Warren, late sheriff of Colleton district, any funds in his hands derived from sales of said lands, and apply the same as above directed; and that he is authorized and directed to commence suit on any bonds in his hands, given for any portion of said fund. That, applying one moiety of said fund to the judgment of L. C. A. Schepler, as aforesaid, he do invest the other moiety in bonds bearing interest from date, with good personal security, to await the further order of this Court. And it is further ordered, that an account be taken of all sums of money received by Eliza McBurney in her lifetime, for or on account of sales of any portion of the said lands made by her, and that the Commissioner report the state of the fund at the next term of this Court, together with any special matter.

The defendant appealed, on the grounds, 1st. Because the funds in dispute, form no portion of the estate of James Thompson.

2d. Because the decree of his Honor is otherwise contrary to law and equity.

Tracy, for appellant.

Carn, contra.

DUNKIN, Ch., delivered the opinion of the Court.

The only question presented by this appeal is, whether the grants to Robert Goodloe

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Harper and James Booth Thompson, *took effect from their date in 1793, or from their delivery to Hugh McBurney and wife, under the Act of 1817. This precise question was determined by the Constitutional Court in 1821, at Charleston, in the case of Hugh McBurney v. Alfred Walter.(a) It was there

(a) HUGH MCBURNEY V. ALFRED WALTER.

[Public Lands *§* 169.]

[Where a grant of land by the state is signed, sealed, and delivered to the secretary of state, to be delivered to the grantee, as provided by act of 1785 (2 Brev. Dig. p. 3), such a delivery is as valid in law as if made to the grantee himself.]

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. *§* 504; Dec. Dig. *§* 169.]

This was an action of trespass to try title. The plaintiff derived title under a grant to Robert Goodloe Harper and James Booth Thompson, dated in 1793; and which had been delivered to the plaintiff and his wife, under the Act of 1817. The defendant claimed by adverse possession anterior to 1817. Verdict for plaintiff and appeal by defendant.

January, 1821. COLCOCK, J. A motion for a new trial is moved for on seven grounds: but as the Court have determined the case on a single point, it is unnecessary to state them all. The Judge, in his charge to the jury, gave it as his opinion that the grant did not take

ruled, that the grants took effect from the date—that under the law, the Governor, after the great seal was affixed, “was empowered and directed to sign the same, and thereupon deliver them to the Secretary of State

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to *be delivered to the respective grantees, or their order.” “The grant then,” (concludes the Court) “after having been signed and sealed, was delivered to the Secretary to be delivered to the respective grantees, and such delivery is as valid in law as if made to the grantee himself.”

effect until the year, 1817, when it was delivered to the plaintiff by virtue of the Act of the Legislature, and this, it is contended, precluded the jury from considering the evidence of possession (offered by defendant) anterior to that time;—whereas, the grant ought to be considered as taking effect from the year 1793.

It was contended, on the part of the defendant, that the grant could not enure to the benefit of the grantees in 1793, because there was a condition precedent to be performed by them, viz:—paying ten dollars per hundred into the Treasury and the fees of office. That the grant had been withheld by the Secretary of State on these grounds, and that, therefore, there was no delivery until the year 1817, when the Legislature directed the Secretary to deliver it. In point of fact, there is no foundation for such argument, for there was no evidence that the grant was withheld from the grantees, consequently, no evidence of any reasons for withholding it; nor are any stated in the Act of 1817, and upon a reference to the Acts of the Legislature on the subject of granting lands, it will appear, that in the year 1793 there was no Bounty money (as it has been called commonly) required by the Legislature; nor do they make the payment of the fees a condition precedent to the completion of the grant. The first clause of the Act of 1791, repeals the Acts or clauses of Acts requiring money to be paid by the grantees, and declares that all vacant land shall be granted to any citizens applying for the same, on paying the fees of office. 2 Brev. Dig. § 333.

This grant was made in 1793, more than two years after the passing of the Act; but it is said the clause speaks of vacant land, and this land had been surveyed in the year 17—, for James Thompson, the elder, and is called appropriated land: but there is no such distinction recognized in any of the Acts upon the subject of granting lands, except for the period of six months, after the expiration of that time from the time of the survey.

The land is considered as vacant land by the 22d section of the Act of 1785, 2 Brev. Dig. 6. The first Act directing the mode of granting land in this State, passed in 1785, enacted “that any person making a survey of land, shall be allowed six months from the time of survey to obtain a grant, and, in default of obtaining the grant within that time, any person may, at the expiration thereof, apply for and obtain the grant for the said land on paying for it, and any grant obtained for land within six months from the time of its being surveyed, (except by the person for whom it is surveyed) shall be ipso facto null and void.” Here the period of six months from the time of survey had elapsed. Any person, then, according to the provision of the Act, might either obtain a grant on the first

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survey, or again run the *land and take out a grant. This land, then, in 1793, was, to all intents and purposes, vacant land. As to the delivery of the grant, that was also complete,

This decision was recognized and reaffirmed by the Court of Appeals at Charleston, in April, 1828, in the case of Simon Verdier v. Hugh McBurney.^(b)

for by the seventh section of the same Act, (2 Brev. Dig. 3) the mode of preparing and completing the grant is pointed out. The Surveyor General is required, on the return of entry and plat from the office of the Commissioner of Locations, to make out a plat, record and certify it; and then transmit it to the Secretary of State, who is required to make out the grant, affix the great seal to it, and within a given time, and on particular days, lay before his Excellency, the Governor for the time being, all such grants by him prepared as aforesaid, who is empowered and directed to sign the same, and thereupon deliver them to the Secretary of State to be delivered to the respective grantees or their order.

The grant then, after having been signed and sealed, was delivered to the Secretary of State, to be delivered to the grantees; and such a delivery is as valid in law as if made to the grantee himself.

The Court, then, being of opinion that the grant must be considered as taking effect from its date; and conceiving, that the expression of a contrary opinion, by the presiding Judge, may have induced the jury not to consider the evidence offered by the defendant of his possession anterior to 1817;—grant the motion for a new trial.

BAY, NOTT and JOHNSON, JJ. concurred. GANTT, J. dissented.

(b) SIMON VERDIER et al. v. HUGH MCBURNEY and Wife.

[Public Lands ⇐ 169.]

[Where grants to public lands were regularly laid out in 1793, and signed by the proper officers, but were not taken out of the office by the grantee in his lifetime, and for some reason not appearing were withheld from his administrator until 1817, when an act was passed directing their delivery to him in trust for the heirs of the grantee, the title nevertheless vested in the grantee from the date of the grant.]

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 504; Dec. Dig. ⇐ 169.]

In the Court of Appeals, 2d April, 1828, JOHNSON, J. It is conceded on all sides, that on the death of James Booth Thompson, without issue, his estate, in whatever it may have consisted, was, after the payment of his debts, distributable equally between his widow (the defendant, Mrs. McBurney) and his father, James Thompson; and that the complainants representing the heirs of the father, since deceased, are entitled to distribution of whatever may remain, and the object of the bill is for an account and distribution, so that the principal difficulty in the case consists in ascertaining what remains for distribution.

One enquiry is as to what real estate James Booth Thompson was possessed of at the time of his death.

The complainants claim title for him to the several tracts of land granted to him and R. G. Harper, jointly, in 1793, and in which Harper had released to him all his interest. The grants to these lands, it seems, were regularly made out and signed by the proper officers, but were not taken out of the office by J. B. Thompson in his lifetime, and, for some reason that does not now appear, they were withheld from Dr. McBurney, who married his widow, and in her right became administrator of the estate, until 1817, when an Act was passed directing their delivery to him in trust for the heirs of James B. Thompson.

The present village of Walterborough is situated on one of these tracts, which, it is said,

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*Neither of these decisions has been reported; and the want of acquaintance with them has probably occasioned subsequent misapprehension, and given rise to this appeal.

The motion to reverse the order of the Chancellor is dismissed.

JOHNSTON, DARGAN and WARDLAW, CC., concurred.

Appeal dismissed.

contained one thousand acres, and in this the defendants deny the complainant's right to partition, and claim title in the defendant, Dr. Burney, under a purchase made at sheriff's sale for twelve hundred dollars, under fi. fa. issued

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against the defendants as administrator and administratrix of James B. Thompson, at the suit of William Robertson, for the sum of forty-nine dollars.

The complainants resist this claim, on the grounds,

First. That the grants having remained in the office, nothing passed under them until they were ordered to be delivered by the Act of 1817, and that McBurney could hold only upon the terms of that Act, viz: for the benefit of the heirs of James B. Thompson; and, consequently, that they were not liable to be taken in execution for debts due by him.

This question was solemnly settled by the Constitutional Court (Judge Gantt dissenting) in the case of McBurney v. Walter, decided at January Sittings, 1821, but which, by some accident, appears not to have been published. [See ante, p. 260, note]. That was an action to try the title to the tract on which Walterborough is situated, and the question arose whether James B. Thompson took under the grant and from the date, or his heirs under the Act of 1817, and it was ruled that James B. Thompson had title from the date of the grant, and must be regarded as decisive of this question.

(Other questions were considered, and it was ruled that the sheriff's sale to Dr. Burney was void for actual fraud.)

NOTT and COLCOCK, JJ. concurred.

3 Rich. Eq. 262

T. C. SKRINE v. H. & W. WALKER.

(Charleston. Jan. Term, 1851.)

[Wills 639.]

Testatrix bequeathed as follows:—"I give, devise and bequeath unto my friend, M. H. my negro woman, Phillis, together with her future issue and increase, trusting that the said M. H. will fully comply with my wishes, respecting the said negro woman Phillis, and her children which may hereafter be born; and it is further my will and desire, that the said Phillis should be allowed to keep with her, and have the services of her child, Martha, during the lifetime of the said Phillis; and at her death, I give, devise and bequeath unto C. W. the said negro girl, Martha;" and the will contained a residuary clause: *Held*, that there was no such gift of the beneficial interest in Phillis to M. H. and of Martha to Phillis, as vested the legal title of Martha, during the life of Phillis, in M. H.;—that the effect of the will was to vest the legal title to Martha, during the life of Phillis, in the residuary legatee;—and that the recommendation, that Martha be allowed to at-

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tend and serve *Phillis, amounted only to an address to the benevolence and good faith of the residuary legatee.

[Ed. Note.—Cited in *Ford v. Dangerfield*, 8 Rich. Eq. 108.

For other cases, see Wills, Cent. Dig. § 1522; Dec. Dig. 639.]

The decisions in *Carmille v. Carmille*, (2 McM. 454,) and *McLeish v. Burch*, (3 Strob. Eq. 237,) will not be extended to cases where it was not the intention of the donor to bestow the beneficial interest, subject to a particular charge, upon the donee of the legal interest: *Semble*.

[*Slaves* 13.]

A slave, although a chattel, is also a person, and, to some extent, capable of the acquisition of property for the benefit of the master. But a privilege attending the person of a slave, or a trust for him, or an executory contract made with him, cannot be judicially established, either for the slave or his master.

[Ed. Note.—For other cases, see *Slaves*, Cent. Dig. § 59; Dec. Dig. 13.]

[*Specific Performance* 69.]

A bill will not lie, it seems, for the specific delivery of slaves, where the plaintiff seeks the delivery, not from the peculiar value of the slaves to himself which damages would not compensate, nor, indeed, for his own use, but for the accommodation of an old negro woman, herself a slave.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 201; Dec. Dig. 69.]

Before Caldwell, Ch., at Georgetown, February, 1848.

This case will be sufficiently understood from the opinion delivered in the Court of Appeals.

Mitchell, for appellants.

Wilkinson, contra.

WARDLAW, Ch., delivered the opinion of the Court.

The plaintiff, in this suit, seeks to compel the defendants to deliver to him two slaves, Martha, and her child, William.

The following statement will exhibit the facts upon which the questions in the case depend. Mary Vereen died in 1833, leaving of force her will, bearing date July 17, 1832, which was admitted to probate, November 1, 1833. This will contained the following clauses:—"I give, devise and bequeath unto my friend, Mary S. M. Hardwicke, my negro woman, Phillis together with her future issue and increase trusting that the said Mary S. M. Hardwicke will fully comply with my wishes, respecting the said negro woman, Phillis, and her children which may hereafter be born; and it is further my will and desire, that the said Phillis should be allowed to keep with her, and have the services of her child, Martha, during the lifetime of the said Phillis; and at her death, I give, devise and bequeath unto my great-grand-daughter, Catherine LaBruce Walker, the said negro girl, Martha, togeth-

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er with her future issue and in*crease, un-

der the same conditions." &c: and the will contained other clauses, by which it was provided, that if either of the great-grand-children of the testatrix (of whom the said Catherine, and the two defendants were alive at her death) should die before being married, and before attaining the age of twenty-one years, the property bequeathed to such legatee should go to the survivors; and the said three great-grand-children were made residuary legatees. The said Catherine died about the year 1839, then aged about ten years, and unmarried. The executor of Mary Vereen included Phillis and Martha in his inventory of the estate, but does not mention them in his subsequent returns; nor does it appear that he further intermeddled with them. Martha was from two to six years of age at the death of Mary Vereen, and she has since had issue, the slave, William.

Mary S. M. Hardwicke died about the beginning of the year 1837, leaving of force her will, bearing date before Mrs. Vereen's viz.—January, 23, 1831, but, apparently, not offered for probate until April, 1847, after the seizure of the slaves by defendants as hereafter mentioned: and this will makes the plaintiff executor and residuary legatee. It appears, by the testimony of four witnesses, that Phillis lived, for some time after Mrs. Vereen's death, with Mrs. Hardwicke; but after her death, if not sooner, Phillis lived in a house in Georgetown, which was conveyed to her husband, Ben, a negro who had also formerly belonged to Mrs. Vereen, and had passed into the ownership of Benjamin King, who paid taxes for him as a slave, but permitted him, in most respects, to exercise the privileges of a free negro. The plaintiff lived at Cape Romaine, and Eleazer Waterman was his agent at Georgetown, but neither plaintiff nor his agent exacted any wages from Phillis or Martha, nor exerted any act of ownership over them. Their taxes, as slaves, were paid by the owner of Ben. The wishes of Mary Vereen respecting Phillis, with which she trusted her friend, Mrs. Hardwicke, would fully comply, appear pretty plainly by the will itself to be, that Phillis should be held in nominal servitude only: And the acts of the parties place this beyond doubt.

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*The plaintiff, in his bill, which I suppose was sworn to, as an injunction was prayed for, states, "that the said Phillis having been a favorite servant of her former mistress, and being now aged and infirm, and standing in need of the aid and services of some younger person, the plaintiff had permitted her, from the death of his sister, Mrs. Hardwicke, her last owner, after the example of his said sister, and in compliance with the testamentary wishes of Mrs. Mary Vereen, her former mistress, to pass her life in exemption from labor, with the attendance of her

daughter upon her person, which he conceived himself bound in conscience and good faith to do, though a departure from his legal rights; and to this end he permitted them to live in Georgetown, without any requisition upon the labor of Martha, further than necessary to the support of the mother and infant child, also the subject of this suit." On 31st March, 1847, the defendants took possession of the slaves, Martha and William, and now claim them either as bequeathed to them by Mary Vereen, or under their seizure, as set free by the tenant for life of Phillis, in violation of the Act of 1800.

From this state of facts arise the questions, whether the plaintiff has shown good title to Martha and William: and, if this has been done, whether he has forfeited his title by any illegal attempt, on the part of himself or those under whom he claims, to emancipate the slaves: and, on the whole, whether this be a proper case for the extraordinary jurisdiction of this Court.

The process by which the plaintiff deduces title to the slaves is, that the will of Mary Vereen bequeathed the services of Martha to Phillis, for the life of Phillis,—that a gift of the services of a slave is a gift of the slave,—that a gift to a slave amounts to a gift to the owner of the slave,—that Phillis is given to Mrs. Hardwicke, subject only to an ineffectual trust or recommendation, which the legatee may or may not execute,—that the gift of Phillis carries to the legatee Martha, as an incident, for the life of Phillis; and that plaintiff has all the title of Mrs. Hardwicke. If one trusting to common sense could detect no flaw in this reasoning, he would still be reluctant to admit a conclu-

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sion, attained by adding deduction to deduction, and in utter conflict with the intention of the testatrix, and the policy of our law as to slaves. It is obvious that Mrs. Vereen in her will, makes no direct gift of Martha, for the life of Phillis, unless it be to the residuary legatees, the defendants; and that she was expressing a desire, likely to be onerous and not beneficial to the legatee, when she requested that Phillis might be allowed to keep her child Martha with her. It is equally obvious, whatever in this matter may be the decisions of Judges, the province of whom is to declare the law as it exists, and not to determine upon the policy of the State; that it is against the course of legislation amongst us, that slaves should be practically released from the dominion and oversight of their masters, and be permitted to exercise the privileges of free persons. Of this, the Acts of 1800, 1820 and 1841, afford conclusive evidence. Nevertheless, if the reasoning of plaintiff be legitimate, we must adopt this conclusion, whatsoever may be our regret. As to the bequest of Phillis to Mrs. Hardwicke, the decisions of our Court of

Errors in *Carmille v. Carmille*, (2 McM. 454,) and *McLeish v. Burch*, (3 Strob. Eq. 237,) establish the title of the legatee, if we may presume here, as in those cases was presumed, that it was the intention of the donor to bestow the beneficial interest, subject to a particular charge, upon the donee of the legal interest. These decisions, however, are not to be extended without grave consideration to other cases, not strictly within their doctrines. Our attention should always be directed to the inquiry, whether it was the purpose of the testator to give to the legatee the beneficial as well as the legal interest. The distinction pointed out by Lord Eldon in *King v. Denison*, (1 V. & B. 272), although nice is satisfactory. "If I give to A. and his heirs all my real estate charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose and nothing more; the effect of these two modes admits just this difference; the former is a devise of an estate of inheritance for the pur-

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pose of giving *the devisee the beneficial interest subject to a particular purpose; the latter is a devise for a particular purpose, with no intention to give him any beneficial interest. Where, therefore, the whole legal interest is given for the purpose of satisfying trusts expressed, and those trusts do not in their execution exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir; but where the whole legal interest is given for a particular purpose, with an intention to give to the devisee of the legal estate the beneficial interest, if the whole is not exhausted by that particular purpose, the surplus goes to the devisee, as it is intended to be given to him." This distinction is recognized by our cases. In *Carmille v. Carmille*, the distinction did not come under discussion, nor, I may remark in passing, could the doctrine of resulting trusts to the heir or next of kin, as to indefinite, inoperative or failing trusts, declared in *Morice v. Bishop of Durham*, (10 Ves. 521,) be applied in that case, which turned upon a deed *inter vivos*. Judge O'Neill, in delivering the judgment, properly says, "the case before us stands upon deeds executed, and taking effect, in the lifetime of the intestate, and the case must be considered as if the intestate was himself the complainant, asking that the deeds should be set aside; and a bill by one claiming to be relieved from his own act done in fraud of the law, could not be sustained."

In *McLeish v. Burch*, Ch. Caldwell, in the circuit decree, which, as is said in the ultimate decree, is not controverted on this point, remarks, "whenever the expressions manifest an intention that the donee is not to have the beneficial enjoyment of the subject of gift, they will bind the conscience

of the trustee, and will, in equity, effectually exclude his claim to any beneficial interest." "When a gift is conclusively and absolutely impressed with the character of a trust, the trustee will not, in any event, be entitled to the beneficial enjoyment, although the particular object of the donor's bounty becomes unable to take it." Again, in the final decree, he says: "If the testatrix had not bequeath-

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ed the slaves to any *one, but required her executors to perform the trusts by paying them their legacies, and permitting them to live free of service or wages, except what might be sufficient to pay their taxes, it would have constituted a very different case;" but, as the facts were, "there was nothing upon which the doctrine of indefinite and void trusts, when no personal benefit is bestowed on the executor, can operate, so as to create a resulting trust in favor of the next of kin."

In *Fable v. Brown*, (2 Hill Eq. 398,) where the estate was given to slaves, without any direct bequest to the executor, Ch. Harper states the question, "whether this can be regarded as a personal bequest to the executor, giving the property beneficially to him, and only depending on his friendship and good faith to deal with it as the testator recommends," and comes to the conclusion, that the estate was not given to the executor, and that neither master nor slave could maintain an action against the executor for the legacy given in the case. All of these cases, as the one before us, are without the operation of the Act of 1841.

The application of these doctrines to this case, is fatal to the plaintiff's pretension, that the gift of the services of Martha to Phillis, for the life of Phillis, amounts to a gift of Martha for the same term to the legatee of Phillis. The testatrix has not given, directly at least, any legal interest in Martha to Mrs. Hardwicke, and she intended for this legatee no beneficial interest in Phillis, much less in Martha. When Mrs. Vereen expressed the desire, "that Phillis should be allowed to keep with her, and have the services of her child, Martha," it was surely not her purpose to constitute Phillis proprietor of Martha, and a proprietor who could transmit title. The words of the will imply that some accommodation or indulgence, from Martha's company and attendance, was designed for Phillis, as a personal privilege to a favorite servant; but first to convert this privilege into full title, and then to transfer it to Mrs. Hardwicke, is to change the whole substance of the bequest, both as to subject and object. If the wife of my

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coachman, both slaves, should *become sick, during the casual absence of my neighbor, her owner, and I should write a note to his overseer, that the coachman might remain with his wife, and yield her any service;

could it be pretended that my neighbor had thereby received my bill of sale of the coachman? Yet that case does not differ from the one before us in principle. It is not controverted, that a gift of the use of an inanimate chattel, or of the services of an intelligent or sentient chattel, is generally a gift of the chattel: for the use and services of the chattel included all benefit that property in it can afford, and imply the intention of the donor to convey the property. He is the owner, who is entitled to all the advantages and attributes of owner. But unless the donee be sui juris, and capable of exerting dominion and enjoyment, as he cannot be entitled to the use and services, he cannot take the chattel itself, to which these cohere. A bequest of \$50 to the horse of another, that the horse might be supplied with wholesome provender, would be barren to the horse and his owner, although a bequest to the owner for the use of the horse, might be good.

A slave, although a chattel, is also a person, and, to some extent, capable of the acquisition of property, for the benefit of the master. But a privilege attending the person of the slave, or a trust for him, or an executory contract made with him, cannot be judicially established, either for the slave or his master. Chancellor Harper, in *Fable v. Brown*, presents the just view of this matter: "whatsoever chattels the slave acquires, he acquires for his master, and the master might maintain an action for them in the hands of a stranger. But an executory contract made with a slave cannot be enforced. No action could be maintained on a bond or note given to a slave." The bequest to Phillis here, is a voluntary and executory contract that she may have the society and service of her child, and is not an assignable interest. In fact, the legal interest in Martha is given to the defendants as residuary legatees, and the recommendation that she might be allowed to attend and serve Phillis, is addressed to their benevo-

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lence and good faith. We conclude that the plaintiff has not shown title to the slaves claimed in his bill.

This view supersedes the necessity of a full consideration of the question, whether, if the plaintiff had title to the slaves, his practical emancipation of them did not subject them to seizure under the Act of 1800. If these slaves, when seized by defendants, were not in that condition of dereliction by their proprietors, and irregular emancipation, intended to be prevented by the Acts of 1800 and 1820, it would be difficult to specify any case distinctly within the mischiefs and scope of the Acts; but we are restrained from any absolute determination on this point, which depends on the facts, by deference to the judgment of the Chancellor who heard the case on the circuit. The judgment

of a Chancellor, when exercising the functions of a jury, and settling the weight of testimony, from the manner and character of the witnesses, is entitled to the same respect from an appellate tribunal, as the verdict of a jury. The Chancellor in this case decides, that the slaves were not in the predicament exposing them to seizure, and we will not reject, however we may distrust, his conclusion from the evidence.

If both of the questions discussed, as to the title and seizure, had been decided in favor of plaintiff, we should still have refused to him the specific delivery of the slaves. This remedy is peculiar to this Court, and is to be exercised with sound, judicial discretion. The plaintiff here seeks delivery of the slaves, not from their peculiar value to him which damages would not compensate, nor, indeed, for his own service, but for the accommodation of an old negro woman; and we should have left him to his redress at law.

It is ordered and decreed that the circuit decree be reversed and the bill dismissed.

JOHNSTON and DUNKIN, CC., concurred.

DARGAN, Ch. I concur in the judgment of the Court in this case, but not in all the reasoning by which it is sustained. The gift of the use or services of a slave is equiv-

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alent to giving an estate in such slave, whether for life or in fee. Phillis was well bequeathed to Mrs. Hardwicke, as the bequest took effect before the Act of 1841 was passed. The gift of the services of Martha to Phillis for her life was a bequest of an estate in Martha to Phillis for her life. A gift to a slave operates as a gift to the master and vests the title in him. Mrs. Hardwicke was, therefore, entitled to both Phillis and Martha, under the bequests of the will. I concur in this decree, on the ground that there was a dereliction of these slaves on the part of Mrs. Hardwicke, their legal owner, and that the title was in the defendants as their captors under the provisions of the Act of 1800.

Decree reversed.

3 Rich. Eq. 271

THOMAS BARKSDALE et al. v. EDWARD GAMAGE et al.

(Charleston. Jan. Term, 1851.)

[*Perpetuities* § 4; *Wills* § 603.]

Testator devised as follows: 'I give, devise and bequeath to my daughters, M. and S. two lots of land.' &c. 'to be equally divided between them, and the heirs of their body. Should either of them die without an heir of their body, then to my surviving children and their issue.' Held, (1) that M. took a fee conditional in the moiety of the lots devised to her; and (2) that

the limitation over to the 'surviving children and their issue,' was void for remoteness.

[Ed. Note.—Cited in *Selman v. Robertson*, 46 S. C. 268, 269, 24 S. E. 187; *Dillard v. Yarboro*, 77 S. C. 231, 57 S. E. 841; *Holley v. Still*, 91 S. C. 495, 74 S. E. 1065.

For other cases, see *Perpetuities*, Cent. Dig. § 26; Dec. Dig. ⚡4; *Wills*, Cent. Dig. § 1354; Dec. Dig. ⚡603.]

[*Estates* ⚡7.]

An alienation, by tenant in fee conditional, before the birth of issue, does not prevent the reverter to the donor, if the issue, afterwards born, die in the life time of the tenant in fee conditional.

[Ed. Note.—Cited in *Dillard v. Yarboro*, 77 S. C. 231, 57 S. E. 841.

For other cases, see *Estates*, Cent. Dig. § 7; Dec. Dig. ⚡7.]

[*Estates* ⚡7.]

An alienation after the birth and death of issue bars the right of the donor in the reversion.

[Ed. Note.—Cited in *Graham v. Moore*, 13 S. C. 119; *Powers v. Bullwinkle*, 33 S. C. 303, 11 S. E. 971; *Holley v. Still*, 91 S. C. 495, 74 S. E. 1065.

For other cases, see *Estates*, Cent. Dig. § 7; Dec. Dig. ⚡7.]

[This case is also cited in *Du Pont v. Du Bos*, 52 S. C. 261, 29 S. E. 665, as an example of partition as the proper procedure in estates in fee conditioned, and cited and affirmed in *Holley v. Still*, 91 S. C. 487, 74 S. E. 1065.]

Before Dargan, Ch., at Charleston, February, 1850.

The decree of his Honor the circuit Chancellor, is as follows.

Dargan, Ch. Thomas Barksdale, by his will, dated the 22d day of May, A. D. 1800, inter alia, devised as follows:—"I give, devise and bequeath to my daughters, Mary and Sarah Barksdale, two lots of land, fronting East Bay and corner of Tradd street, to be equally divided between them and the heirs of their body; should either of them die without an heir of their body, then to my surviving children and their issue."

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*The property was subsequently divided between the two devisees, and that portion of it which fell to the share of Sarah Barksdale is the subject of this litigation. She intermarried with Charles Dewar Simons, (a) and there was an antenuptial marriage settlement between them, executed on the 25th September, 1807, by which she conveyed to George Edwards and Thomas Barksdale all her estate, including her undivided moiety in the two lots devised to her and Mary Barksdale, by the will of Thomas Barksdale, in trust, for the use and benefit of the said Charles Dewar Simons and Sarah Barksdale,

(a) Charles Dewar (or DeWar) Simons, M. D. was an eminent professor of Chemistry at the time of his death, in the South Carolina College, at Columbia. He was drowned on the 21st January, A. D. 1812, in passing through the Houghbook Swamp, below Granby, when the waters were unusually high, and was profoundly regretted by the whole State.

during their joint lives; remainder to the survivor for life, remainder to such child or children of the marriage as should be living at the death of the survivor, and on failure of issue living at the death of the survivor then to the survivor in fee. Charles Dewar Simons and Sarah, his wife, had issue, (a female child, born alive,) which lived but a few days, or hours; and afterwards, to wit, on the 21st January, 1812, Charles Dewar Simons died, leaving Sarah, his wife, surviving him, and without any issue then living.

On the 24th September, 1811, there was a partition of the two lots, between Sarah Simons and Mary Barksdale. On the 18th day of March, 1817, Sarah Simons contracted marriage with the defendant, Edward Gamage, and, previous to the solemnization thereof, conveyed, by a deed of marriage settlement, to George Edwards and Thomas Barksdale, in fee, all that lot, etc. being the property devised to her by her father's will, and the subject of this litigation, in trust, for the joint use of the said Edward Gamage and Sarah Simons, during their joint lives; remainder to the survivor for life, remainder to the child or children of the marriage, in fee; and in default of such children, to the survivor in fee. The said Sarah

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departed this life on *the 30th June, 1841, leaving the said Edward Gamage surviving her; but without leaving, or ever having had, any issue of the marriage between her and the said Edward Gamage.

The complainant, Thomas Barksdale, is the brother, and the complainants, Sabina Payne and Mary Barksdale, are the sisters of the deceased Sarah Gamage, and are the surviving children of the testator. The defendant, George B. Edwards, is the son of a deceased sister, Elizabeth Edwards, who was a daughter of the testator, and Elizabeth Hammond and Charles O. Hammond are the children of Mary Hammond, and grandchildren of Elizabeth Edwards, and, therefore, great-grandchildren of the testator, Thomas Barksdale.

The foregoing is a statement of the material facts, and the relationship and position of the parties. And the question for the judgment of the Court is, which of these parties are entitled to the estate, and in what proportions? This involves the inquiry, as to what estate Sarah Gamage took in this property, under Thomas Barksdale's will? The first question which appears to me to be proper for discussion is, as to the effect of the words, "and their issue," super-added to the intended limitation, in favor of the testator's surviving children. In personal property, a limitation to the survivors of living persons has the effect of qualifying the generality of a gift to the first taker, and his issue, or the heirs of his body; so as to make the first taker have a life estate, and

the issue, or heirs of the body, take as purchasers, by way of remainder. But where words of inheritance or succession are super-added to the limitation in favor of survivors, who are to take after a general failure of the issue of the first taker, such issue cannot take as purchasers. The ulterior limitation over, in such a case, would, itself, fall for remoteness, and, therefore, cannot impart such a restrictive modification to the words, heirs of the body, or issue, as to make them mean heirs of the body, or issue, living at the death of the first taker. 2 Fearné Con. Rem. (Smith's) m. p. 555. Massey v. Hudson, 2 Mer. 138. Postell v. Postell, Bail. Eq. 390. Where the limitation to survivors has

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the effect of reducing the estate *of the first taker to a life estate, and of making his issue purchasers, it must be to the survivors simply: as in *Stevens v. Patterson*, (Bail. Eq. 42.) *De Treville v. Ellis*, (Bail. Eq. 40.) It must appear that the testator contemplated that the survivor should succeed personally to the estate, and not take a transmissible interest.

The limitation in *Thomas Barksdale's* will can, then, have no effect upon the estate given to his daughter, Sarah. And the question recurs, what estate did she take? My opinion is, that she took a fee conditional, and I so adjudge. If the limitation intended by the testator to have been created in favor of his surviving children had been such as would have been valid as an executory devise, grafted upon a fee simple, then the question would have arisen, whether such an executory devise would be operative, when grafted upon a fee conditional. And I should have held that it would not, in conformity with my decision in *Buist v. Dawes* [4 Strob. Eq. 37], now before the Court of Errors. If the estate be once admitted to be a fee conditional, it must have the effect of cutting off all remainders and executory devises. Such an estate must expire upon its own natural efflux. It has certain characteristics inseparable from it, to destroy which would be to destroy the estate. Upon its natural termination, there must be a reverter to the donor, or his heirs. If there be issue born alive, capable of inheriting the estate, the tenant in fee conditional has the right of alienation. And if he does not alien, the estate must descend per formam doni. The two first of these attributes would necessarily be, and the third might be, destroyed by allowing a remainder or an executory devise to be limited upon a fee conditional. And this would be to destroy the only distinguishing marks which the estate possesses. But this question does not necessarily arise, and I pass on.

Mrs. Sarah Gamage took a fee conditional, under the will, and by her first marriage she had issue, born alive, capable of inheriting the estate. This event entitled her to alienate the estate. There were two alienations

by her, for valuable consideration—for I regard both the deeds of marriage settle-

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ment in that light. One of these was before, and the other after the birth of issue. The latter was after the issue had died. An alienation, either before or after the birth of the issue, is sufficient to bar the rights of those are to take per formam doni, and to make the title of the purchaser valid. But if the alienation is before the birth of issue, and then the issue die before the tenant in fee conditional, who has alienated, or if the alienation be after the birth and death of the issue, this does not prevent the reverter to the donor. Bac. Abr. Tit. Estate in Tail: Plow. 241; 1 Cruise Dig. S3; 1 Coke, (by Thomas) 510.

The only question which I am to consider is, whether the husband, Edward Gamage, is entitled to hold and enjoy, as tenant by the courtesy, this estate, of which his wife was seized during their marriage, as a tenant in fee conditional. This last is an estate of inheritance, and courtesy will attach upon it where the necessary conditions exist. "When a man marries a woman seized at any time during the coverture, of an estate of inheritance in severalty, in coparcenary, or in common, and hath issue by her born alive, and which might, by possibility, inherit the same estate as heir to the wife, and the wife dies in the lifetime of the husband, he holds the lands during his life, by courtesy." 4 Kent's Com. 27; Paine's Case, 8 Coke, 67. Charles Dewar Simons might, if he had survived his wife, have held this estate by the courtesy; but the defendant, Edward Gamage, not having had issue by his wife, is not entitled to set up any such claim.

The decree of the Court is, that the real estate described in the pleadings reverts to the right heirs of the testator, Thomas Barksdale, to be divided among them, jure representationis. It is further ordered and decreed, that the said estate be divided into four equal parts, and that the complainants do each take one of the said four equal parts; that the remaining fourth part be again divided into two equal parts, one of which is to be assigned to George B. Edwards, and the other to Elizabeth Hammond and Charles O. Hammond, equally to be divided between them.

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*It is further ordered and decreed that the defendant, Edward Gamage, account for the rents and profits of the said real estate, from the death of the said Sarah Gamage, to wit, the 30th June, A. D. 1841, and that it be referred to one of the masters to state the account.

It is further ordered and decreed, that the rents and profits be divided among the heirs of the testator, in the same manner and proportions as the corpus of the estate is herein directed to be divided.

The defendant, Edward Gamage, appealed, upon the following grounds, viz:

1. That his Honor, the Chancellor, erred in ordering an account of the rents and profits, received by Edward Gamage since the death of Sarah Gamage, and in ordering a partition of the premises among the right heirs of Thomas Barksdale, the testator.

2. That the Chancellor erred in decreeing that Mrs. Sarah Gamage did not take a fee simple in the said premises, upon the birth and death of an heir of her body.

3. That the decree was, in other respects, contrary to the correct construction of the testator's will, and to equity.

DeSaussure & Son, for appellant.

Yeadon & Macbeth, contra.

DARGAN, Ch., delivered the opinion of the Court.

From the view which the Court has taken of this case, it is unnecessary to discuss some of the questions which have been elaborately argued at the bar. The construction given to the will of Thomas Barksdale, is believed to be correct. The limitation over to the testator's surviving children, in the event of Mrs. Gamage dying without issue, is void for remoteness. The words, "and their issue," superadded to the devise in favor of the surviving children, indicates an intention, on the part of the testator, not to confer a personal benefit on the survivors as such: but that if they should be dead on the failure of the issue of Mrs. Gamage, the issue of his surviving chil-

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dren should *represent them and take the estate in that event. This is an attempt to create an estate in remainder, to take effect after an indefinite failure of issue, and after the natural efflux of the precedent estate of inheritance devised to Mrs. Gamage. The limitation to the surviving children of the testator is void for remoteness, and the devise to Mrs. Gamage (Sarah Barksdale) stands unaffected by it. The devise, then, is to her, and the heirs of her body: the technical import of which words is to create a fee conditional. No more appropriate and significant words could have been employed for that purpose. For a fee conditional is defined to be "a fee restrained to some particular heirs, exclusive of others: *donatio stricta et coarctata*; *sicut certis hæredibus, quibusdam successione exclusis*: as to the heirs of a man's body, by which only his lineal descendants were admitted: or to the heirs male of his body, in exclusion both of collaterals and lineal females also." 2 Bl. Com. 110.

There is no objection, whatever, in point of policy, to the estate in fee conditional. I think it subserves a useful purpose. At all events, it is in no disfavor. It is only within a recent period, however, that it has been recognized by judicial authority to ex-

ist in South Carolina. No earlier case exists in which such estates were so recognized than Jones ads. Postell & Potter, (Harp. 92, A. D. 1824). Beyond this period, we may appeal in vain to our Reports and judicial records for any decision or discussion illustrative of the rules and principles which govern these estates. In the mother country, they were abolished, or so modified, by the statute *de donis conditionalibus*, as to deprive them of all those distinctive attributes which they possessed at common law. This celebrated statute, so important in its bearing upon the institutions of landed property in England, and, I may say, upon the form of Government and the political destiny of that great country, was passed 576 years ago. The great body of the common law, in all its ponderous and majestic proportions, has been built up by judicial decisions and the commentaries of eminent jurists since that period. Subsequent to that time, there has

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been but little discussion in English *courts, and in the works of English writers upon law, on the subject of estates in fee conditional: because, with the exception of estates by copyhold tenure, (to which the statute *de donis* did not apply,) no such estates exist in their system of jurisprudence. For this reason, we have only the scanty materials afforded by the early common law writers, to throw light upon this subject, whenever a question like the present arises in our courts. The information, however, which we derive from this source, slight as it is, is sufficient to enable the Court understandingly to decide the question now before it.

Mrs. Gamage, (then Sarah Barksdale) by the will of her father, Thomas Barksdale, being seized of an estate in fee conditional, and being about to contract matrimony with Charles Dewar Simons, on the 25th day of September, A. D. 1807, conveyed the said estate in fee to trustees, to the uses of her marriage settlement, which she entered into with the said Charles Dewar Simons. The marriage was shortly afterwards duly solemnized; and there was issue of this marriage, namely, Mary Moncrief Simons, who was born about the 20th July, 1808, and lived only a day or so after birth. On 21st January, 1812, Charles Dewar Simons died, without leaving issue, and leaving his wife, Sarah, (afterwards Mrs. Gamage) surviving him. On this event (it was provided by the terms of the deed of marriage settlement,) the trustees were to stand seized of the estate, for the use of Mrs. Simons in fee. The statute of uses having executed the use in her, she was again vested with the legal title in the estate.

On the eve of her second marriage (with the defendant, Edward Gamage) she, by a deed of marriage contract, again conveyed the estate to trustees to be held for the joint

use of the said Edward Gamage and Sarah Simons, his intended wife, during their joint lives; remainder to the survivor; remainder to the children of the marriage in fee; and, in default of such child or children, to the survivor of the principal parties to the contract in fee. On the 30th June, 1841, Mrs. Gamage died, without having had issue by

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her second marriage, and *leaving the said Edward Gamage surviving her. And the said Edward Gamage, who is one of the defendants, claims the whole of the estate in fee, by virtue of his survivorship according to the terms of the deed of marriage settlement.

The conveyances of Mrs. Gamage, in the way of marriage settlement, were, each of them, to all intents and purposes, an alienation, in a manner and form which would not only cut off the descent per formam doni to her own issue, but would defeat the reverter to the testator and his heirs: Provided that, under the circumstances of the case, she had the right to convey the fee. In the circuit decree, I held this language: "An alienation, either before or after the birth of issue, is sufficient to bar the rights of those who are to take per formam doni, and to make the title of the purchaser valid. But if the alienation is before the birth of issue, and then the issue die before the tenant in fee conditional who has alienated; or if the alienation be after the birth and death of issue, this does not prevent the reverter to the donor." The first proposition in the preceding sentence is true, and is well sustained by the authorities: namely, that where the alienation is before the birth of issue, and issue is subsequently born and dies during the life of the tenant in fee conditional, the reverter of the donor is not thereby prevented. But the proposition which asserts, that the same result follows, in a case where there is issue born which dies, and there is an alienation after the birth and death of such issue, is not so sustained, and was founded upon a misconception of the state of the authorities upon this subject. The distinction is nice, and, apparently, arbitrary: but yet is found to be in harmony with the general rules of law in regard to estates upon condition. On reference to these rules, and upon a careful examination of the authorities the conclusion is, that where there is an alienation before the birth of issue, the subsequent birth and death of issue, does not defeat the right of the donor in the reversion. Hence the first deed of marriage settlement was inoperative for this purpose. But where the alienation is subsequent to the birth and

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death of issue, as in the case of the *last

deed of marriage settlement, the question presents itself in a different aspect.

Under the purely military system of tenures, that existed under the earlier Kings of the Norman dynasty, all fiefs were granted for the life of the feudatory only (2 Bl. Com. 55). In process of time they were extended beyond his life: and at length to the heirs of his body: and, in some instances, to his heirs general. The fee conditional is a remnant of these earlier tenures. "It was called a fee conditional, by reason of the condition expressed or implied in the donation of it, that if the donee died without such particular heirs," (of his body) "the land should revert to the donor." But if he had such heirs "it should remain to the donee," (2 Bl. Com. 110). "Now we must observe" says Sir William Blackstone, (2 Com. 110) "that when any condition is performed, it is thenceforth entirely gone; and the thing to which it was before annexed, becomes thenceforth absolutely and wholly unconditional." So that, as soon as the grantee had issue born, his estate was supposed to become absolute, by the performance of the condition; at least for these three purposes:—1. To enable the tenant to alien the land, and thereby to bar not only his own issue, but also the donor of his interest in the reversion: 2. To subject him to forfeit it for treason; which he could not do, till issue born, longer than his own life: 3. To empower him to charge the land with rents, &c. The fee conditional, it would thus appear, (to the extent laid down in the passage cited) is not different from other estates on condition; in regard to which, a fundamental rule is, that when the condition is once performed, it is thenceforward gone forever.

Mrs. Gamage having had issue by her first marriage with Charles Dewar Simons, had thus performed the condition annexed to her estate, before her alienation of it by her deed of marriage contract with Edward Gamage. By this deed, the land was conveyed to trustees, to be held for the use of Edward Gamage in fee, upon the condition of his being the survivor, and there being no issue of the marriage. This contingency has happened. The statute has executed the use

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in him, and he is *the sole proprietor of the land, the partition of which is sought in the bill.

It is ordered and decreed that the circuit decree be reversed, and that the bill be dismissed.

JOHNSTON, DUNKIN and WARDLAW, CC. concurred.

Decree reversed.

3 Rich. Eq. 281

GEORGE BUIST, Adm'r James D. Sommers,
v. HUGH P. DAWES and J. I. WARING,
Ex'ors John W. Sommers, and Others.

(Charleston. Jan. Term, 1851.)

[Wills ⚡587.]

Testator, after disposing specifically of some few articles of insignificant value, gave several small pecuniary legacies, concluding as follows: "and all the rest of monies coming to me from the estate of my father, or from any other quarter, I give and bequeath to" J. S.; there was money, and nothing else, coming to testator from the estate of his father; *Held*, that the above residuary clause embraced only monies due to testator, and did not embrace a contingent interest in lands and negroes.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1282; Dec. Dig. ⚡587.]

[Appeal and Error ⚡1180.]

Defendant, in whose favor a circuit decree had been pronounced, and from which an appeal was pending, consented that the bill should be amended, so that an objection to the decree, not taken on the circuit, might be considered in the Court of Appeals; the Court of Appeals remanded the case to the Circuit Court, that the matter might first be considered there; *Held*, that the order remanding the case, virtually opened the circuit decree, and that defendant, on an appeal from the next circuit decree, could not claim the benefit of it as a subsisting decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4658; Dec. Dig. ⚡1180.]

[Election of Remedies ⚡1.]

Wherever two rights are alternatively created, or given, either in express terms, or by construction, the party to whom they are given is entitled to only one of the two, and must elect between them; but after he has made his election he is bound, and will not be allowed to elect again, unless he can shew some equitable circumstances entitling him to retract the choice he has made.

[Ed. Note.—Cited in Powers v. McEachern, 7 S. C. 300.]

For other cases, see Election of Remedies, Cent. Dig. § 1; Dec. Dig. ⚡1.]

[Election of Remedies ⚡14.]

If the two rights are legal rights, after an election has been made, (and it is sufficient to constitute such an election at law that one has been taken, though it was not taken as an alternative, or by way of choice between the two,) it operates as a complete legal bar by way of estoppel against the claim of the alternative.

[Ed. Note.—Cited in Glover v. Glover, 45 S. C. 55, 22 S. E. 739.]

For other cases, see Election of Remedies, Cent. Dig. § 16; Dec. Dig. ⚡14.]

[Descent and Distribution ⚡67.]

The right to dower and thirds are both legal rights, and the acceptance of one (whether intended as a waiver of the other or not,) is a bar, at law and in equity, to the claim of the other.

[Ed. Note.—Cited in Evans v. Pierson, 9 Rich. 12; Glover v. Glover, 45 S. C. 54, 22 S. E. 739; Lavender v. Daniel & Harmon, 58 S. C. 137, 36 S. E. 546; Kennedy v. Kennedy, 74 S. C. 545, 54 S. E. 773.]

For other cases, see Descent and Distribution, Cent. Dig. § 202; Dec. Dig. ⚡67.]

[Descent and Distribution ⚡67.]

A party will not be allowed to retract an election once made, unless upon grounds of

equity shown to exist, by evidence inherent in the circumstances or extrinsic.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 205; Dec. Dig. ⚡67.]

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[Descent and Distribution ⚡67.]

*In 1819 J. S. died intestate, leaving a widow; at his death he was in possession of an inconsiderable estate, and was considered insolvent, but had a contingent interest in a large estate; in 1820, the widow recovered a sum of money in lieu of dower in a plantation, of which J. S. had been seized; the widow afterwards died, and, in 1848, the contingent interests of J. S. became vested,—and, on bill for settlement of his estate, the representatives of the widow claimed her distributive share thereof;—*Held*, that the acceptance of dower by the widow in 1820, was a bar to the claim.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 205; Dec. Dig. ⚡67.]

[Descent and Distribution ⚡67.]

Held further, that the representatives of the widow were not entitled to retract the election made in 1820, and take her distributive share,—making compensation for the dower received.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 205; Dec. Dig. ⚡67.]

Before Dunkin, Ch., at Charleston, June, 1850.

For a full understanding of this case, as now reported, reference must be had to the first decision in the case, as reported 4 Strob. Eq. 37.

Dunkin, Ch. It has been heretofore adjudged, that on the demise of John W. Sommers in January, 1848, without issue living at his death, the complainant, as the legal representative of James D. Sommers, deceased, was entitled to the personal property which passed under Edward Tonge's will. It was also in proof, that at the death of James D. Sommers, in 1817, intestate, his estate, under the Act of 1791, was distributable as follows, viz.: one moiety to his widow, Susan B. Sommers, and the other moiety equally between his brother, John W. Sommers, and his sisters, Henrietta Rowand and Mary Buist.

Thomas R. Waring, one of the defendants, is the administrator of Susan B. Sommers, afterwards Susan B. McDow, deceased. The circuit decree had directed a distribution of the personal estate among such persons as answered the description of distributees of James D. Sommers, at the time of his death, or their legal representatives. This established or declared the right of Thomas R. Waring, as administrator, to one moiety of the estate.

Subsequently an amended bill was filed, by consent, in which it was suggested, that the legal representative of Mrs. McDow, formerly the widow of James D. Sommers, was not entitled to any portion of this prop-

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erty, inasmuch as she had claimed and *had been allowed her dower in his real estate.

Upon the death of her husband, a widow is entitled either to claim her common law right of dower, or to take the provision made for her in lieu of dower, by his will, if he died testate, or the share allotted to her by the Act of 1791, if he died intestate. In either case, the widow has her election. She is entitled to a full knowledge of the condition of the estate before she shall be required to elect. And so liberal has been the construction of the Court, that, in a case of peculiar circumstances arising on the Duke of Montague's will, the House of Lords decided that this right of election lasted fifty years. *Beaulieu v. Cardigan*, (6 Bro. P. C. 232.) Although a party has actually made an election, yet if the choice has been made in ignorance of the real estate of the funds or under a misconception of the extent of the fund elected by him, such election shall not be conclusive on him. (2 Storey's Eq. § 1098.)

The Act of 1791 expressly declares, that the provision therein made for the widow, shall, if accepted by her, be considered as in lieu of, and in bar of, dower. (5 Stat. 163.) So this Court, acting on its own principles, would not permit a widow to recover both dower and thirds in the same estate. She is in the same situation as if her husband had executed a will making provision for her, but expressly in lieu and bar of dower. She is, in both cases, put to her election. Nor is a widow in a different situation from any other person preferring inconsistent claims. Any party, deriving title under a deed or will, must conform to its provisions, and renounce every right inconsistent with it. The question has been sometimes discussed, whether this doctrine of election implied forfeiture, or only compensation. In the language of Mr. Justice Story, "Whether a devisee, electing against the will, thereby forfeits the whole of the benefit proposed to him, or so much only as is requisite to compensate, by an equivalent, those claimants whom he had disappointed." The learned commentator concludes the better authority, and more in conformity with the general principles of equity, to be that "there is not in such case

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an absolute forfeiture; but there *is a duty of compensation, (at least where the case admits of compensation,) or its equivalent." (2 Story's Eq. § 1085.)

It is not doubted that an election may be determined by matter in pais, as well as by matter of record. But it is not always enough to conclude a party, that he has heretofore established a right inconsistent with the principles on which he now claims. It must appear that the act was done *eo intuitu*. "An election can only be determined by plain and unequivocal acts, under a full knowledge of all the circumstances, and of the party's rights." *White's Lead. Cases in Chancery*, 289. In *O'Driscoll v. Koger*, (2 Des. 299.)

Chancellor Rutledge declared, in relation to this doctrine of election, that the Court was not inclined to deprive a woman of her legal rights, unless it should be made to appear, that the acts done by her were done "with a perfect cognizance of all her rights."

The leading case on the question of election is *Dillon v. Parker*, (1 Swanst. 359,) heard by Sir Thomas Plumer, Master of the Rolls. In that case it was urged for the plaintiff, that Sir Henry John Parker was in his lifetime bound to elect, and that having accepted property under his son's will, this determined his election, and that the defendant claiming under Sir Henry, was bound to conform to all the provisions of his son's will. It had been submitted by Sir Samuel Romilly, in behalf of the defendant, "that the Court must be satisfied that Sir Henry was apprised of the obligation to elect, and of the value of his different rights." The Court say, "The point made by the plaintiff is, that acceptance binds and operates forfeiture without reference to intent. It is said that Sir Henry accepting his son's gift, by that act renounced his own estate; that is not election, but forfeiture. If such is the effect of acceptance, even though in ignorance that it was not competent to the party to retain both benefits, but that, on taking one, the consequence of law was that he renounced the other, then, by inadvertence, without choice, an estate may be lost. But, in all cases of election, the Court is anxious, while it enforces the rule of equity, that the party shall not avail him-

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self of both his claims, still to *secure to him the option of either; not to hold him concluded by equivocal acts, performed perhaps in ignorance of the value of the funds; a principle strongly illustrated by the decision in *Wake v. Wake*. The rule of the Court is not forfeiture, but election; *utrum horum*."

Wake v. Wake is reported 1 Ves. Jr. 335, and was heard by Mr. Justice Buller, sitting for the Lord Chancellor. A widow had, under her husband's will, a legacy of £120, and an annuity of £35. She had been paid her legacy, and had received also the annuity for three years. At the expiration of that time, she filed a bill praying for dower out of her husband's real estate, as well as the provision made for her by the will. The devise of the real estate was a son by a former marriage, and was in possession under the will. It was held to constitute a case of election. And it was then insisted on the part of the defendant, that the widow had determined her election, by acceptance of the provisions made by the will. But Mr. Justice Buller overruled the objection. "The point is," says he, "whether she had full knowledge of the circumstances, and of her own rights. If she acted with full knowledge, she should not afterwards deny it." The claim of dower was sustained, but the widow was held ac-

countable for the legacy, and what she had received on the annuity. A note to this case refers to *Butricke v. Broadhurst*, (id 171.) That was very analogous, in some of its circumstances, to our own case of *Wilson v. Hayne*, (Cheves Eq. 37.) A widow had enjoyed the provisions made by her husband's will for five years, and then brought a suit, praying to be permitted to take an interest in a trust fund of £2000 under her marriage settlement, instead of the estate under the will. Lord Thurlow dismissed the bill, but he desired it to be understood, that it was under the particular circumstance that the plaintiff had stated no ground, no ignorance of the state of the property, &c., but on the contrary, it appeared that the fund was a free fund from the beginning; and that there was no suggestion that the estate was in such a situation as to render it doubtful what the result would be.

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*A careful review of all the cases makes manifest what Sir Thomas Plumer terms, "the anxious desire of the Court, while it enforces the rule of equity, that the party shall not avail himself of both his claims, still to secure to him the option of either."

Although the statute declares, that the provision therein made for the widow, shall, if accepted, be in lieu and bar of dower, yet the correlative proposition is not put. Nor was it necessary. It stands upon the acknowledged principles of this Court. A party claiming dower would thereby disturb the arrangement of the statute, and quoad hoc, frustrate its provisions. Equity will not permit this, but will put the party to her election. But the Court favors the right to make an election, and will not permit acts done in ignorance of a party's rights, to preclude him from this privilege. In this Court, neither the doctrine of estoppels, nor that of forfeiture, is encouraged. Originally the widow of J. D. Sommers had the legal right to one-half of his personalty. It has been so declared by the decree of the circuit Court. The plaintiff seeks to deprive her administrator of this legal right, or to shew that it does not exist in him. Then, says the authority of *Dillon v. Parker*, p. 385, he is bound to make out his case, to establish that the alternative was fairly and fully presented to her, and that she made her election. "The argument," says the Master of the Rolls, "which represents lapse of time and acts performed as conclusive, without regard to intent, is subject to great difficulties."

James D. Sommers died in 1817. Sometime afterwards his widow intermarried with William McDow. Joseph Clarke was a witness, and his testimony is in writing. He states that he was the confidential adviser of Mr. McDow, and had always been so; that he advised him to institute proceedings for his wife's dower, simply because the late James

D. Sommers was considered to be insolvent; that he knew of no real estate which he left, except a place on the Jacksonborough road; that he received his instructions from Mr. McDow, and does not now remember to have had any conversation with Mrs. McDow on the subject. Proceedings were made up in

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1820, in the name of *McDow and wife, against the heirs of James D. Sommers, deceased. The dower was assessed at four hundred and sixty dollars, and the land sold to pay the assessment. The witness says that he advised the proceedings, because, although the value and amount of the dower was small, still "it was something to persons in the situation of McDow and wife. The claim was made and established upon his advice to Mr. McDow, for the above reason. Witness had no knowledge of any rights or contingent claims, which they, or either of them, had, or could have, under the will of Edward Tonge, and he does not believe that either the said William McDow, or Susan B., his wife, had any knowledge or imagination even of any rights under Edward Tonge's will. It seemed to be a set down matter," adds the witness, "not only in the family, but generally, that, after the death of the late Mrs. Tonge, the estate covered by said will, would go to and vest in the late John W. Sommers absolutely." In a previous answer, this witness says he did not personally know whether the late William McDow, or his wife, the late Susan B., were familiar with, or apprized of, the will of the late Edward Tonge. "I was quite intimate with them," continues the witness, "and can say that neither of them, to my recollection, ever spoke to me of their rights under said will, as representatives of James D. Sommers. It is evident to my mind, that they were not aware of any rights under Tonge's will, as representatives of James D. Sommers, for, if so, Mr. McDow would doubtless have consulted me as to those rights, it having been his uniform habit to consult me upon whatever was of material interest to him."

The proceedings in dower, to which Mr. Clarke refers, were also put in evidence. Some objections were urged to the irregularity of these proceedings; but this Court is of opinion, that none of these objections are sufficient to invalidate the judgment, or impair its legal efficacy. Assuming Mrs. McDow to have been a party, the regularity of the judgment cannot be impeached here and in this form, and although the inference from the testimony is very strong, that she, in fact,

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knew nothing what*ever of the proceedings, yet, such has been the practice of the Court, that for the security of titles, this Court must conclude that she was sufficiently made a party.

The decree of the circuit Court has settled, that James D. Sommers had, at his death, a

contingent title to about one hundred and thirty negroes, under Tonge's will. Whether he had, or had not, an equal interest in the real estate, is a question yet to be adjudicated by the Court of Errors. In reference to the personalty, the Chancellor held, that "James D. Sommers, if now living, would be the person who would be entitled to take," and decreed, that "distribution be made of the personal property, which is hereby adjudged to be the estate of the said James D. Sommers, among those persons parties to this bill, who represent the character of distributees, at the time of his death, or his, or her, legal representatives." James D. Sommers's widow represented the character of a distributee at the time of his death, and her legal representative was a party to the proceedings before the Court. The amended bill sought to displace the legal representative of this distributee, from any right under the decree, or any share in the distribution, on the ground that the proceedings of 1820 constituted an election, which was irrevocable, and which "forever barred and precluded the said Susan B. Sommers, afterwards McDow, from all claim to any further distribution, or other share or interest in the estate of which James D. Sommers died intestate, and, consequently, in the said James D. Sommers's contingent interests in the real and personal estate under the will of the said Edward Tonge."

The doctrine seems to be well condensed by Judge Johnson, in *Pinckney v. Pinckney*, (2 Rich. Eq. 237.) "The term election, imports, of itself, a right to choose between one and another, or more things; and it is impossible to exercise that right understandingly, unless the party is fully informed of their relative value, for without it, his judgment, or will, or even his caprice, could not enter into the act of choosing. Hence the well settled rule, that he is not bound to elect, until all the circumstances necessary to enable him to

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make a deliberate and discriminating choice, are ascertained; and if he even make an election without it, he is not bound by it." The authority to which he refers, fully sustains the position; and it is in entire accordance with the general principles of this Court in administering equity. If the act insisted on, was not done under circumstances which enabled the party to exercise the right of election understandingly, if he was not so informed of the relative value, as to enable him to determine *utrum horum*, to choose between one or the other, the party is not concluded by such act. It is not to be supposed that the widow of James D. Sommers should be informed of the exact value of the Tonge estate. But had she any knowledge whatever of the rights of her deceased husband, whatever they might be, under Edward Tonge's will? Now if she was informed of those rights, and weighing the relative value

of what was before her, it might with justice be said, that she had made her election. The evidence is as direct and positive as can well be adduced, that she had not "even an imagination" of any rights of her husband under Tonge's will. There is no proof whatever, that she knew of the existence of that instrument. And Mr. Clarke distinctly testifies, that the expediency of instituting the proceedings in dower, was determined without any reference to any supposed rights of James D. Sommers under Tonge's will. They were instituted on his advice, and "I had," says he, "no knowledge of any rights, or contingent claims, which they, or either of them, had, or could have, under the will of Edward Tonge." If the widow of Jas. D. Sommers were now alive, might she not say, and has she not proved, "I took my dower in total ignorance of any rights of my deceased husband under Tonge's will. I made no election in reference to that of which I had no knowledge, and I ask now to be permitted to do what I have never yet done."

But there is much latitude permitted on this subject; and it arises not only from the unwillingness of this Court to enforce any thing like a forfeiture, but also to protect a party from the consequences of a premature or injudicious choice, or acts which might be construed an election. "The cases have

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gone so far," *says the Chancellor, in *Hall v. Hall*, (2 McC. Eq. 269, 280,) "that after the wife has made her election, and has received benefits under the will, she has been allowed to retract and resort to her legal rights, when the estate has turned out differently from what it was believed and stated to be at the time of the election prematurely made." *Kidney v. Conssmaker*, (12 Ves. 135,) was a very strong case. It was decided by Sir William Grant, in 1806. The will had been twice before the Court for adjudication,—in 1792, before Lord Thurlow, and in 1793, before Lord Rosselyn. In the original causes, an arrangement had been made, and the widow had deliberately elected to take the estate devised by the will, in satisfaction of her dower. Subsequent events caused the creditors of the husband to prefer a claim to a portion of the estate so devised, and, in his decree of 1806, this claim was sustained by Sir William Grant. "The consequence is only," says he, "that the widow will not be bound by any election she then made; she must be let in now to any of her legal rights; and an enquiry in what estates she was entitled in dower and free bench; her election as being made under a mistaken impression, that the creditors were not to make any claim upon those estates, not binding her." So in *Adsit v. Adsit*, (2 Johns. Ch. 451.) Chancellor Kent refers to the principle familiarly. "If the legacy is to be taken in lieu of dower, I should think that the defendant is entitled to her election, not-

withstanding her acceptance of the legacy, for it is evident that she did not, in that case, act with a proper understanding of the consequence of that acceptance, but was under mistaken impressions." This indulgence of the Court, (if it may be so termed,) confers no new rights. It only remits the party to an election between two acknowledged rights. In some cases, the Court has disturbed a possession in order to aid a suitor claiming the right of election. But in the case before the Court, no possession is sought to be disturbed. No one is required to surrender property which they have held under the impression or confidence, that the widow's claim was barred by the proceedings of 1820. So soon as the right of James D. Som-

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mers, or his representatives, *became vested by the death of John W. Sommers, in 1848, the interests of the parties were submitted to the adjudication of the proper tribunal, and the representative of the widow James D. Sommers was declared entitled to a moiety of the estate. It is objected, that the other distributees of James D. Sommers were parties to the proceedings in dower, and consented to the admeasurement of dower. It is not apparent to the Court that they were in any manner prejudiced by that consent. But in any view, the language of Lord Redesdale, in *Moore v. Butler*, (2 Sch. and Lef. 268,) breathes the spirit by which this Court is governed. "It is contended," says he, "that James Butler, (under whom the parties claimed,) did elect to take under the settlement of 1720. But the facts on which this is contended are so extremely various, that it would have been impossible to hold him bound, if he could have put the parties affected by that claim into the condition in which they would have been, if he had not done those acts." And so in *Dillon v. Parker*, (385,) the Master of the Rolls states the disposition of the Court, even in a case where the party himself had accepted benefits under the instrument which imposes the obligation of election, if the representatives of the party, who has accepted these benefits, without explicitly electing, "can offer compensation, and place the other party in the same condition as if those benefits had not been accepted, they may renounce them and elect for themselves." In *Wake v. Wake*, the widow was required to account for the legacy which she had received. In this case, the Court is of opinion, that the representative of James D. Sommers, deceased, is entitled to the share of the personal estate to which his intestate was declared entitled by the circuit decree of Chancellor Dargan, but that he must account for the sum assessed in lieu of dower, with interest thereon, as part of the estate of James D. Sommers, deceased.

The other question, which it becomes necessary to consider arises under the will of

Charles Elliott Rowand, the younger. His mother, Mrs. Henrietta Rowand, was a sister of James D. Sommers, and died intestate, and

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a widow, in April, 1838. *Charles E. Rowand, Jr., her son, died in January, 1839. The residuary clause of his will is as follows, viz: "All the rest of moneys coming to me from the estate of my father, or from any quarter, I give and bequeath to my brother Robert Rowand's family, for their use and support."

It is a familiar rule, that a will of personalty speaks at the death of the testator. And it is well settled, that the Court is permitted to resort to extrinsic evidence for the purpose of ascertaining whether there is anything, and what, to which the terms of the will apply. At the death of Charles E. Rowand, Jr., his uncle, John W. Sommers, was alive, and survived for nine years afterwards. Do the terms, "all the rest of the moneys coming to me from any quarter," embrace the contingent interest of the testator, as one of the distributees of his mother, who had been a distributee of James D. Sommers, deceased? The term "moneys" is generally applicable to particular species of personalty. But there are cases in which, by force of the context, a more extended signification has been given to it. It has been held to embrace stocks, promissory notes, &c. But without some explanatory context, the term must be confined to its proper signification. (1 Jarman, 702; *Gosden v. Dotterell*, 6 Cond. E. C. R. 496.) In *Man v. Man*, (1 Johns. Ch., 235,) Chancellor Kent says, "if the testator uses the word (moneys) absolutely, without any accompanying qualification, it cannot be construed beyond its usual and legal signification, without destroying all certainty and precision in language, and involving the meaning of the will in great uncertainty. The difficulty would be to know what precise check to give to the force of the term, after we have once moved it from its seat; vires acquirit eundo." But in this will the testator has used a qualification, the effect of which is rather to restrict the term to its original and proper signification. The expression is, "moneys coming to me from the estate of my father, or from any quarter." Moneys coming to me, means money due and owing to me, "money to which I have a right and ought to receive." At the death of the testator in January, 1839, could

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these terms be applied to the interest, *whatever it might be, in the lands and negroes at Tongeville? In *Gosden v. Dotterell*, the vice Chancellor refused to enlarge the meaning of the term, although by so doing, he was satisfied he would effectuate the intention of the testator. But in this case the Court is convinced, from the terms used, that the testator here intended only what the law implies;

and that, as to this interest, Chas. E. Rowand, Jr., died intestate.

It is ordered and decreed, that distribution be made of the personal estate, adjudged to be the estate of James D. Sommers, deceased, upon the principles declared in this decree. Parties being at liberty to apply for such further orders as may be necessary.

From this decree an appeal was taken, on the grounds:

1. That McDow and wife having elected to take, and having actually taken in money, Mrs. McDow's dower in the estate of her first husband, James D. Sommers, both her and his representatives are bound by that election, and are debarred by the attachment of Mr. McDow's marital rights, by lapse of time, and otherwise by law, from now recalling the same.

2. That the residuary clause in the will of Chs. E. Rowand, the younger, extends to and embraces the interest of the said Chs. E. Rowand, the younger, in the Tongeville property, real and personal.

Yeadon, Petigru, for appellants.

Munro, contra.

JOINSTON, Ch., delivered the opinion of the Court.

Little need be added to what the Chancellor has said, in his decree, in relation to the construction of the (so called) residuary clause of Charles E. Rowand's will.

This testator was entitled, under his father's will, to the annual interest, for life, of one-tenth part of a certain portion of the father's estate, which, under the directions of the will, was sold, and the proceeds vested for his benefit. And besides what arrearages of this provision might be due him, at his death, there was nothing coming to him from

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his father's estate. So that *this money, and what little might be, accidentally, due to him from other quarters, was all the money he had to dispose of.

Accordingly we find that the specific sums disposed of by him in his will, amounted, in the whole, to only the sum of \$300: and even these small legacies were given with expressions of distrust whether there would be money enough to satisfy them.

In his will, after disposing specifically of some few articles of insignificant value: he proceeds as follows:

"I leave Rev'd. Arthur Buist the sum of \$200, should there be a sufficiency, after some or all my debts are paid.

"Should there, also, be a sufficiency, I leave to the Ladies Benevolent Society the sum of \$50, to be paid them by my executor.

"I leave to my nephew, C. E. Rowand Drayton, \$50; and all the rest of monies coming to me from the estate of my father, or from any other quarter, I give and be-

queath to my brother Robert Rowand's family, for their use and support."

The word monies, must be understood here in its ordinary meaning, of cash, coin, bank notes, or other circulating medium, unless there is something in the context of the will, or in the existing circumstances, to shew that it was employed in a different sense.

In looking to the extrinsic circumstances, we should not be justified in applying the word used by the testator to any thing but money, unless in that survey we discover that there was no money, to come to the testator from his father's estate, but that something else was coming from that estate to which the term money might be applied, in a secondary, or less obvious sense.

But, when we discover that money was coming to him, and nothing else, we are obliged to say that the reference of the testator, was to money, and to nothing else.

Neither does the context of the will lead to any other conclusion.

The clauses immediately preceding the

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clause in question *relate to money: or bequests of money:—and it is obviously of importance, that from these, he proceeds immediately to dispose of the rest of the monies due him.(a) The word rest here undoubtedly refers to the rest of that subject, which he was engaged in disposing of at the time. The interpretation of the word (rest) by the connection in which it is used, is a rule of interpretation familiar to the profession: and so far has it been carried that, in some instances, where the residuary words were descriptive not only of the subjects embraced in the prior clauses, but had a general meaning taking in other species of property, they have been restricted, by the connexion, to property of a like description with that previously disposed of. Thus, where the residuary words would, in themselves, have extended to realty, as well as personalty, they have been so restricted as to indicate only the rest of personalty, because the prior dispositions were of personalty only.(b)

This doctrine has, undoubtedly, been stretched beyond the limits of good sense in some of the cases. But it is founded in good sense, and is conformable to the usages of mankind: and it is presumed that no man, speaking in the ordinary way of the distribution of certain portions of money, thus and thus, and the rest so and so, would ever be understood as meaning by this rest any thing else than the rest of that of which he had been speaking; i. e. the rest of his money. How much stronger the evidence of his meaning, when, as in this case, he expressly characterises the residue as money!

This Court, therefore, concurs in that part of the decree which relates to this subject;

(a) *Haynesworth v. Cox*, Harp. Eq. 121.

(b) *Marchant v. Twisden*, Gilb. Eq. Ca. 30.

and it is ordered that the same be affirmed, and the appeal dismissed.

Another part of the decree is, in our view, more doubtful. It is that part of it which establishes a right of election between the dower awarded to the widow of James D. Sommers, in her life time, and a distributive part of his estate, which is now claimed in its place.

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*By the will of Edward Tonge, who died in 1809, his estate, real and personal, was given to his wife, during widowhood;—remainder, for life, to his mother;—remainder, for life, to James B. Perry;—remainder to such of his issue as should survive him:—in default of such issue, to John W. Sommers, with like limitations;—and in default of issue surviving him,—then over, in fee, to James D. Sommers.

The widow of Tonge forfeited her estate by marriage. The mother took possession and enjoyed the property until her death; upon which it devolved on J. B. Perry.

While he was yet alive, James D. Sommers died, (about 1819,) leaving a wife,—who, in the latter part of that year, intermarried with McDow.

Then, in 1821, or 1822, James B. Perry died without issue.

Thereupon, John W. Sommers took possession and enjoyed the property until 1848; when he died without issue.

It was held by Chancellor Dargan that the personal property covered by the will of Tonge, passed over, upon the death of John W. Sommers, to the estate of James D. Sommers; and he having died intestate, was distributable among his distributees, of whom his wife, (afterwards Mrs. McDow,) was one.

But, as far back as 1820, it appears that she and her second husband, McDow, brought suit against the other distributees of James D. Sommers, and recovered about \$400, as a commutation for her dower in James D. Sommers's real estate called Golden Grove; the execution for which was levied on Golden Grove; and that tract, (which was all that existed or remained of James D. Sommers's real estate, at the time) was sold and conveyed by the sheriff to McDow, at a sum approximating, but somewhat less than the dower assessed. This sale and conveyance took place in December, 1820.

Mrs. McDow lived until somewhere about 1831, and Mr. McDow somewhat longer; but no movement was made by them, or either of them, or the heirs or representatives of either, towards claiming any further in-

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terests in James D. Sommers's estate until after John W. Sommers's death; which took place, as has been stated, in 1848.

When Chancellor Dargan delivered his decree, of which I have spoken, (adjudging distribution,) the fact of this allotment or as-

signment of dower did not appear in the pleadings, and was not brought to his view. After the decree was pronounced, but before it came before the Appeal Court, this fact was suggested on the record, by way of amendment to the bill: and the parties proceeded to argue, and did argue, the question in the Appeal Court, (Jan. 1850,) whether the allowance of dower was a bar to the thirds (c) claimed for Mrs. McDow, or whether an election between the dower and the thirds should still be allowed. As that question had not been heard on the circuit, the Court could not determine it in appeal; and, therefore, remanded the cause to the circuit, that it might be heard and determined there; thus opening the circuit decree upon that point.

In the decree now under review, Chancellor Dunkin has entitled the heirs and representatives of Mrs. McDow, and of Mr. McDow, (one of the distributees,) to claim the thirds, in her right, out of the estate which fell in upon John W. Sommers's death, provided they repay the sum received in 1820, in lieu of her dower, with interest.

And this is an appeal, by all parties, from his decision.

It may be proper, before proceeding to the questions made by the grounds of appeal, to dispose of a point which was obscurely intimated after the argument was closed.

It is that the parties claiming Mrs. McDow's thirds are entitled to the benefit of Chancellor Dargan's decree; that it is to be regarded as still subsisting and unopened, unless the other side shew grounds of equity for setting it aside.

I can only say that the amendment of the record was made by consent, to come up with Chancellor Dargan's decree, as if the decree had been made upon the record as amended; and the parties must take the consequences.

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*It was made with the express view of submitting the question to the Appeal Court, whether the assessment and assignment of dower were not a bar, in this Court to the claim of thirds, and whether, under the circumstances, the parties making the claim might not retract, and make an election now.

It was so argued, in Appeal, in 1850; and the order remanding the cause was made with a view to the discussion and decision of that question.

It was so argued here, on this appeal; and never, until after the case was closed was any intimation given to the contrary. Indeed, I hardly understand, now, whether the point is intended to be made.

But if it is, there is nothing in it.

(c) Note by his Honor. I have used the word, "thirds," throughout this opinion to obviate circumlocution, and designate Mrs. McDow's distributive share: which was, in fact, one-half, and not one-third.

There is no doubt whatever that the acceptance of dower, whether intended as a waiver of thirds, or not, is a bar, at law, and in equity, to the claim of thirds. It is made so by the necessary construction of the statute of 1791; a construction which has been adopted in many cases.

Can it be doubted, then, that, when the fact is proved that dower has been accepted, the party accepting it is not equitably entitled to retain a decree for its equivalent? I do not mean when this proof is made collaterally, in a different suit, as in *McDowall v. McDowall*, Bail. Eq. 324, but when, as in this case, it is made in the same cause, and made by consent with the express view of testing the correctness of a part of the decree in the case.

Can any one affirm, that if Mrs. McDow's acceptance was intended to have been in lieu of thirds, she could equitably insist on the decree obtained for the thirds, while the case is still pending, and the question open, by consent, and before the Court?

It is impossible. The dower being accepted, is,—so long as the dowress is not allowed to retract,—a complete bar:—and, therefore, a decree for thirds is inequitable and should not be allowed to stand, when the Court retains a control over the sub-

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ject. But the truth is the decree referred to in this case was virtually opened by this Court in 1850.

The case was presented and argued in appeal, in 1850, as if the amendment had been in before Chancellor Dargan's decree, and interposed by way of objection to his making the decree he did:—as if he had overruled the objection. This was the light in which this Court viewed the objection: and it sent the case back, only because he had not, in fact, heard and overruled it. How, then, can it be said that the case was sent back subject to the decree: when plainly it was sent back to ascertain whether such a decree should ever have been made?

If I am right in this, then, upon the merits the only equity of the parties in possession of the dower, must consist in a right to retract and elect, if such right can be shewn.

This was the view taken by the Chancellor, as appears by the whole tenor of his decree. It is the correct view; and, if the claimants are not entitled to the election he has given them, they must abide by the dower as assessed and accepted.

It has been attempted to be shewn in the argument, that the proceedings at law, by which the dower was allotted, are null and void, in consequence of defects in the record; and that, therefore, the amount received under the recovery is no satisfaction of the right of dower; and consequently dower has not been received or accepted.

If the record were void, it would by no means follow that the sum of money recov-

ered as a compensation for dower, though received under it, was no satisfaction of the dower, and equivalent to a reception of the dower, itself. But the defects pointed out do not vitiate the judgment. We are not to look behind the judgment for the purpose of ascertaining whether Mrs. McDow was or was not before the Court, in virtue of a power of attorney executed by her as authorised by the statute. It was the business of the Court, before which the cause was heard, to see that the parties were before it, and after it has given judgment, we are bound to presume that it had proper evidence of the fact, before it took jurisdiction. Miserable would

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be the condition of the community, if a doctrine should receive the least countenance, by which solemn judgments would be converted into absolute nullities, merely because the writ, or the warrant of attorney, which led to them, may have been mislaid or may have perished from lapse of time.

Neither can the form of the judgment vitiate it. The Court had jurisdiction of the subject matter, and must determine for itself, (for it was a part of its judicial functions in the case,) what judgment was proper to be given between the parties before it.

These principles are too well settled to require further consideration.

Then, the important question, which was considered in the decree, occurs:—whether Mrs. McDow's acceptance of the dower precluded the claim for thirds now set up; and whether, a retraction will be allowed, and a right of election given.

Wherever two rights are alternatively created, or given, either in express terms or by construction, the party to whom they are given is entitled to only one of the two, and must elect between them. but after he has made his election, he is bound; and will not be allowed to elect, again, unless he can shew some equitable circumstances entitling him to retract the choice he has made.

There is some difference, in this matter of election, owing to the quality of the rights, among which, the election is to be made:—i. e. whether they are legal or equitable.

If the alternative rights are legal, that is to say, if both of them purport to vest a legal title in the party to whom they are given:—though a court of law could not compel an election, while the matter may have remained executory, yet after an election has been made (and it is sufficient, to constitute such an election at law, that one has been taken, —though it was not taken as an alternative, or by way of choice between the two):—It operates as a complete legal bar, by way of estoppel, against the claim of the alternative. The title to that, though it was before a complete legal title, is extinguished.

Thus, under the statute of uses, uses which

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would have been executed in the husband to

the extent of creating a title to dower in the wife, are prevented from being executed to that extent, by the proviso that the dower shall not be claimed if a jointure was settled on her.^(d) In such case the acceptance of the jointure is a bar of the dower, and vice versa. The acceptance of the one is a satisfaction of the other, and the legal right or title to that other is extinguished.

So here: the right to dower, or thirds, is made convertible by the statute of 1791: and both being legal rights proceeding to the wife, if she takes one, her legal right to the other perishes.

It is unnecessary, therefore, to go into an examination of the argument, at bar, in relation to rights of an equitable character, or in relation to elections expressly created by the instrument, or implied by equity in promotion of the evident intention; or in relation to the different degrees of evidence required to prove that an election has been made in the one case or the other.

I take it that whenever an election has been made, either at law or in equity, it is a satisfaction of the alternative right: and that the party will not be allowed to retract, unless upon grounds of equity, shewn to exist, by evidence inherent in the circumstances, or extrinsic.

I will assume that equity has a right to put out of the way the legal consequences of Mrs. McDow's acceptance of dower: the question is whether she herself, if now alive, would be allowed, under the circumstances of this case, to retract what she has done, and to elect between her dower and thirds.

This is not a case where an election remains to be made. The right is not executory, but executed.

It is not a case, even, where dower was taken, irrespective of the alternative right. It is not a case of mere estoppel, but a positive election, intentionally made. Clarke's testimony shews that the attention of the parties was drawn to the alternative of choosing between dower and thirds in James D. Som-

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mers's *estate: and that the former was chosen under his advice, as the more valuable of the two.

It is true that the value of the expectancies dependent upon the deaths of James B. Perry and John W. Sommers and their issue may not have been estimated on that occasion. But it is probable that the circumstances upon which that contingent right depended were known; because Clarke speaks of opinions as "set down opinions in the family" which could only have sprung from a knowledge of the provisions of Tonge's will.

But a choice made upon a view of interests as contingent, and which were in fact contingent at the time of the choice, is a de-

liberate choice,—a well understood act,—a fair exercise of the judgment:—and a subsequent result of the contingency, which, if foreseen, would have led to a different choice,—forms no ground for another election.

It may be affirmed, without hesitation, that Mrs. McDow was right in the choice she made, supposing that she took a deliberate view of the expectancy, and the contingencies upon which it was to depend. Her election was made in 1820; at which time two life estates, of young men, interposed before her husband's expectancy: and not only so, but the expectancy was liable to be entirely defeated by either of those two leaving issue.

Such an expectancy could have had no marketable value at the time she was called upon to elect between it and her dower: and if she had chosen to abide by the expectancy, she could not have sold it and must have starved herself to enrich her heirs. Would that have been the exercise of a sound election on her part? If the Court were to grant her if now living, a second choice, it must be upon the principle that her first choice was,—at the time it was made,—improvident and mistaken: and I repeat the question:—Was it unwise, improvident, or mistaken?

But, if a right of election can be revived, the claim must be made within reasonable time. Here thirty years have expired; during all which time there was a perfect acquiescence. Lord Hardwicke observes in *Pawlet v. Delaval*, (2 Ves. sen. 668,) that

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"facts *and acquiescence are material to determine great rights and properties; and many decrees have been made thereupon in this Court:" and we see how far our own Courts have gone upon this subject in the cases of *Wilson v. Hayne*, (Chev. Eq. 37) and *Caston v. Caston*, (2 Rich. Eq. 1) where elections were held to be conclusive upon a much shorter lapse of time.

Suppose, however, that Mrs. McDow could insist upon a retraction of her acts;—can her heirs and representatives claim the same rights?

As a general rule privies in the post are bound by all the acts and engagements of those under whom they claim; and if the latter rested satisfied with their transactions, and died without seeking to unravel them, their privies are concluded.

In *Stratford v. Powell, Ball & B.* 24, Lord Ch. Manners said: "The utmost I could have done if I had any doubt upon this part of the case," (a question of election, the electing party being dead after having elected) "would have been to refer it to the master, to ascertain what was most for her advantage:—though I never heard of that being done after the death of the wife, or of the party bound to elect: Here the act and acquiescence of Lady Aldborough are sufficient to bind her and those deriving from her."

In *Archer v. Pope*, 2 Ves. sen. 525, Lord

(d) See *Gretton v. Harvard*, 1 Swan, 425, note (a); cited 2 Story Eq. § 1080, (5th Ed.)

Hardwicke expressed the opinion that "if a freeman of London make a will contrary to the custom, and dies, though the wife is not perhaps executrix; nor does so strong an act as is done here, by her proving the will, but has acted in this manner, without declaring one way or the other; the Court will not suffer the representative of the wife to insist on the custom, in contradiction to what was done by her:—and that in cases where, if the wife had been before the Court, she might have had an election; therefore, if she has done it, for a short time only, that acquiescence shall bind her and her representatives:—and it would be very mischievous if the Court should suffer her representatives to take it up in prejudice of the children."

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*He expressed the same opinion in a number of the reported cases: so that it was well considered and settled in his mind.

Upon what principle can it be maintained in this case, that the privies of Mrs. McDow are entitled to be let in to elect, unless it be that her election when made was unwise and to her disadvantage? We have seen that it was not so. The privies come in here to elect, upon a contemplation of their own interests, as they now stand, and not upon a contemplation of her interests as they stood at the time she made her election. But it is her election, and not that of her representatives, which is sought to be set aside: and the true question is whether the election made by her, with whom the right of election was, was beneficial and satisfactory to her, whether it be otherwise to her representatives or not.

Being upon the whole, of opinion that no new election should have been allowed; we are, of course, of opinion that the compensation which was given as a condition of allowing it, should not have been decreed. Indeed the parties to whom the compensation should have been made, were the creditors of James D. Sommers and not his heirs.

It is ordered that so much of Chancellor Dunkin's decree as gives a right to elect thirds, and decrees compensation for the dower; and also (out of caution) that so much of Chancellor Dargan's decree as allowed Mrs. McDow, her representatives and distributees, to come in for a distributive share of James D. Sommers's estate, be reversed.

DARGAN and WARDLAW, CC. concurred.
Decree reversed.

3 Rich. Eq. *305

*W. C. JOHNSON, by Next Friend, v. WM. CLARKSON and T. B. CLARKSON.

(Charleston. Jan. Term, 1851.)

[1. *Wills* ⇨ 681.]

Testator, who died in 1849, left of force his will, bearing date 2d October, 1840, in these

words, to wit:—"After all my debts are paid, I will and bequeath to my brother, W. C. all of my property, on certain conditions made with him. Should he decline taking it, I will and bequeath it to the Rev. W. B. on the same conditions. I appoint my said brother, W. C. my executor;" shortly after testator's death, W. C. qualified as executor: with the will were found several unattested papers signed by the testator, and bearing dates subsequent to the date of the will, in which he, the testator, expressed his desire, and declared it to be one of the conditions mentioned in his will, that his slaves should be emancipated, if it could be done without evasion of the law, and in which he directed certain legacies to be paid, and, in a certain contingency, distribution of his whole estate: to a bill filed by the next of kin of testator claiming that a trust resulted to them, W. C. answered and stated, that he had never, before testator's death, seen either his will, or any of the papers accompanying it, "although testator had, at different times, conversed with him upon the first and principal subject mentioned in the papers accompanying his will, (the emancipation of his slaves) and relied implicitly upon this defendant's integrity for carrying out his intentions as far as he could without practising any evasion of the law:"—*Held*,—That no beneficial interest was given by the will to W. C.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1613; Dec. Dig. ⇨ 681.]

[2. *Wills* ⇨ 98.]

That the papers found with the will, having been executed after the will, and not being attested by three witnesses, could not be received in evidence as testamentary papers, or as showing the conditions referred to in the will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 234; Dec. Dig. ⇨ 98.]

[3. *Slaves* ⇨ 13.]

That the conditions upon which W. C. held the estate, being, as stated in his answer, for the benefit of the slaves of testator, were void by the provisions of the Act of 1841.

[Ed. Note.—For other cases, see *Slaves*, Cent. Dig. § 59; Dec. Dig. ⇨ 13.]

[4. *Wills* ⇨ 681.]

That a trust resulted to the next of kin of testator:—and partition of the estate was ordered.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1613; Dec. Dig. ⇨ 681.]

[5. *Wills* ⇨ 98, 108.]

A paper referred to in a will, or described so that there can be no doubt as to its identity, becomes part of the will, whether executed or not; but a paper executed after the will, and not attested by three witnesses, can have no operation as a testamentary paper.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 234, 249; Dec. Dig. ⇨ 98, 108.]

Before Dunkin, Ch., at Charleston, June, 1850.

The bill stated that the uncle of plaintiff, John Clarkson, late of Charleston, departed this life in eighteen hundred and forty-nine, having first made and published an instrument in the nature of a last will and testament, of which the following is a copy, to wit: "I make the following will and testa-

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ment: After all my debts *are paid, I will and bequeath to my brother, William Clarkson, all of my property on certain conditions made with him.—Should he decline taking it, I will and bequeath it to the Rev. Wm. H.

Barnwell on the same conditions. I appoint my said brother, William Clarkson, my executor. Witness my hand and seal, this second day of October, eighteen hundred and forty.

John Clarkson. [Seal.]

Signed and sealed in the presence of E. A. Clarkson, H. S. Wilson, C. C. Woodruff."

That William Clarkson, the executor named in the said will, duly proved the same in common form, and assumed the duty of executor, and took possession of the property of the testator. That the said property consisted of a plantation and a large number of negroes, together with stocks and other personal estate; and that but few, if any, debts remained unpaid; that the devise and bequest aforesaid was not made to the said Wm. Clarkson for his own use and benefit; and that said William cannot take the beneficial interest in the property, and there being no designation in the will of the persons who are to take, either the whole devise is void for uncertainty, or a trust results for the benefit of the next of kin of the said John Clarkson; and they are entitled to partition both of the real and personal estate of which he died possessed.

That plaintiff is informed and believes, that the mind of his uncle was in a diseased state in relation to his right to hold his negroes in slavery; that he spoke from time to time of emancipating them, but never came to any fixed conclusions, and plaintiff apprehends and so charges that the devise and bequest to the said William Clarkson, his brother, was made by the said John Clarkson with a view that the said slaves should, after his death, be removed from this State and be emancipated; or that they should be held in nominal servitude; and plaintiff expressly charged that the said bequest is made void by the Act of Assembly to prevent the emancipation of slaves, passed the 17th day of December, eighteen hun-

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dred and forty-one; and that *the said executor is bound to deliver up the said slaves to the next of kin.

That at the decease of the said John Clarkson, his heirs at law and distributees were his two brothers, William and Thomas B. Clarkson, and plaintiff, the only child of his deceased sister, all of whom are now alive. "To the end, therefore, that the said William Clarkson and Thomas B. Clarkson may answer the premises; that the said William Clarkson may account for his actings as executor, and may set forth and discover whether he hath accepted the devise and bequest made to him by the said will; whether the removal of the slaves of the said John Clarkson, or some of them, without the limits of this State after the death of the said John, with a view to their emancipation, was not intended or secured by the said bequest made to him, the said William; whether there is any secret or expressed trust, that the slaves

of the said John, or any of them, shall be held in nominal servitude; whether he claims the said negroes and other property as given to him absolutely, or whether there is any secret or expressed or implied trust or condition accompanying the devise or bequest, and what that is, and what is the evidence thereof; whether he, the said William Clarkson, does not intend to remove the said negroes from the State, with a view to their emancipation, or what disposition he conceives himself under obligation to his brother's wishes to make of them; that the said devise and bequest may either be declared void, or a trust for the benefit of the heirs at law or distributees of the said John Clarkson; that partitions may be made of all and singular the property, and your orator's share delivered him in severalty, and that such other and further relief may be granted as to your Honors shall seem meet. May it please your Honors," &c.

The defendant, William Clarkson, in his answer, after admitting the execution of the will,—the death of testator,—that defendant had qualified as executor,—that plaintiff and the two defendants were the heirs at law and distributees of testator, &c. says—"that he was not present at the death-bed of his

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*said brother, the testator, but has understood and believed, that when the testator found his death rapidly approaching, he directed this defendant's co-defendant and brother, Thomas B. Clarkson, where he should look for his will, and that the said will was there found, and along with it several other papers bearing several dates, in the words and figures set forth in copies thereof herewith filed as an Exhibit, and marked A.

"And this defendant further answering, saith, that he never, at any time, induced the said testator to devise his said estate to him, this defendant, by any promise or assurance or undertaking on his, this defendant's, part, that he would carry the wishes expressed in the said written directions into execution, nor had he ever seen (as far as his memory serves) either his brother's will or any of the papers accompanying it, in his brother's lifetime, nor until after his brother's death, although his said brother had, at different times, conversed with him upon the first and principal subject mentioned in the papers accompanying his will, and relied implicitly upon this defendant's integrity for carrying out his intentions as far as he, this defendant, could, without practising any evasion of the law; and with a view to so doing, this defendant, after a full consideration of the subject, qualified upon his brother's will. And this defendant further answering, saith, that he has accepted the devise and bequest of the whole of his, testator's, estate real and personal, upon the conditions intended by his testator, and that he, this defendant, is bound to undertake, and is ready and will-

ing to perform, the said conditions, unless prevented by this Honorable Court, and these conditions he understands to be as follows:— That he, this defendant, is to practise no evasion of the law, (as he is so directed by the memorandum dated January, 1843, a copy of which is herewith filed in Exhibit A,) but to make application to the Legislature of this State, which body alone can emancipate slaves, to emancipate all the slaves belonging to his brother at his death, or to give this defendant license and permission to send them out of this State; and if the said negroes be emancipated by the Legislature, or

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this defendant have the legislative license to send them out of this State, then that he, this defendant, shall sell the plantation of his testator, and out of the proceeds thereof, to pay five thousand dollars each to two legatees named in the said papers, and the balance, with such moneys as his testator left at his death, to divide among the said negroes; but if the Legislature, upon such application made by this defendant, refuse both to emancipate the said slaves or to give this defendant license to remove them out of the State, then that this defendant shall sell the whole of the testator's estate, and divide the proceeds into five equal parts, or otherwise divide said estate into five equal parts, to be paid to the said several legatees and objects designated in the said papers, that is, in the memorandum bearing date February, 1849. And he, this defendant, submits to this Honorable Court, that he holds the estate of his testator upon the said conditions, and that the said conditions are lawful conditions, and that he, this defendant, is bound and also ready and willing to perform them, and that even if the said conditions were unlawful and he could not perform them, his right to hold the said estate could not be affected thereby, but would be held by him discharged of the condition which he could not lawfully perform."

Exhibit A.

To William Clarkson.—By my will all my property will come into your hands on certain conditions, or on your declining to take it, into the possession of the Rev. William H. Barnwell, on the same conditions. Some of these conditions I now express in writing. All of my negroes must be emancipated, either immediately or at any time the Rev. Wm. H. Barnwell shall think advisable. Should immediate emancipation be deemed inexpedient, the proceeds arising from the lands and negroes, must be placed at interest until they are liberated, and then this accumulated sum, together with the sale of my lands and other moneys not specifically appropriated, shall be given to them, that is, my land and all the proceeds shall be considered their property.

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If the law for bidding the emancipation of

slaves in South Carolina is then in force, so that all my negroes must be removed, then the husbands or wives of any of mine belonging to other persons, must be purchased from monies of my estate not vested in lands, if there is a sufficient amount, but if there is not a sufficient sum, then so much as is necessary in addition, must be taken from the sale of the lands. The purchase is only to be made, provided no arrangement can be effected by which the husbands and wives will not be separated. If there is any amount left after the purchase of the negroes and without using the funds arising from the sale of the lands, then two hundred dollars is to be given to the Ladies' Benevolent Society of Charleston, and the remainder to the Domestic and Foreign Missionary Society of the United States of America, provided there is as much as six hundred dollars left. But if there is not so much, then the Domestic and Foreign Missionary Society is to receive twice as much as the Ladies' Benevolent Society of whatever sum is left; but should there be more, the Ladies' Benevolent Society is only to receive the two hundred dollars, and the Domestic and Foreign Missionary Society the remainder, whatever it may be. I wish (if possible) that the negroes should not be sent out of America. I will expect you or the Rev. Mr. Barnwell, whoever receives the property, to make a will providing for the emancipation of my negroes, together with their husbands and wives belonging to other persons as stated above, if the negroes must be sent and remain out of the neighborhood. The Rev. W. H. Barnwell must be advised with in every case that I do not determine in writing or orally. Whatever oral directions I may give are to be considered my will in preference to this, although verbal.

John Clarkson.

October 7th 1840.

Husbands and wives must on no account be separated.

Nov. 25th, 1842.

John Clarkson.

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*I became of age on the 5th of Jan., 1832. From the 5th Jan., 1832, to 5th, 1841—9 years. Betty came into my possession 5th Jan., 1832. George, Caesar, Jack, Henry, David, Robert,—owned a fourth part of these six negroes until 8th Nov., 1836, when George and Caesar were taken by me in the division that was made at that time. George owed me \$112 in August, 1841, and has paid me very little I think since that date. But credit him with \$25. Anthony was sold on the 7th Dec., 1832, by Mr. Kunhardt to B. D. Heriot. I wish a calculation to be made as to what the above-named negroes could have earned me after paying all their expenses, which sums I wish paid to them—I mean during the time I owned them. Deduct the amount which George owes me, and will owe me, unless he pays. Caesar's wages should

be counted up to 1837, besides that he will be on the same footing with the plantation negroes. Betty and George, besides their wages, will be on the same footing with the plantation negroes.

Nov. 25th, 1842. John Clarkson.

If there is any portion of my property given to the Domestic and Foreign Missionary Society, I wish it given to the domestic department, or a portion to Texas.

Nov. 25th, 1842. John Clarkson.

I understand that my will cannot be lawfully carried into effect. I wish no evasion of the law practised, but application to be made to the Legislature to permit it to be executed.

January, 1843. John Clarkson.

Should my negroes be emancipated, instead of giving to them all the proceeds from the sale of my plantation, I bequeath \$5,000 of the said proceeds to Miss J—— J——, (you will know who I mean,) and \$5,000 to Miss A. E. M., (Rev. J. S. Hancel can tell you who I mean,) and should my negroes not be emancipated, and there be no intention of its being done, I wish my property divided into five equal parts: one given to missions and charity; one to my brother William

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Clarkson; one to my *brother T. B. Clarkson; one to Miss J—— J——, named above, and one to Miss A. E. M., named above. Rev. Mr. Barnwell must be consulted as to the propriety of giving legacies to these ladies. I wish it done, if there be no impropriety in doing it.

Feb., 1849. John Clarkson.

I do not wish my negroes forced to go to Africa, if they do not wish it.

Aug. 13, 1849. John Clarkson.

I wish whatever amount I shall receive from my mother's estate, having come to me through my aunt, Mrs. Broughton, to be returned to Mrs. Broughton's family. That is all that I can control.

Aug., 1849. John Clarkson.

Thomas Boston Clarkson, in his answer, submitted the whole matter to the judgment of the Court.

Dunkin, Ch. The will of John Clarkson bears date 2nd October, 1840, and is as follows, viz:—"I make the following will and testament. After all my debts are paid, I will and bequeath to my brother, William Clarkson, all of my property on certain conditions made with him. Should he decline taking it, I will and bequeath it to the Rev. Wm. H. Barnwell on the same conditions. I appoint my said brother my executor." The testator died on the 21st October, 1849, and soon afterward the executor named, proved the will and qualified thereon. The estimated value of the testator's real estate is \$23,500, and of his personal estate about \$93,000. His next of kin and heirs at law are his two brothers, William and T. B.

Clarkson, and the complainant, who is the only child of a deceased sister. The bill submits that no valid testamentary disposition has been made of the testator's estate, and that a trust results to his heirs at law.

It may be as well first to inquire, whether any beneficial interest is given to William Clarkson? If none, then his title is wholly fiduciary. He is a trustee, and the conse-

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quences result*ing from that will be afterwards considered. Did the testator intend a bounty to William Clarkson, and were "the conditions made with him" merely subordinate or incidental? or, on the other hand, was the legal title vested in him for the express purpose of enabling him to accomplish certain objects, and not with any view to his own advantage and emolument? The terms used imply no intention to confer a personal benefit. No donative words are used but as coupled with the condition. The context repels any such inference. It is true the will shows William Clarkson to have been the brother of the testator, and thence an object of his affection, and a natural object of his bounty. But the will declares, should he decline taking it, the property is given to the Rev. Mr. Barnwell on the same conditions. Was any bounty intended to Mr. Barnwell? Manifestly none. The only purpose was to fix the legal title in some person who would execute the trust. In *Stubbs v. Sargon*, (3 M. & C. 507,) the language was much stronger to support the position, that Sarah Sargon held the £2,000 as a gift subject to a charge, but the Lord Chancellor held it a gift upon trust. She was no more than the donee of a power to be exercised in favor of others.

Then what is the trust upon which William Clarkson took the property? The will bears date, as has been stated, 2nd Oct., 1840. No particular trust is specified on the face of the instrument. No reference is made to any existing document. He is to take the property "on certain conditions made with him," or not to take it at all. But the will is silent as to those conditions. It is proposed to give in evidence certain loose pieces of paper, containing memoranda made by the testator at various times from the 7th October, 1840, to August, 1849. The first is directed to William Clarkson, and all are signed by the testator. In William Clarkson's answer he says, that he understands these papers were found where the will was found, and along with it; but he says that (so far as he remembers) he had never, before his brother's death, seen either his brother's will, or any of the papers accompanying it, "although," he adds, "his said

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*brother had, at different times, conversed with him upon the first and principal subject mentioned in the papers accompanying

his will, and relied implicitly upon this defendant's integrity, for carrying out his intentions, as far as he could, without practising any evasion of the law." This first and principal subject to which the defendant refers, as the only matter about which they had conversed, was the emancipation of the testator's slaves. Assuming that to be a trust, acknowledged by the defendant, it may stand on a different footing, and will be presently considered. The admissibility of the papers, about which the defendant knows nothing, which he never saw until after his brother's death, is first to be determined. Upon this point, as well as other branches of this cause, the argument in *Habergham v. Vincent*, (2 Ves. Jr. 205,) is very instructive. In the decision of the case, the Lord Chancellor had the assistance of Justices Wilson and Buller, and all concurred in the judgment. It was insisted that the deed was valid as part of the testator's will. After premising that the statute was made not for the benefit of the testator only, but for general public purposes, and that the law did not allow a testator to say that he would make a will without the requisites prescribed, either not thinking he would be imposed upon, or not caring about it, Judge Wilson adverts to a distinction as well established. "If a testator in his will refers expressly to any paper already written, and has so described it that there can be no doubt of the identity, and the will is executed in the presence of three witnesses, that paper makes part of the will, whether executed or not: such reference is the same as if he had incorporated it. But the difference between that case and a relation to a future intention, is striking. In the former, there is a precise intention mentioned at the time of making the will: but when a man declares he will, in some future paper, do something, he says he will make a will as far as his intention is then known to himself, but he will take time to consider what he shall do in future." In the argument, *Adlington v. Can & Andrews*, (3 Atk. 141,) was cited as a leading authority, in which Lord Hardwicke

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held, that it would be "a repeal of the statute, if a paper, subsequent in date to the will, and to which the testator had made no reference, should be allowed any effect. It was conceded at the bar, that "where such reference is wanting, none of the cases have gone so far as to connect the paper with the will: for it must be collected, that the testator meant to refer to the paper not executed according to the statute, otherwise the statute is not satisfied." The will of John Clarkson refers to no paper whatever. It refers to "certain conditions" made with William Clarkson. If under this description could be classed the various changes made by the testator, oral or written, within the ensuing eight or nine years, it would introduce a

mode of testamentary disposition entirely novel, and rendering nugatory all the safeguards of the statute. The defendant, William Clarkson, is no party to these papers. He admits himself not to have known of their existence until after his brother's death. One of these papers provides for a distribution of the estate, on a certain contingency, into five parts, which are disposed of to several legatees. Why could not any other legatees insist on parol declarations of the testator that the conditions made with William Clarkson were, that he should divide the estate among them? "If a paper can have this effect against the statute, immediately after the execution of the will, it might at any distance of time, so that having gone through the form of a will, which parts with nothing effectually, he might, when under influence, or incapable of disposition, or even just expiring, in short, in that situation which the statute meant to protect against fraud, by an unattested paper, dispose of his whole estate." These papers can have no effect but as a testamentary disposition, and, not being executed with the formalities prescribed by the statute, they have no legal operation.

Then it is said that, without any reference to these unattested papers, the defendant is a trustee to carry into effect the intentions of the testator, in regard to the emancipation of his slaves, "as far as he could without practising any evasion of the law." And if there were any conditions made with the

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defendant, *which have been proved, this was the trust to be discharged by him. The Court is willing to place the case on the footing, that this admission of the defendant's answer was incorporated in the will: or (which is perhaps nearer the fact) that the case is directly analogous to *Smith v. Attersoll*, (1 Russ. 265,) and that the defendant, contemporaneously with the execution of the will, had signed a declaration of trust, to the effect of the implied understanding admitted by the answer. If the will should be regarded as taking effect from its date, or if the testator had died prior to Dec., 1841, then it would fall precisely within the principle of the second class in *Finley v. Hunter*, (2 Strob. Eq. 208, 216.) Slaves were bequeathed on the condition that they should be emancipated or sent out of the State. Chancellor Johnston, delivering the judgment of the Court of Appeals, says: "I am of opinion, that what has been called a condition, is to be regarded in this Court as a trust. The second class was given entirely upon trust, without any intent to confer a benefit upon the trustee. Ever since *Morrice v. the Bishop of Durham*, the rule has been, that where no beneficial interest is intended, but a trust is attempted to be imposed, if the trust fails from any cause, the trustee shall not hold for his own benefit; but a trust results to the grantor or his next of

kin." *Blackmann v. Gordon*, (2 Rich. Eq. 42 [44 Am. Dec. 241]), proceeds upon the same principle.

But the testator died in 1849. The validity of his will, and the trusts therein declared, must be determined by the law of 1841. The defendant does not state very particularly, or exactly, what were the conditions or trusts on which the slaves and other property of the testator was confided to him. But the Act of 1841, after declaring void certain provisions for the emancipation of slaves, concludes by a declaration, that "every devise or bequest to a slave or slaves, or to any person upon a trust or confidence, secret or expressed, for the benefit of any slave or slaves, shall be null and void." The conditions, whatever they were, on which this estate was devised and bequeathed to the defendant, were confessedly for the bene-

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fit of the slaves of the testator, so far as the law would permit. But the law permits no such benefits as the testator contemplated. The design which he had in view cannot be accomplished. The consequence is, as declared in *Finley v. Hunter*: "The trustee shall not hold for his own benefit, but a trust results to the next of kin of the testator."

It is declared that the defendant, William Clarkson, holds the estate, real and personal, of John Clarkson, deceased, in trust for his heirs at law and next of kin. It is ordered and decreed, that a writ of partition issue, according to the prayer of the bill, for the purpose of dividing the said estate among the parties to the pleadings. It is further ordered, that one of the Masters take an account of the management of the defendant as executor of the said John Clarkson. Parties to be at liberty to apply for any further order, or for any modifications of these orders, consistent with the principles of the decree. Costs to be paid out of the estate.

The defendant, William Clarkson, appealed on the following grounds:

1. Because the devise of the estate to William Clarkson, was a devise upon a condition subsequent, which vested the estate in the devisee; and if the condition be unlawful the estate remains, and if lawful the condition may be performed.

2. Because even if the devise be a devise of a trust, the trustee having declared his readiness to execute the trust which is lawful, the cestui que trusts may now enforce him to it, and he is therefore trustee for these for whose benefit he has declared the trust to be.

3. That the devise to William Clarkson, was a devise of the beneficial interest, subject to uses to be declared by the testator, and that he changed his mind and declared new uses from time to time; that the last uses declared by him are contained in the written memoranda found with his will.

That those uses are lawful; and there is nothing in the statute of frauds, or in the Act against emancipation, to prevent the

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devise from taking effect as a devise to the uses contained in the written memoranda left by the testator.

McCrary, for W. Clarkson.

Martin, for T. B. Clarkson, cited 2 Story Eq. §§ 1304, 1306; *Att'y. Gen. v. Christ's Hospital*, 3 Bro. C. C. 165; *Crommelin v. Crommelin*, 3 Ves. 227; *Holmes v. Lysaght*, 2 Bro. P. C. 261; *Stratton v. Grymes*, 2 Vern. 357; *Dawson v. Dawson*, Rice Eq. 260; *Izard v. Montgomery*, 1 N. & McC. 381; *Milledge v. Lamar*, 4 Des. 617; *Rose v. Cunynghame*, 12 Ves. 36; *Bonner v. Bonner*, 13 Ves. 379; *Buckeredge v. Ingram*, 2 Ves. 652; *Smart v. Prujean*, 6 Ves. 559; *Sheddon v. Goodrich*, 8 Ves. 500; *Smith v. Attersold*, 1 Russ. 226; *Rob. on Frauds*, 332, 337; *Habergham v. Vincent*, 4 Bro. C. C. 371; *Lawson v. Lawson*, 1 P. W. 440; *Coxe v. Basset*, 3 Ves. 160; *Chaworth v. Beech*, 4 Ves. 565; *Finley v. Hunter*, 1 Strob. Eq. 208; *Blackman v. Gordon*, 2 Rich. Eq. 43.

Memminger, for plaintiff.

Petigru, for legatees.

PER CURIAM. This Court concurs in the decree; and it is ordered that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.

3 Rich. Eq. 318

J. J. CLARKE v. J. JENKINS and Others.
(Charleston. Jan. Term, 1851.)

[*Appeal and Error* 1022.]

Executors charged with neglect in the management of the plantations of testator under their charge; the Master and Chancellor having concurred that there had been no neglect, the Court of Appeals refused to disturb their judgment.

[Ed. Note.—Cited in *Austin v. Kinsman*, 1 S. C. 101; *Arnold v. House*, 12 S. C. 608; *Willoughby v. North Eastern R. R. Co.*, 52 S. C. 175, 29 S. E. 629; *Ex parte Baker*, 67 S. C. 82, 45 S. E. 143.

For other cases, see *Appeal and Error*, Cent. Dig. § 4015; Dec. Dig. 1022.]

[*Executors and Administrators* 93.]

Testator devised separate plantations to his three infant children; there being a considerable amount of debts of testator to pay, and the number of working hands of the children being about equal, the executors, until the debts were extinguished, managed the several plantations as one estate, without separation of the

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income of each child—charging, however, one of the children, whose plantation was of less value than the others, with a reasonable amount for rent; *Held*, that there was no reasonable

objection to the conduct of the executors in managing the estate as a whole.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 407; Dec. Dig. 493.]

[*Compromise and Settlement* 16.]

At the foot of an account, containing several demands, the creditor gave a receipt in full, and more than four years afterwards claimed other demands not included in the account; *Held*, That the receipt amounted to a waiver and abandonment of the claims not included in the account.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. § 56; Dec. Dig. 16.]

[*Limitation of Actions* 60.]

Held further, that if the party might have opened the receipt upon any ground of equity, such as fraud or mistake, the statute of limitations began to run against the exercise of such right from the date of the receipt.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 334; Dec. Dig. 60.]

[*Limitation of Actions* 143.]

The acknowledgment of an executor of the justice of a claim, after the bar of the statute of limitations is complete, will not prevent legatees and distributees, into whose hands the estate has gone, from availing themselves of the bar of the statute.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 582; Dec. Dig. 143.]

[*Executors and Administrators* 125.]

Every executor has a several right to receive the assets of the estate; and he who receives, is exclusively answerable for the misapplication of them, unless his coexecutors have contributed to enable him to get possession of them, or have acquiesced in his appropriation of them contrary to the trusts of the will, knowing of such misapplication.

[Ed. Note.—Cited in *Gates v. Whetstone*, 8 S. C. 247, 28 Am. Rep. 284.

For other cases, see *Executors and Administrators*, Cent. Dig. § 522; Dec. Dig. 125.]

[*Infants* 112.]

[Cited in *Barnes v. Cunningham*, 9 Rich. Eq. 479, to the point that until a decree is regularly vacated infant parties are bound by it to the same degree as adults.]

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 320; Dec. Dig. 112.]

Before Dargan, Ch., at Charleston, February, 1850.

This case came before the Court on exceptions to the report of the Master, which is as follows:

This case was referred to me to report on the matters set forth in the pleadings. Having received no instructions from the Court, touching the principles upon which the report should be founded, the Master will be compelled, in order to bring the whole case fairly and fully before the Court, to express opinions on several important points of law.

The complainant is James Joseph Clarke, son of William M. Clarke, deceased; and the defendants are John Jenkins, William M. Murray, and George W. Seabrook, executors of the said William M. Clarke, and Mr. and Mrs. Hanckel, and Mr. and Mrs. Whaley. These two ladies being daughters of the said William M. Clarke.

It appears that William M. Clarke was twice married; his first wife was Martha Mary Murray; she departed this life in the year 1821, about nine months after her marriage, leaving surviving her the said William

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M. Clarke, and one daughter, Mar*tha Mary Murray Clarke, now Mrs. Whaley, one of the defendants. The second wife of Mr. Clarke was Elizabeth Jenkins. He died in the year 1831, leaving surviving him his said widow, Elizabeth Jenkins, and two children by her, the complainant J. J. Clarke, and the defendant Mrs. Hanckel. The widow afterwards intermarried with John Hannahan; but neither of them are parties to this bill.

In order to understand the questions involved in this case, it is necessary to advert to the will of Joseph James Murray, the father of Mr. Clarke's first wife, and grandfather of the defendant, Mrs. Whaley. This gentleman, on the 23d February, 1815, executed two deeds, which he confirmed by his will bearing the same date—wherein he conveyed to trustees, sixteen negro slaves for the separate use of his daughter, Martha Mary Murray, mother of the defendant, Mrs. Whaley, during her life, and remainder to any child or children living at the time of her death, absolutely. At or soon after her marriage with Mr. Clarke, these negroes went into his possession, and he continued to use them from that time, about the year 1820, to his death in the year 1831, without accounting for their hire to his daughter, Mrs. Whaley, in whom, upon the death of her mother, they had absolutely vested.

Mr. Clarke, by his will made in 1830, among other things, after devising to his widow in fee a plantation called "Cypress Trees," devised and bequeathed in the following words:

"Item. I give, devise and bequeath unto my dear daughter, Martha Mary Murray Clarke, her heirs and assigns forever, all my right, title, interest and estate in the plantation or tract of land commonly called "Vinegar Hill," that came from the estate of her grand-father, Joseph James Murray; and as the said plantation is, in my opinion, less valuable than the plantations respectively given to my wife and other children; and as it is my wish that, at my death, my wife and each of my children be as nearly as possible on an equality in regard to property, I give, devise and bequeath unto my daughter, Martha Mary Murray Clarke, so much money as,

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with the said plantation "Vinegar Hill," will be equal in value to "Cypress Trees" plantation, in lieu, and to stand in the place of, so much land, to her and her heirs forever.

"Item. I give, devise and bequeath the plantation or tract of land called "Shell

House," unto my son James Joseph Clarke, his heirs and assigns forever.

"Item. It is, as I have already said, my desire that, at my death, my wife and children respectively, should be as nearly as possible possessed of property of equal value. And as my dear daughter, Martha Mary Murray Clarke, under the deed of her grandfather, Joseph James Murray, to her mother, then Abigail Jenkins Murray, dated the twenty-third day of February, in the year of our Lord one thousand eight hundred and fifteen, will be possessed, in her own right, of as many slaves as can fall to my present wife and her two children, on a division among them of all the negroes that belong to me, I therefore will, order, and direct, that all the negro slaves of which I may die possessed in my own right, be divided into three equal portions or parts. That my negro slaves Frank, Bob, Sarah, and her children Joe, Prince, John, Martha, Mary, Sam and Ben, be included in one of these three equal parts; and I give and bequeath the one of the said three equal portions, in which the slaves designated are included, unto my dear wife Elizabeth Mary Clarke, forever, to and for her own sole and separate use, and without being in any respect subject to the debts, influence, or control of any husband whom she may have. And I give and bequeath the remaining two equal parts or shares of my said slaves unto my dear children, James Joseph Clarke and Elizabeth Jenkins Clarke, namely, one share or part to each of them forever. And should any or either of my said children die under twenty-one years of age, without leaving lawfully begotten issue living at the time of his, her, or their death, then the share or shares of my estate, real and personal, of such child or children so dying, whether specifically given, or otherwise accruing under this will, shall go to the survivor or survivors of my said wife and children, and the issue

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of any deceased child *or children, to be equally divided among them, share and share alike. The issue of any deceased child or children taking among them the share or proportion only to which the parent or parents, if alive, would have been entitled. And should all my said three children die before attaining twenty-one years of age, without leaving issue lawfully begotten, living at the time of his, her, and their death, then, and in that case, I give, devise and bequeath all and singular, the property, real and personal, given, devised and bequeathed unto my said three children, whether specifically given, or otherwise accruing under this will, unto the issue of my two sisters, Elizabeth Grimbail Jenkins, the wife of John Jenkins, and Lydia Calon Murray, the wife of Millivan Murray, to them and their heirs forever, to be equally divided between them.

"Item. I give, devise, and bequeath all

the rest, residue, and remainder of my estate, real and personal, unto my dear wife and children, to be equally divided among them, share and share alike, to them and their heirs forever."

The executors named in the will all qualified thereon, and are now defendants to this bill. Finding much difficulty in the administration of the estate, the executors above named, in the year 1837, filed their bill in this Court against Mr. and Mrs. Hannahan, and against J. J. Clarke, Mrs. Hanckel, and Mrs. Whaley; all three of whom were then infants, and answered by their guardian ad litem, asking instructions on the following points:

1st. As to the mode of determining the amount of money to be paid to Mrs. Whaley, to equalize her plantation "Vinegar Hill" with "Cypress Trees."

2d. How that amount should be raised.

3d. The proportion to be borne by each devisee.

The case was referred to me, and my report is on file.

The sum of \$9046 was reported as the difference in value between "Vinegar Hill" and "Cypress Trees." Chancellor Harper decreed, at January Term, 1839, that the executors, out of the residue after the payment of the

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debts of the testator, *should pay two-thirds of that amount, to wit, \$6030, to Mrs. Whaley; and in case the residue was insufficient, that that sum must be made up out of the negroes bequeathed to the complainant, James J. Clarke, and his sister, Mrs. Hanckel, by their father. The executors proceeded to administer the estate upon these principles, and in December, 1841, they paid to Mr. Whaley the sum of \$11,222.76, and took the following receipt at the foot of their accounts on the executors' book:

"1841, November 17, by balance due W. J. Whaley, \$11,222.76. Edisto Island, December 11th, 1841, received of George W. Seabrook, executor estate Wm. M. Clarke, the sum of eleven thousand two hundred and twenty-two dollars 76.1-4, in full of the above balance. Wm. J. Whaley."

The complainant, James J. Clarke, having arrived at the age of twenty-one years, filed the present bill against the defendants, praying an account from the executors; charging that the debts of the estate had been improperly paid by the executors out of his share, and that of his sister, exclusive of Mrs. Whaley;—that the executors, whilst the estate was under their management, neglected the same, by means whereof the annual income and profits thereof were diminished. The bill further prays, that the defendants, Mr. and Mrs. Whaley, may account for such sums of money as they had received, and that he be held liable for one-third of the debts of the testator. The answer of the executors stated, that the principal burthen of the ad-

ministration was assumed by the defendant, George W. Seabrook; that they vouched their accounts in the proper office; that they charged the debts upon the residue, and after that was exhausted, they were bound to fall back upon the residuary bequest of negroes, in preference to the land devised. That they, upon demand by complainant's solicitor, exhibited their accounts to him; that they have managed the property to the best advantage in their power, and have credited the entire amount of the income of the estate. That the property is by no means very productive; and that the income, under their man-

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agement, was *as great as complainant has realized from it since it was turned over to him. They admit to have in hands \$1,277.89, which they are ready to pay over, according to the direction of the Court. They further state, that the defendant, Whaley, claims against the estate an account for the hire of Mrs. Whaley's negroes, from the time of the death of the first Mrs. Clarke to the death of Mr. Clarke, and while they continued in the hands of the executors; and they admit that the claim is perfectly just, and interpose no objection thereto.

The answers of Mr. and Mrs. Hanckel, and Mr. and Mrs. Whaley, contain no facts not already mentioned. The principal, if not only point, to which the complainant, and the defendants Mr. and Mrs. Hanckel, have introduced testimony, is as to the alleged mismanagement, by the executors, of their several plantations.

The rule laid down by the Court in *Taveau v. Ball* (1 McCord Eq. 461) is, that executors, administrators and others, acting in a fiduciary character, are bound to manage the funds committed to their care, with the same care and diligence, that a prudent and cautious man would bestow on his own concerns. In all cases, therefore, where a loss arises in the management of funds by the executor, or other person acting as trustee, the question arises, whether the loss happened from casualties against which no one can be expected always to guard, or from his want of care and circumspection. 2 Hill Eq. 361, *Bryan v. Mulligan*. Such is, I presume, the law applicable to the present case. The first question of fact therefore is, did the executors manage this property with the same care and diligence that a prudent and cautious man would bestow on his own concerns? I find that they did. The executors employed as their overseer, from the death of Mr. Clarke, to the period when the devisees took possession of their several plantations, Mr. John W. Wescoat; to him was confided the management of the several plantations. So that the fidelity of the executors to the obligation of their office, depends upon the honesty, capacity and industry of their overseer. On this point the testimony is as follows:

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*1st. Governor Seabrook testified, that "the overseer," Wescoat, employed by them, the executors, has an excellent reputation, but has known nothing of him personally."

2d. Mr. James Legare testifies, "Knows Wescoat very well; about four years ago, when he, witness, was married, found him the overseer of his wife and her sisters; has continued to employ him; has always been satisfied with him; thinks him an honest and competent overseer."

3d. Mr. A. J. Clarke, brother of the complainant, "Knows Wescoat; he is a perfectly competent overseer."

4th. Mr. Thomas Bailey, "Knows Wescoat; he managed the places as overseer for several years; far as he knows him personally, thinks he is as good an overseer as can be found in the Southern States."

In behalf of the complainant and Mrs. Hanckel, the witnesses testify as follows:

Mr. William Whaley. Among the men with whom witness associated, did not think Wescoat a great or good planter; witness's father hired him for one year on the estate of Benjamin Whaley, and at the close of the year dismissed him; told him early in the season he might go as soon as he pleased; this was at the same time he managed Clarke's place. Mr. Legare is the first man he ever heard speak well of Wescoat as a planter, though there may be others, and must be, from the number of places he is employed on; thinks he, Wescoat, was as extensively employed as any other overseer; never heard of his having made any distinguished crop. He has latterly been employed by men of property. Would himself rather go without an overseer on his plantation, though not living there, rather than employ Wescoat. Wescoat is employed by Ephraim Baynard.

2d. Mr. Edward Fuller's testimony leads to the conclusion, that the Clarke estate was not as well managed as he managed his own property.

From this testimony, I find that the executors have managed with the care and diligence that a prudent man would bestow

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*on his own affairs. At the same time, it is probable, that if these plantations had been the property of one or more individuals of greater energy, capability and discretion, than the executors named by the testator, larger crops might have been obtained.

Assuming then that the executors are not responsible for more than they have received, the next question that arises is as to their accounts. It is admitted by all parties, that they have actually disbursed all that has been received by them. But it is contended, on the part of the complainant, that the accounts should be readjusted, so as to allow to him 25 per cent. more of the annual crops, than is allowed to Mrs. Whaley and Mrs. Hanckel, because of the superior fertility of his land.

So a claim for a greater share than that allowed to Mrs. Whaley, is claimed in behalf of the defendant, Mrs. Hanckel.

From the testimony, it appears that each of the devisees had about an equal number of hands. The plantations, says Mr. Wescoat, were cultivated together as one place. The negroes were pretty much on one place. Thinks it was the best way to cultivate the lands, by cultivating them as one whole. In a division of the crops, Old Franks (the plantation of the defendant) ought to have had a little the most, "perhaps one quarter more than either of the other places."

If the testator had died free of debt, and it had been unnecessary, by the provisions of this will, to raise the sum of \$6030 paid to Mrs. Whaley, it would clearly have been their duty to cultivate the places separately, or at all events to have discriminated in favor of the complainant, between the shares allotted to the other two parties. But the testator being in debt, and the complainant and Mrs. Hanckel having taken their shares subject to the allotment to Mrs. Whaley of \$6030, the executors, looking to the payment of the creditors, in which class I place Mrs. Whaley, pro hac vice, made an equal partition of the annual income. To obtain this annual income, Mrs. Whaley's gang contributed their services, and also the use of the Vinegar Hill tract for provisions. This income was

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applied, as before stated, to *the payment of debts, for which the complainant and Mrs. Hanckel were liable; and for which, between the distributees, Mrs. Whaley was in no event liable.

Besides, the executors, in their account, p. 144, have charged Mrs. Whaley with the sum of \$2095 for the hire of the land of Clarke and Hanckel, at the price of \$5 per acre, which, according to the testimony, is a fair valuation.

I am of opinion, therefore, that the divisions of the income made by the executors was proper.

The defendants, Mr. and Mrs. Whaley, have also presented three distinct claims, which will now be considered. The first is a claim against the estate, as a debt, for the hire of Mrs. Whaley's negroes, from the death of her mother in 1821, to the death of her father in 1831. The executors, in their answer, admit that this claim is perfectly just; but the complainant and Mrs. Hanckel contend that, as against them, the lapse of time is a bar. I find that the claim of Mrs. Whaley is correct, and recommend that she be allowed hire at the rate of £10 per annum for 13 hands, for the space of nine years, with annual rests. Whether this claim is barred or not as to the other devisees, I refer to the Court as a question of law; and I report a statement of her claim made up on these principles.

The second claim of Mrs. Whaley is for interest on the sum of \$6030, decreed by Chancellor Harper, from one year after the testator's death, to wit, from 1832. It has been already seen that the testator intended to equalize the fortunes of his children, and for that purpose excluded Mrs. Whaley from any share of his negroes; and as Vinegar Hill was inferior in value to other places, he devised to Mrs. Whaley "so much money as, with the said Vinegar Hill, will be equal in value to Cypress Trees plantation, in lieu, and to stand in the place of, so much land, to her and her heirs forever." It is contended by Mrs. Whaley, that the true construction to be put on the will is to read it, as if instead of the words "so much money," there had been inserted the sum found by the decree to be the difference in value, to wit, \$6030. In that case, the amount would have

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borne interest *from one year after the death of the testator. I concur in that opinion, for whether the sum be regarded as money or land, in order to preserve equality between the heirs, it must be considered as belonging to Mrs. Whaley from the time of the death of her father, when Cypress Trees and the other plantations, as well as negroes, vested in the other devisees. There can be no doubt, that if the executors had filed their bill for instructions in 1831, upon the death of Mr. Clarke, that a certain sum of money would have been decreed to Mrs. Whaley, and that sum would have borne interest in the hands of the executors. But it is objected on the part of the executors, that the decree of Chancellor Harper precludes this claim. To this it is replied, that Mrs. Whaley was then an infant; that the executors were also her guardians by the will of her father, and that neither they, nor her guardians ad litem, could waive her rights to her prejudice.

On the part of the complainant and Mrs. Hanckel, the lapse of time is also objected to this claim; so far as the executors are concerned, I can discern nothing in the decree of Chancellor Harper, which authorizes me to conclude that they were exonerated; and I therefore report the claim as well founded against them. As to the other devisees, it is as in the former case, a question of law, which I respectfully refer to the Court.

The third and last claim of Mrs. Whaley is, that she is entitled to a credit for the sum of \$2095, charged to her debit in the books of the executors, page 144, as hire paid by her to the other devisees for the use of their land. Vinegar Hill plantation was inferior in fertility to the other places, the executors therefore employed Mrs. Whaley's gang on the best lands, allowed her one-third of the crops, and to make up for the difference in fertility, charged her with that sum as rent of so much land hired for her use. She would be entitled to this credit, if she

were obliged to account for 25 per cent. of the one-third part of the income allotted to her; but as she is not, according to my view of the case, bound to do so, I think the executors were right in charging her with

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that sum, as hire of the land of her co-devisees. I therefore recommend that the claim be not allowed.

The only other question remaining is, whether all the executors are responsible, or only Mr. George W. Seabrook, for any demand which may be established by any of the parties. The complainant and the defendants, Hanckel and Whaley, all contend for their joint liability. The executors state in their answer, that the principal burthen of the administration was borne by Mr. Seabrook. Mr. Legare, who was the factor of the estate, states that his dealings were principally with Washington Seabrook; thinks in some cases orders may have been drawn by John Jenkins; knows that Mr. Murray was an executor, would have paid any order he had drawn on him; does not recollect that any such order was drawn. Always looked upon Washington Seabrook as the acting executor. Has conversed about the business of the estate with John Jenkins, had no more to do with him than with Murray. In reply, he states that in his business relations with Seabrook, considered that his co-executors were bound by his accounts; but has no recollection of ever having any business dealings in the matter of the estate, with either Murray or Jenkins.

John Wescoat, the overseer, testifies that after Clarke's death, he was employed by John Jenkins, one of the executors; continued as overseer until the last three years.

Whitemarsh B. Seabrook testifies, that he was employed by Washington Seabrook to adjust his accounts as executor of Clarke; so far as he knows, Washington Seabrook was the only acting executor; knew him only in the business; believes that he alone managed the financial concerns of the estate.

In behalf of the other parties, it is contended, that the executors are bound for each others acts by the fact that they united in the bill filed in 1837, asking instructions; and that they cannot now excuse themselves from loss, by pleading that they have not executed the instructions prayed; that they were bound also, as testamentary guardians, to additional responsibility beyond that imposed merely upon executors; that G. W.

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*Seabrook was in fact their agent for certain purposes, to wit, the management of the financial part of the estate, but not of the whole business, as it is proved that the overseer had been hired by John Jenkins.

I find that George W. Seabrook was the sole acting executor, and that the others are

not responsible for his defaults, if any should be proved. Respectfully submitted.

Edward R. Laurens, Master in Equity.

Dargan, Ch. This case comes before me for trial, on the report of the Master, and exceptions thereto. The excellent synopsis of the facts given by the Master in his report, renders it unnecessary for me to make a statement of them. Yet the case was imperfectly prepared for trial. No statements or exhibits of the accounts, have been filed with the report. There are numerous exceptions, many of which relate to the form and particulars of the account: there is no report upon the exceptions. And on account of the deficiencies here noted, some of the exceptions are not sufficiently intelligible to warrant me in deciding upon them. Under these circumstances, I shall decide the general questions of law and fact, presented in the pleadings, and refer the case back to the Master, to be more elaborately reported upon as to the details, and to have the report conformed to the decree.

And first, as to the alleged mismanagement and neglect of the executors, in the conduct of the planting interest, of which they had the charge. The complainant and Mr. and Mrs. Hanckel allege that there have been such mismanagement and neglect on the part of the executors, and consequent loss to them, as to make the executors liable. It strikes me that the agricultural operations of this estate, conducted by the executors, have not been successful. This is not sufficient of itself, to make them responsible. If they use the ordinary means of good farming, and pursue the common agricultural system of the country, with an adaptation of means to ends which prudence and care would dictate, this is all that is required. It would be unjust to make them insurers against the un-

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propitiousness of the seasons, *or those failures arising from natural and sometimes unperceived causes, which so often battle the skill and disappoint the hopes of the agriculturalist. Moreover, it is not to be expected that an executor will, or can, (at least in many instances,) devote his entire personal attention to the management of the planting business of the estate, to the abandonment and neglect of his own affairs. It is not to be expected, that he would devote the same intense personal attention and care to an estate of which he had charge as an executor, as he would to one of which he was the proprietor. To require him to do this would be to engross the whole of his time. To impose these terms upon his acceptance of the trust, and to exact the performance of them at his peril and cost, would be to establish a rule to which few could be found willing to submit. The consequence would be, that it would be difficult to find competent and worthy persons who would be willing to

assume these necessary, important and responsible trusts; particularly where they involved the management of a planting interest. In some instances, where the estate consists, as it does in this, of plantations and negroes, there is a necessity imposed on the executor of carrying on a planting interest. To hire out the negroes might sometimes bring in a greater ready income. But in such cases, the negroes generally deteriorate, and are not so prolific; and the homestead and plantation are abandoned to dilapidation and decay. I might pursue this train of reflection farther, but it is unnecessary.

Upon an attentive consideration of the evidence, I cannot perceive any such mismanagement and inattention on the part of the executors, as should subject them to liability for unsatisfactory or deficient results. They employed a skilful overseer, and one who had enjoyed a high reputation in his line of business. They pursued the ordinary routine of making crops; and if the crops were not as abundant as might have been hoped or anticipated, I see no reason for making the executors responsible. And this is the judgment of the Court on this point.

The next question which I shall consider is, whether, for the balance found due on the

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accounts of the executors, the three *executors are jointly responsible; or is G. W. Seabrook, who alone received the funds of the estate, alone liable. I think that the evidence warrants the conclusion that the three executors acted in conjunction in their management of the planting interest; and if there had been such default in this respect, as to have charged them for losses on account of deficient crops, they would all have been jointly liable. But the question now is, as to their liability for moneys actually received; and it appears that G. W. Seabrook alone performed the duty of receiving and disbursing the funds of the estate. The accounts were kept and made up in the name of "the Executors of W. J. Clarke." But this is only a matter of form; and the proof is, that Seabrook received all the money, and made all the payments; and the other two executors not only did no act of this kind, but there is no evidence that they concurred in the receipts or payments of the acting executor. Under these circumstances, I am of the opinion that G. W. Seabrook is alone liable for the balance due upon the executors's accounts. And it is accordingly so decreed.

In regard to the apportionment and division of the income of the estate among the complainants, Mrs. Whaley and Mrs. Hanckel, and the charges and allowances which have been made in the way of rent, on account of the different fertility and productiveness of the several plantations, I am satisfied with the decision and report of the Master thereon, and for the reason which he

has given. And the report is, in this respect, confirmed.

I come now to consider the claims set up in behalf of Mrs. Whaley.

The first which I shall notice arises under the following circumstances. She got no negroes from her father's estate. Her grandfather, Joseph James Murray, by a deed, gave to his daughter, (Mrs. Whaley's mother, and the first Mrs. Clarke,) certain negroes for her life; and at her death, he gave, by way of limitation, the same negroes to her children. She died in 1821, and Mrs. Whaley be-

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ing her only child, was then entitled *to the negroes. But they were kept by her father, the late Mr. Clarke, and used and employed as his own. He appropriated the products of their labor to his own use, kept no account, and seemed to have contemplated no liability for the rents and hire of these negroes. He made no provision in his will, or otherwise, for the payment of this claim; and he declared and provided in his will, that in consequence of his oldest daughter being entitled to these negroes, in her own right, and they being equal in value to one-third of his own negroes, all his own negroes should be equally divided among his two other children and his wife. And this has accordingly been done.

There cannot be a doubt but that the claim of Mrs. Whaley, for the hire of the negroes after her mother's death, was, at one time, valid against her father's estate. It is contended now, in reference to this claim, that the will presents a case of election; and that in consequence of the devise of land by the will to Mrs. Whaley, and her acceptance thereof, that she is not to be allowed this demand. It is supposed that, upon a fair construction of the will, this claim is incompatible with its provisions; and that Mrs. Whaley having elected to take the land devised to her, cannot now be permitted to recover a demand which would be adverse. I think differently. A doctrine has been invoked which has no application. As to Mrs. Whaley, the will presents no case of election. The testator evidently contemplated equality among the different members of his family, as to negro property. But this claim was a debt, honestly and actually due. He did not affect to dispose of it, and said not a word about it, in any way whatever. There are no conditions, express or implied, imposed by the will, as to the devise of land to Mrs. Whaley. It is not a case of election.

But there are other difficulties. There were former proceedings between these parties, on a bill filed in 1839, in reference to the estate of the testator. All the persons now parties before the Court, were parties to that bill. The widow of the testator, Mrs. Hannahan, and Mr. Hannahan, her second husband, were also parties. Mrs. Wha-

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ley then set up against the executors a *claim for the hire of her negroes after the testator's death, which was allowed her. But she advanced no claim for the hire that had accrued before her father's death. She was then an infant. The Court decreed that she should be paid the difference between "Vinegar Hill," devised to her, and "Shell Bank," devised to her brother, W. J. Clarke. The widow's share was exonerated from contribution for this purpose. In equalizing the value of her land, one-third was borne by herself, and two-thirds imposed as debts on the shares of J. J. Clarke and Elizabeth M. Clarke. The amount of the difference between the places was found to be \$9046; which entitled her to receive from her brother and sister \$6030. She afterwards intermarried with the defendant, W. J. Whaley; and he, on the 17th November, 1841, executed to the executors a receipt for \$11,222.76, which included the amount due for the difference in the value of "Vinegar Hill" and "Shell Bank," the negro hire due his wife, that had accrued after testator's death, and all other demands at that time claimed, or thought to be due. The executors had delivered up the estate to the devisees and legatees, before this claim was advanced. They admit it to be a just demand, as it obviously was in its inception. They make no objection to its being allowed, but contend that a decree cannot go against them, on the ground, that the claimants stood by and saw them part with the control and possession of the estate, without intimating a design to set up this demand. There is only a small balance now in the hands of one of the executors, that remains to be accounted for. This reasoning, I think, is not to be resisted. If the claim should be allowed, a decree is not to be made against the executors, except, perhaps, so far as regards the small balance before spoken of. But in case the claim is allowed, the decree must be against J. J. Clarke and Elizabeth Clarke, who have received the property; the claimants themselves bearing their proportionate shares.

But in this view of the case, these parties are not to be compromised by the pleadings or admission of the executors, but they are to be permitted to use the same grounds of

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defence that *the executors would, had they been the parties liable, and the claim set up against them.

In *Dawson v. Dawson*, MSS. Feb. 7, 1850, under precisely the circumstances of the case now before me a party was held to have forfeited and lost, what could otherwise have been considered as a just and valid claim. A party is not allowed to litigate his rights to the same subject matter by piece-meal. Therefore, if a present claim before the Court could have been adjudged in a former suit between the same parties, and was not ad-

judged, because not advanced, the claimant is concluded. The rule is that a former suit is a bar to all matters that have been, or, from the nature of the proceedings, might have been adjudged.

Mrs. Whaley was an infant at the time of the former proceedings. Admitting that this fact would qualify the rule, and entitle her to open the proceedings, (upon which point I express no opinion,) yet on her coming of age, or intermarriage with an adult, she must proceed with diligence to assert her rights; and failing to do this, she would, at all events, be concluded. From November, 1841, to 16th December, 1846, the claimants have not impugned the correctness of the former settlement.

Thus I think that Mrs. Whaley is concluded and barred as to this claim, by the former suit. I think she is concluded by the receipt to the executors, considering it as a settlement without reference to a suit or decree, *Porter v. Cain*, McM. Eq. 81. I also think that the claim was barred by the statute of limitations, which has run against it from the date of W. J. Whaley's receipt.

Can these pleas and defences be available to the parties in whose favor they operate, without being made in the pleadings? I think they can. The claim is not set up in a bill. It is brought forward by the Whaleys, not by bill, but in their answer, against the complainant and one of their co-defendants. Replications are not usual in the Court of Equity in this State. Questions made, and claims brought forward, in the manner in which this has been done, are not required

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to be answered, *and are not presented according to the strict rules of pleading. I think that the objections to the claims are available in the manner in which they have been presented, and I hold that the claim is barred. And it is so ordered and decreed.

The next claim set up by Mr. and Mrs. Whaley, is for interest on the sum of \$6032, which they received under the decree of the Court in the former case, in the equalization of the devises of the plantations. They contend that this was a pecuniary legacy, and should have borne interest from one year after the testator's death. This may be a true interpretation of that part of the will. I express no opinion.

But it is a late day to claim interest, so long after the principal has been paid. If the interest was due, I think it has been waived. I think it is barred by the former bill, by the settlement, and by the statute of limitations. In fact, every objection against the claim for negro hire, applies with equal force against this. The claim is disallowed.

Another question raised in behalf of Mrs. Whaley is, in regard to a charge of land-rent made against her by the executors. The executors, as has already been stated, cultivated the different plantations together, for

the joint benefit of the parties interested. Her place, "Vinegar Hill," was of an inferior quality as to soil and productiveness. Her hands have been worked in part on a better place, and she has had the benefit of it. For this she has been charged rent. The amount charged is reasonable, according to the testimony; and in making the charge, the use of her own land in the joint cultivations has been considered. The exception is overruled.

There is only one more topic which I will discuss. I do not think it proper, in the examination of the executors's accounts, to go farther back than the decree made upon them in the former bill. As far as they are affected by that decree, they are to be presumed to be correct. From this stage in the accounts, the Master will examine them in the usual manner.

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*There are some errors that have confessedly crept into the statement of the accounts. These will, of course, be corrected.

It is ordered and decreed, that this case be re-committed to the Master, that he conform his report to the principles of this decree, and that he correct all errors that may appear in his statement of the accounts.

The defendants, W. J. Whaley and wife, appealed, on the grounds,

1. Because the bill of 1839 having been filed by the executors for instructions as to the mode of paying all the debts of the testator, no particular debt is forfeited because not specially mentioned to the Court at that time by the creditors or executors, but, on the contrary, the decree protects the debt.

2. Because the receipt of 1841 does not affect to be, nor is in law or in fact, a receipt in full of all demands; on the contrary, the executors, at the same time that they produce the receipt, admit that Mrs. Whaley is still a creditor to a large amount.

3. Because the debt to Mrs. Whaley for hire, being admitted by the executors to be due, the statute of limitations is inapplicable, and she is entitled to a decree therefor against G. W. Seabrook.

4. Because G. W. Seabrook being admitted to be insolvent, the complainant and Mrs. Hanckel ought to refund for the payment of this debt.

5. Because neither the complainant nor Mrs. Hanckel, can plead the statute of limitations in bar to the claims of Mrs. Whaley.

6. As to the decree under the bill of 1839—Because the proceedings in that suit cannot bar her rights under that decree.

7. Because the plea of the statute of limitations cannot be pleaded to a decree of this Court.

8. Because the receipt of 1841 is not a settlement in full of the decree, nor has the same been pleaded as such by the executors, or by the complainant, or by Mrs. Hanckel.

9. Because the decree and so much of the

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interest as is *unpaid, is a valid and subsisting charge upon the estates of the complainant and Mrs. Hanckel.

The complainant also appealed, on the following grounds.

1. Because the complainant was entitled to an account of the profit or income of his property in the hands of the executors of W. M. Clarke, who were also the guardians of complainant, and this account has never been rendered.

2. Because the executors, in the testimony which they introduced, established the fact, that of the income which they derived and disbursed, a much larger proportion was derived from the property devised to the complainant than from the property devised to the other children. And the complainant submits that they are bound to account with him for their application of the income arising from his share of the estate.

3. Because the executors were, and are, jointly liable to the complainant.

Magrath, Yeadon, for complainant.

Memminger, J. M. Walker, McCrady, for defendants.

WARDLAW, Ch., delivered the opinion of the Court.

The questions raised by the grounds of appeal in this case may be considered most conveniently, by taking up the points decided in the circuit decree.

1. Neglect is imputed to the executors in the management of the plantations under their charge.

The Master and the Chancellor concur in the conclusion, that there has been no mismanagement; their judgment upon a matter of fact would not be disturbed by us, where there was testimony upon both sides, upon any doubt as to the weight of evidence. Here their judgment is amply sustained by the evidence.

2. It is complained, that the executors have treated the several plantations of the children of testator as one estate, without separation of the income of each devisee, whereas the land of plaintiff was more productive than the land of either of the other two, and the land of Mrs. Hanckel more productive

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than *the land of Mrs. Whaley. In the judgment of the Master and Chancellor, which we are not disposed to controvert, Mrs. Whaley has made sufficient compensation to the plaintiff and Mrs. Hanckel for the superior productiveness of their lands, by the payment of \$2095 for rent of their lands; and as the slaves bequeathed to the latter two were liable, by the decree of 1839, to the payment of \$6030 to Mrs. Whaley, to produce equality among the three devisees, we see no reasonable objection to the executors's conduct in managing the estate as a common

property, until the debts, including the \$6030, were extinguished.

3. A claim is set up in behalf of Mrs. Whaley, for the hire of her negroes from the death of her mother until the death of her father, about ten years. One of the grounds upon which the Chancellor rejects this claim, is, that it was a matter litigated, or proper for litigation, in the former case between the parties to the present suit, reported as *Jenkins v. Hanahan*, (Chev. Eq. 129.) That a former decree, or judgment, is a bar to further litigation between the parties and privies, as to the same subject of controversy, is firmly established in this Court. (*McDowall v. McDowall*, Bail. Eq. 330; *Tate v. Hunter*, 3 Strob. Eq. 136.) The infancy of a party at the time of the former decree, is no ground of exception to the estoppel; for an infant is bound, as fully as an adult, by a decree, until it be reversed. (Story's Eq. Pl. § 792; *Spencer v. Bank*, Bail. Eq. 468; *Huson v. Wallace*, 1 Rich. Eq. 1.) But the obscurity of the facts as presented to us, makes the application of the doctrine somewhat doubtful in this matter; and the necessity of scrutiny into the facts is superseded as other objections to this claim clearly appear. At the foot of an account, containing a demand against the executors for the hire of Mrs. Whaley's negroes after the death of her father, her husband, then adult, and entitled to receive her choses in action, November 17, 1841, signed a receipt in full to the executors. The omission, at that time, to set up any claim for the hire of Mrs. Whaley's negroes before the death of her father, amounts to a waiver and abandonment of such claim. (*Chesnut v. Strong*,

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1 Hill Eq. 128.) *It is the duty of the Court to give full effect to private settlements between parties of adverse interests, ut sit finis litium. (*Fraser v. Hext*, 2 Strob. Eq. 250.)

If the party might have opened this receipt upon any ground of equity, such as fraud or mistake, the statute of limitations would begin to run against the exercise of such right from the date of the receipt; and here the bar of the statute was complete before this claim was stirred. It may be mentioned, although the fact is not regarded as important, that Mrs. Whaley herself was of full age more than four years ante litem motam. It is urged, however, that the acknowledgment by the executors of the justice of the claim, removes the bar of the statute, and revives the demand. But the acknowledgement was after the claim had been fully barred, and was not accompanied by any promise to pay; and under such circumstances the debt would not be revived against an original debtor; much less against a legal representative to create liability through him upon legatees or distributees. The mere omission of the executors to plead the statute, will not preclude other parties, who may

be charged with the debt, from availing themselves of the defence. (*Shewen v. Vanderhorst*, 1 Rus. & Myl. 347.) One legatee can make reclamation of another only through the executors, and upon some ground of equity that entitles the executors to be reimbursed for the erroneous appropriation of the assets. How could executors establish such grounds of equity, after they had willfully refrained from resorting to a legal defence?

4. Mr. & Mrs. Whaley propounded another claim, for interest on the \$6030 decreed to her for equality. The principal sum was included in the account, at the foot of which, W. J. Whaley gave a receipt in full in November, 1841. The interest should have been claimed then, if ever. The claim of it now, is liable to all the defences which have been considered to exclude her demand for hire. More than that; this claim was never well founded. It is not allowed in terms by the decree of 1839; and it is not just that she should receive interest on a sum representing land devised to her, while the profits of the

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lands of *her co-devisees are in the course of appropriation to make her land of equal value with theirs respectively.

5. The remaining question is as to the joint liability of all the executors for the acts of each. The effect of our decision upon the first point—as to mismanagement of the plantations—is to restrict this enquiry to the subject of the pecuniary assets of the estate received by G. W. Seabrook. As to the receipts and payments, he alone was the acting executor; and no act of concurrence, on the part of the co-executors, appears in the evidence. Indeed we are not furnished with any proof of his misapplication of the assets. Every executor has a several right to receive the assets of the estate; and he who receives, is exclusively answerable for the misapplication of them, unless his co-executors have contributed to enable him to get possession of them, or have acquiesced in his appropriation of them, contrary to the trusts of the will, knowing of such misapplication. Here his co-executors have been merely passive; they have not obstructed G. W. Seabrook in getting possession of the assets; and they are not responsible for his acts. (*Langford v. Gascoyne*, 11 Ves. 335; *Atcheson v. Robertson*, Col. Dec. 1850, ante, p. 132 [5 Am. Dec. 634].)

It is not our purpose, in this opinion, to conclude the parties on any matter outside of the case made for our decision. The equities of the parties as to the distribution of the funds remaining in the hands of the acting executor, will be determined when they are properly presented.

It is represented to us, that the plaintiff and Mrs. Whaley have died since the filing of the circuit decree. Leave is granted, to any party, to take the necessary steps for revivor.

Ordered that the circuit decree be affirmed and the appeal be dismissed.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

Appeal dismissed.

3 Rich. Eq. *342

*JAMES R. PRINGLE and JULIUS ST. JULIEN PRINGLE, Executors of Elizabeth M. Pringle, v. WILLIAM RAVENEL and Wife et al.

(Charleston. Jan. Term, 1851.)

[Wills \hookrightarrow 718, 781.]

By marriage settlement the survivor had power, by will, to fix the proportion each child should take of the settled estate: the wife survived, and on bill for settlement of the husband's estate, by a consent decree, the trustee under the settlement became the purchaser, to and for the uses of the settlement, of the husband's separate estate, and entered into bonds to pay, as trustee, to each child, a certain sum, the value of its share of the husband's estate: the wife died leaving a will, by which she devised and bequeathed the trust and other property to the children, and directed that her several devises and bequests should be taken by her devisees and legatees in full satisfaction of any demand on herself, or her estate, or the estate of her deceased husband; the bond of the trustee to E. R. one of the children, was unpaid at the death of the wife: *Held*, that the acceptance of E. R. of the devises and bequests to her operated as a satisfaction of the bond.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1718, 2016; Dec. Dig. \hookrightarrow 718, 781.]

[This case is also cited in Matthis v. Hammond, 6 Rich. Eq. 402, without specific application.]

Before Dunkin, Ch. at Charleston, June, 1850.

The bill stated that, by marriage settlement, made between plaintiff's father, James Reid Pringle and Elizabeth Mary Pringle, by her then name of Elizabeth Mary McPherson, and Susanna McPherson, James E. McPherson, and John Julius Pringle, trustees, bearing date the 18th day of March, 1807, certain real and personal estate; and also certain reversionary interests to which the said Elizabeth Mary was entitled under the will of her father, General John McPherson, were, by her, with the consent of the said James Reid Pringle, conveyed to the said trustees, among other uses, after the marriage then expected, and shortly after solemnized between the said James Reid Pringle and Elizabeth Mary McPherson, to the use of husband and wife during life, and the survivor for life, and after the decease of the survivor, "to the use of all and singular, or such one or more of the children of them the said Elizabeth Mary McPherson and James Reid Pringle, and for such estate and estates in such parts and proportions, manner and form, with or without power of revocation as the said Elizabeth Mary McPherson and James Reid Pringle shall, at any time or

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times during their joint lives, *by any deed

or deeds, writing or writings, under both their hands and seals, attested by two or more credible witnesses, direct, limit and appoint; and in default of such direction, limitation and appointment, and in case any such shall be when and as soon as the estates and interests thereby limited shall respectively end and determine, and as to such part or parts of the premises where no such direction, limitation or appointment shall be made, then, as the survivor of them, the said Elizabeth Mary McPherson and James Reid Pringle, shall, at any time or times, during his or her life, by any deed or deeds, writing or writings, under his or her hand and seal, attested by three or more witnesses, or by his or her last will and testament, in writing, to be by him or her, signed, sealed and published, in the presence of the like number of witnesses, direct, give, limit and appoint, the same as aforesaid; and, in default of such direction, limitation, gift and appointment, or in case any such shall be, when and so soon as the estates and interests thereby limited shall respectively end and determine, and as to such part or parts of the premises whereof no direction, gift, limitation or appointment as aforesaid, shall be made, to the use of all and every, the child or children of the said Elizabeth Mary McPherson and James Reid Pringle," &c.

That Susanna McPherson, by her last will and testament, bearing date the 20th day of August, 1834, gave and bequeathed to the said James Reid Pringle, one-third part of the residue of her estate, in trust, for the sole and separate use of her daughter, the said Elizabeth Mary Pringle, during her life, and after her death, to her children then living: and appointed the said James Reid Pringle one of her executors.

That on the 11th day of July, 1840, the said James Reid Pringle died intestate, leaving the said Elizabeth Mary Pringle surviving him, and leaving issue, the plaintiffs, and Eliza Butler, wife of William Ravenel, and Rosamond Miles Pringle, and having had issue of the said marriage, one son and three daughters, who had died before him; that administration of his estates and effects was committed to the plaintiff, James Reid

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*Pringle, and for the settlement of his estate, a bill was filed, wherein Elizabeth Mary Pringle, William Ravenel, Eliza Butler Ravenel, Julius St. Julien Pringle, and Rosamond Miles Pringle, were complainants, and the plaintiff, James R. Pringle, defendant; and an account was taken between the said James Reid Pringle, and the trust estate under the marriage settlement, and also an account of the funds which came into the hands of the said James Reid Pringle as trustee of his wife, under the will of Mrs. McPherson, and the said Elizabeth Mary Pringle,

became the purchaser of his estate, and undertook to pay to his children the sum of seventeen thousand seven hundred and one dollars, sixty-four cents, as the amount of two-thirds of his estate after the payment of debts, which arrangement, on the 29th day of May, 1841, was carried into effect by a decree of this Court.(a)

That soon after the settlement of the said estate, the said Elizabeth Mary Pringle entered into a bond to William Ravenel conditioned for the payment of \$4,425.41, being the portion of the said Eliza B. Ravenel in her father's said estate, and the said William Ravenel soon afterwards assigned the said bond, and all the interest and estate of the said Eliza B. Ravenel, under the marriage settlement, and the will of Mrs. McPherson, to the plaintiff, James Reid Pringle, in trust for husband and wife for life, and to the survivor for life, and to the issue of

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the marriage, as the survivor may appoint,

(a) So much of the consent decree, of 29th May, 1841, as is necessary to a proper understanding of this case is as follows.

"On hearing the Master's report in this case, and on motion of Mr. DeSaussure, complainant's solicitor, ordered that the same be confirmed. And it is further ordered and decreed that James W. Gray, Master in Equity, do convey to James R. Pringle, the trustee substituted in lieu of John Julius Pringle, at the present term, as trustee, under the marriage settlement of Mrs. Elizabeth M. Pringle, upon the trusts, and subject to the conditions and limitations expressed therein, the plantation on Santee river, called the Marsh, containing two hundred and forty acres—also, the plantation adjoining the above, on Santee river, containing two hundred and six acres of swamp land; also, the small lot and house on South Island; also, the lot of land, with the dwelling house thereon, in Cannonsborough, on Charleston Neck, all which premises are fully described in the pleadings." "And that the said James R. Pringle hold, to the uses of the marriage settlement, the remaining sixteen negroes, mentioned in Schedule No. 5, as standing in the name of his testator, nine of whom are taken to supply the place of nine, which were sold by the late James R. Pringle, belonging to the trust estate, and seven, to make up the seven due by the Schedule No. 3. And it is further ordered and decreed, that the said trustee do pay, with the funds of the trust estate, the sum of sixteen thousand and sixty-eight dollars, and forty-one cents, with the accruing interest thereon, being the amount of the

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debts *the said James R. Pringle, deceased, reported by the Master. And it is further ordered and decreed, that the said trustee do pay, from the funds of the trust estate, to the four children of James R. Pringle, deceased, seventeen thousand, seven hundred and one dollars and sixty-six cents, with interest from the date of this decree, in equal shares, to wit,—to Mrs. Eliza B. Ravenel, and William Ravenel, her husband, the sum of four thousand, four hundred and twenty-five dollars and forty-one cents; to himself, the said James R. Pringle, the sum of four thousand five hundred and twenty-five dollars and forty-one cents; and, to the duly appointed guardian of Rosamond M. Pringle, the sum of four thousand, five hundred and twenty-five dollars and forty-one cents; and to the duly appointed guardian of Julius St. Julien Pringle, the sum of four thousand five hundred and twenty-five dollars and forty-one cts."

and in default of issue to the survivor in fee. (b)

That plaintiffs's mother, the said Elizabeth Mary Pringle, by her last will and testament in writing, bearing date the 14th day of April, 1843, in execution of her power of appointment, and in exercise of her rights of property, undertook to dispose of all the trust estate under the marriage settlement, as well as her mother's will, and gave her

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son-in-law, William Ravenel, *one thousand dollars, and legacies to her grandchildren, Catharine Prioleau Ravenel, James Pringle Ravenel, and Elizabeth McPherson Ravenel, (the legacy to Catharine Prioleau Ravenel being a slave belonging to the trust estate,) and to plaintiffs, an undivided fourth part of the plantation and negroes, and other real and personal property in trust, for the sole and separate use of her daughter, Eliza Butler Ravenel, during the joint lives of herself

(b) The bond here referred to was, in fact, the bond of James R. Pringle, trustee, and is as follows.

The State of South Carolina.

Know all men by these presents, That I, James R. Pringle, substituted trustee, under the marriage settlement of Mrs. Elizabeth M. Pringle, in conformity and obedience to a decree of the Court of Equity, made on 29th May, 1841, at Charleston, in a certain cause, wherein the said Elizabeth M. Pringle and her children are complainants, and James R. Pringle, executor of James R. Pringle, deceased, is defendant, acknowledge myself, as trustee under the said marriage settlement, to be held and firmly bound unto James R. Pringle, trustee under the marriage settlement of William Ravenel and Eliza B. his wife, in the full and just sum of eight thousand eight hundred and fifty dollars, eighty-two cents, to be paid to the said James R. Pringle, trustee of William Ravenel, and Eliza B. his wife, his certain attorney, executors and administrators, or assigns; to which payment, well and truly to be made and done, I bind myself, and each and every one of my heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with my seal, and dated at Charleston, the twenty-ninth day of May, in the year of our Lord one thousand eight hundred and forty-one, and in the sixty-fifth year of the Sovereignty and Independence of the United States of America.

The condition of the above obligation is such, That if the above bound James R. Pringle, trustee of Elizabeth M. Pringle, his heirs, executors, and administrators, shall and do well and truly pay, or cause to be paid, unto the above named James R. Pringle, trustee of William Ravenel and Eliza B. his wife, [their] certain attorney, executors, administrators or assigns, the full and just sum of four thousand four hundred and twenty-five dollars and forty-one cents, with legal interest from the date, payable annually, in two equal successive instalments, the first instalment whereof is to be paid on or before the twenty-ninth day of May, which will be in the year of our Lord, one thousand eight hundred and forty-two, without fraud, or further delay, then the above obligation to be void, and of none effect, or else to remain in full force and virtue.

(Signed)

James R. Pringle.

Sealed and delivered in the presence of

(Signed) H. A. De Saussure.

and husband, and in case she should die in his lifetime, to the use of her issue then living; the issue of a deceased child to take the parent's share and no more, and in default of issue, as she may appoint; and in case she should survive her husband, to her absolute use and behoof forever freed and discharged from all other and further trusts. And declared the same trusts of the estate given to her daughter Rosamond Miles Pringle, and directed that her several legatees should receive their legacies as a satisfaction of all demands, on her or her estate, or that of her late husband.

That the testatrix afterwards, on the 14th day of August, 1843, departed this life, leaving the said will in full force; and plaintiffs, as executors therein named, proved the same, and have undertaken the execution thereof; but are unable to proceed without the aid of this Court.

That it is denied that the said power of appointment to which the said Elizabeth Mary Pringle was entitled, authorized her to limit estates to her grandchildren; and it is also denied that the legatees are bound to elect between provisions made by the settlement and the will of Mrs. McPherson, and that made by the testatrix; and the said William Ravenel insists that the share to which the said Eliza Butler Ravenel is entitled, under the marriage settlement of her parents, and the will of her grandmother, should be held by the plaintiff, James Reid Pringle, subject to the uses which have been declared thereof by the assignment of the same in trust, as before mentioned. And that the bond of the testatrix for Mrs. Ravenel's part of her father's estate should be satisfied; whereas, the plaintiffs insist that

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the testatrix had the power to appoint, and that the said power is well executed by her will, and that the parties interested must all elect whether to take under or against the will of the testatrix. And the bill prayed that the trusts of the said will may be declared and executed under the sanction of this Court, &c.

Dunkin, Ch. The first inquiry is, whether the will of Mrs. Pringle is a due execution of the power of appointment, vested in her by the settlement of 1807. It is very clear, that such was the purpose of the testatrix. In the recital, it is declared, that the will is made "as a disposition of all the estate which I may dispose of, either in my own right, or by virtue of any power." If she has failed, it is from a misapprehension of the extent of her authority.

On the part of the defendants, William Ravenel and wife, it is insisted that, under the marriage settlement, Mrs. Pringle had no authority to limit any part of the property to her grandchildren, and that such limitation is void. The settlement declares that, upon the decease of the survivor of them,

"the property shall be held to the use and behoof of all and singular, or such one or more of the children of them, the said Elizabeth Mary McPherson and James Reid Pringle, and for such estate and estates, in such parts and proportions, manner and form, with or without power of revocation, as they, the said Elizabeth Mary McPherson and James Reid Pringle, may direct, limit and appoint, and, in default of such direction, limitation and appointment," &c., "then, as the survivor of them, the said Elizabeth M. McPherson and James R. Pringle," shall, at any time, by deed or will, "direct, give, limit and appoint the same as aforesaid."

The important clause of Mrs. Pringle's will is as follows:—

"Item. To the use of my daughter Eliza, (Mrs. Ravenel,) subject to the trusts herein-after mentioned, and to my sons, Jas. Reid and Julius St. Julien, and my daughter Rosamond Miles Pringle, I give my plantation, and all my lands on Santee River, in the parishes of Prince George, Winyah, and St. James', Santee, and all the negro slaves employed on the said plantation," &c. "And, to provide against the casualties of commerce,

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from *which the most prudent are not secure, I do hereby declare the following trusts of the property bequeathed to the use of my daughter, Eliza Butler Ravenel, that is to say:—the estate, so bequeathed to my said daughter, shall not be vested in her, but in my sons, James Reid Pringle and Julius St. Julien Pringle, as her trustees, to have and to hold the same to the said trustees and their heirs, upon the following trusts, that is to say, upon trust, for the sole and separate use of my daughter, Eliza Butler Ravenel, during the lives of her and her said husband, and, if she should die in the lifetime of her said husband, then to the use of her issue then living, the issue of a deceased child to take the parent's share and no more; but, if she should die in the lifetime of her said husband, without leaving issue, then to such uses as she, by her last will and testament, may limit and appoint; and, in case she should survive her said husband, then to her absolute use and behoof forever, freed and discharged from all other and further trusts."

The argument seems to be, that the limitation to the children of Mrs. Ravenel, on her death, in the lifetime of her husband, is an excessive execution of the power, and null and void. *Robinson v. Hardcastle*, (2 Bro. C. C. 22,) bears a striking analogy to this case. The power was there created by a marriage settlement, and was executed by the will of the husband. Lord Thurlow, before whom the cause was heard, said, that except the case of *Cavendish v. Cavendish*, he knew of no case where it had been decided that an appointment to grandchildren is a good execution of a power to divide among children. If that case be so decided, he believed it was

the first case to that purpose. "What is a perpetuity," continues he, afterwards, "but the extending the estate beyond a life in being, and twenty-one years after. That would have been the effect of this, if done by devise; the question, therefore, is, whether, by the intervention of a power a grantor may extend the estate beyond the rules of law, to what the law terms a perpetuity?" A case was directed for the opinion of the Court of King's Bench; and Buller, J., in delivering the judgment, or rather the reasons, of the

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*Court, says: "I take it to be a clear rule of law, on the execution of a power, that the execution must have a reference to the power itself; and that a person, claiming under the execution, takes under the deed by which the power is created; and, therefore, that the uses, limited by the power, must be such as would have been good if limited by the original deed. If that rule be law, it puts an end to the case." (2 T. R. 252.) So if the uses, limited by the will of Mrs. Pringle to the children of Mrs. Ravenel, had been so limited in the original settlement, (Mrs. Ravenel not being then in existence,) it seems quite clear that they would have been too remote and void. But, as was said by Lord Northington, in *Marlborough v. Godolphin*, (1 Eden, 404,) if the grantor could not lock up his property in this manner himself, neither can he deliver up the keys to another, and empower him to do it. The will of Mrs. Pringle, being no more than an execution of the power, this limitation to the children is consequently inoperative and void. The result, or effect, is not equally clear.

In reference to the valuable estates, included in the clause already cited, the scheme or purpose of the testatrix is not easily to be misapprehended. She designed to execute her power of appointment, then to make an equal division of the property among her four children, as between themselves; and, lastly, to place her daughters on precisely the same footing, in regard to the restrictions and limitations of the estates designed for them respectively. These, in the opinion of the Court, were the leading objects of the testatrix, to which every provision of the clause was intended to be subordinate. If any of these provisions prove inoperative, as violating the rules of law, or transcending the authority of the testatrix, this should not be permitted to defeat the general design, if it may be carried into effect without reference to those inoperative designs. The estates on Santee, with the negroes, &c., upon them, are appointed to her four children. To three out of four, the terms of the appointment, in the first part of the clause, are in the most absolute and unqualified language, and "I re-

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quest," she adds, "that the said *plantation and negroes be not divided, as long as the parties can agree in the management of the

property, believing that, as a joint estate, it will conduce most to their advantage."

The testatrix then proceeds, "and to provide against the casualties of commerce, from which the most prudent are not secure, I do hereby declare the following trusts of the property bequeathed to the use of my daughter, Eliza Butler Ravenel." It is then declared, that the property shall be held by the trustees "for the sole and separate use of Mrs. Ravenel, during the joint lives of her husband and herself, and if she should die, in the lifetime of her husband, then to the use of her issue then living," &c. The testatrix had an undoubted right to restrict the estate of her daughter to her sole and separate use, and the only part of the declaration which exceeds the power, is the limitation to the issue of the marriage on the contingency contemplated. A similar condition is annexed to the gift of the lands and negroes given to her daughter, Rosamond Miles Pringle. And it will be more simple, first to consider her interests in connection with the authorities to be cited. The first part of the clause gives in as absolute terms to Rosamond as to James Reid and Julius St. Julien. Afterwards the condition, (as it is called,) is annexed to this "gift of land and negroes," to wit, that, on her marriage, a settlement should be made declaring the property subject to the same uses as those declared "of the testatrix's daughter, Eliza." In *Arnold v. Congreve*, (1 Rus. & Mylne, 209,) Sir Thomas Plumer, after holding that a limitation to children of grandchildren was, in the particular case, void for remoteness, uses this language: "The testatrix, having by her will, given her grandchildren absolute interests, has made a codicil, expressing her desire that they should take only life estates, in order that their children might take in succession after their deaths; that her sole object in making the codicil was to let in those children of grandchildren; that that purpose necessarily failed, and that, as the great-grandchildren could not take, the intention of the testatrix would be best effectuated by holding, that the absolute interests given to the

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grandchildren by the will, were not destroyed by the codicil." So here, the gift to Rosamond is absolute. The subsequent attempt to limit the succession, being ineffectual for the purpose intended, should not be permitted to cut down the absolute estate, previously well given. And this rejection of qualifying clauses, ineffectually attempted to be engrafted on a previous absolute gift, equally obtains where the whole is contained in the same testamentary paper; it being considered that the testator intends the prior absolute gift to prevail, except so far only as it is effectually superseded by the subsequent qualified one. (1 Jarm. 257.) *Carver v. Bowles* is cited as authority. In that case, a testatrix, having, under a marriage settle-

ment, a power of selection in favor of her children, appointed the settled fund absolutely, in equal shares, to her five children, two sons and three daughters, and then declared that the shares of each of her daughters should be held to her sole and separate use, for life, and after her decease, for her children, &c. It was held, that the words of the appointment were sufficient to vest the shares absolutely in the daughters; that the attempt to restrict their interests by limitations to their issue, being inoperative, did not cut down the absolute appointment; but that it was competent to the donee of the power, to limit the interests which she appointed to her daughters, to their separate use, &c. This authority was followed by Lord Langdale, in *Kempf. v. Jones*, (2 Keene, 756.) "The testatrix," says he, "has made limitations, which to a certain extent, were quite within her power but she has attempted to make others which were beyond the limits of her power; and I think that the absolute gift ought to have effect, subject to the limitations which were within the power, and free from the others." It seems very difficult to distinguish the appointment in favor of Rosamond Miles Pringle, from the cases thus adjudicated.

The gift to Mrs. Ravenel, in the first part of the clause, is not in the same unqualified terms, but the difference is rather verbal than substantial. As has been stated, the evident purpose of the testatrix, in this clause, was to exercise her power of appointment, by making an equal division of

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that estate among her children, and by placing the fortunes given to her daughters, (in the language of the will,) under the same restrictions and limitations. The gift to Rosamond was absolute, and no condition was annexed, but in the event of her marriage. Mrs. Ravenel was already married. Giving to her daughter Eliza one-fourth of the estate, she was solicitous "to provide against the casualties of commerce," and, in that view, declared that the estate should be held to her sole and separate use, during the coverture, and, in the event of her decease in the lifetime of her husband, leaving issue, to the use of the issue then living. If she survived her husband, whether with or without issue, then to her daughter, discharged of all further trusts. So far as the purpose of the testatrix is to be accomplished, by securing the fortune of her daughter to her sole and separate use, this object is fully attained. The deed of 1807 authorized her to prescribe "the manner and form" in which the estates given to her children should be enjoyed. But she had no power, under that instrument, to limit the succession, either for the purpose declared by the will, or for any other purpose. She was vested with unlimited authority to apportion the estate, as she might think proper, among the children; to give all

to one absolutely, and leave all the others unprovided for, or to give such estate or estates to each, as to her might seem expedient. She might make a partial appointment, or might omit entirely to exercise the power of appointment. The only limit to her discretion was the circle of objects within which it was to be exercised. She could not look beyond her own children. So the settlement declared, and beyond this, the law would not have permitted the parties to the settlement to have provided, had they been so disposed. Mrs. Pringle's power of appointment did not extend to grandchildren, and her purpose, in making this limitation, is necessarily frustrated. But, as the estate given to her daughter, was thus restricted or qualified, only for this purpose, and this has failed, the general intention of the testatrix will be best effectuated by holding, as in *Arnold v. Congreve*, that the estate of the daughter is not

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impaired by this inoperative limitation. *Whittell v. Dudin*, (2 Jac. & Walk. 279,) was not decided on the principle of the cases already cited, but is illustrative of what remains to be said. In that case, the testator directed the residue of his property to be equally divided between his wife, and sons and daughters, subject, as to the shares of the daughters, to certain trusts, for the benefit of themselves and their children. The Master of the Rolls held, that a daughter, dying without a child, was entitled absolutely under the original bequest, from which it was to be collected that the testator's design was to make an equal division among his children, which would be frustrated, if the shares of the daughters were to go to the testator's next of kin, as undisposed of property, on their dying without children. So in *Holme v. Holme*, (9 Sim. 644,) the testator directed the trustees, on the death of his wife, "to divide and assign the trust moneys" into as many shares as there were children of that wife; the shares of the sons to be paid to them when the youngest child attained twenty-one years of age, and the shares of the daughters, who should be alive at that time, he directed should remain in the hands of the trustees, upon trust to pay the interests to the daughters, during their natural lives, for their sole and separate use, and, upon the death of a daughter, leaving issue, to such issue, &c., &c. The vice-Chancellor declined to hear Mr. Knight Bruce, and declared the gift to the daughter to be absolute, notwithstanding the super-added directions to settle the shares of the daughters; and that a daughter, who died without leaving children, took an absolute estate. In a note to that case, *Mayer v. Townsend*, (3 Bea. 443,) is referred to. Testator had directed trustees to raise £5000 for his daughter Elizabeth; and when raised, to invest the same, and pay the dividends to his daughter, for her separate use, during

life, and, after the decease of his daughter, there was a limitation to her children. Lord Langdale held, that the limitation not having taken effect, in consequence of the death of the daughter without children, the absolute interest remained in the daughter. When Mrs. Pringle uses the expressions "to the use of my daughter Eliza, subject to the trusts

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hereinafter *mentioned," and then, "the estate, so bequeathed to my said daughter, shall not vest in her, but in my sons, as her trustees," no more is implied than by the language used in *Holme v. Holme*, and in *Mayer v. Townsend*. The gift is to her daughter. The provision is for her. More than once it is referred to as "her daughter Eliza's estate," "her daughter Eliza's fortune." The absolute character of the gift to her was only to be qualified for the purposes and with the limitations mentioned. Part of these attach effectually to the gift. The other is inoperative. From whatever cause is immaterial. "The general rule," says Vice-Chancellor Wigram, "is, that an absolute interest is not to be taken away by a gift over, unless that gift over may itself take effect." *Green v. Harvey*, (1 Hare, 428.)

Then, what is the result? The Court has assumed, as clearly deducible from the language of the clause, that the design of Mrs. Pringle was to make an equal division among her children, of the estates therein described. It seems, too, scarcely open for question upon principle or authority, that the limitation to the children of Mrs. Ravenel, was an excessive appointment, and is, consequently, void. Then upon any other construction than that adopted by the Court, the fortune of Mrs. Ravenel, on the contingency contemplated, would pass, not to her own children, but by the express terms of the marriage settlement, to the children of Mr. and Mrs. Pringle, to be equally divided between them, if the provision be regarded as a limited or defective appointment. But, whether the estate vested in the several children, as they came in esse, or in those who survived the parents, or in the heirs at law of the grantors, as in a case not contemplated, or provided for in the settlement, is unimportant for the purposes of this inquiry. The result would be the same. The design of the testatrix to establish equality among her children would be entirely broken up and defeated; and an ineffectual attempt to secure the fortune of the daughter "from the casualties of commerce," would become the means of disinheriting her offspring. On the other hand, the leading purposes of the testatrix will be accomplished by establishing the gift in the daugh-

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*ter, as in *Kemp v. Jones*, subject to the limitations which were within the power, and free from the others.

Then does this present a case of election? The text writers all agree that, in regard to

the doctrine of election, it is immaterial whether the testator, in disposing of that which was not his own, was aware of the want of title, or proceeded upon the erroneous supposition that he was exercising a power of disposition which belonged to him; in either case, whoever claims in opposition to the will must relinquish what the will gives him. (1 Jarman, 387.) The whole language and spirit of Mrs. Pringle's will prove that she, herself, entertained no misgivings as to her absolute right of disposition, and that she intended to exercise it. In this respect the case differs from *Church v. Kemble*, (5 Sim, 525.) There the testatrix was authorized, by the father's will, to appoint to such children, grandchildren, or more remote issue, as were born before the appointment. By her will she bequeathed her own estate, and that which she had the power to dispose of under her father's will, to be equally divided among her four children, the shares of her three daughters to their sole and separate use; a codicil, premising in case she had the power so to do, under the will of her late father, or otherwise, directed the interest, under her will, of her daughter, Mrs. Church to be vested in trustees, for her sole use, during life, and, after her death, to divide the principal among her children. It was conceded that the appointment, including all the children of Mrs. Church that might be thereafter born, exceeded the power, and was consequently void. On the question of election, Sir Edward Sugden, for Mrs. Church, insisted that the codicil applied only to the property which was the subject of the power; and the testatrix says she did not mean to make the gift, unless she had the power to make it under her father's will, or otherwise. She had no such power. A case of election never arises, unless a party does an act which he believes he has power to do. The Vice Chancellor said, "the question is whether the testatrix meant the disposition to take effect in all events, or only in the event of her having the power to make it. If the testa-

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trix had *an absolute, unconditional intention to give what she could not, then a case of election would arise." Holding that the disposition was conditional, that she only intended to give, provided she had the power under her father's will, the Vice Chancellor decided that it was not a case of election. Mrs. Pringle expresses no such doubt, implies no such condition, but, believing that she had the power, manifests an absolute, unequivocal intention to give the property in the manner indicated. As was said by Sir Pepper Arden, in *Whistler v. Webster*, (2 Ves. jr. 370.) it is not permitted to the Court to speculate as to what she would have done if she had known one thing or another. "No man," says he, "shall claim any benefit under a will, without conforming, as far as he

is able, and giving effect to every thing contained in it, whereby any disposition is made, shewing an intention that such a thing shall take place, without reference to the circumstance whether the testator had any knowledge of the extent of his power or not." Again, "Whether the testator thought he had the right, or knowing the extent of his authority, intended, by an arbitrary exertion of power, to exceed it, no person, taking under the will, shall disappoint it."

The Court is of opinion that Mrs. Ravenel is bound to elect; but she cannot be required to make her election, "until all the circumstances are known, and the state and condition and value of the funds are clearly ascertained." (2 Story Eq. § 1098.)

The remaining question, on which the complainants ask the decision of the Court, relates to the bond of the testatrix for four thousand four hundred and twenty-five dollars and forty-one cents. The bill alleges that this bond was executed to William Ravenel, and by him afterwards assigned to the trustees of his marriage settlement. The last disposing clause of Mrs. Pringle's will declares as follows: "And it is farther my will that the several gifts and devises herein contained, shall be taken, deemed and accepted by my several devisees and legatees, as full satisfaction of and for any claim or demand, whatsoever, which such legatees or devisees may have on me or my estate, or the estate of my deceased husband." This is

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the law of the case, *and is binding equally upon femes coverts and infants, as upon all other persons claiming under the will: "The doctrine of election extends to all interests, whether they are immediate or remote, vested or contingent, of value or of no value." (2 Story Eq. § 1096.) The legatees of Mrs. Pringle, insisting on their rights under the will, can take them only upon the terms prescribed, namely, in full satisfaction of their respective interests, whatever they may be, in the bond executed by testatrix. It is ordered and decreed, that it be referred to one of the Masters of this Court, to take an account of the estate of Mrs. Pringle, and of the debts due and owing by her and by the late James R. Pringle, and out of what fund the same ought to be paid, with leave to state any special matter, and with leave to either party, upon the coming in of the Master's report, to apply for further directions.

W. Ravenel and wife appealed, on the following grounds:

1. That his Honor, it is respectfully submitted, has erred in supposing that the bond mentioned in the decree, was the bond of the testatrix, when, in fact, it was the bond of James R. Pringle, substituted trustee of the marriage settlement of the late James R. Pringle, deceased, and family.

2. That his Honor, it is respectfully sub-

mitted, has erred in decreeing that Mrs. Pringle's will presents any case of election, so far as Mrs. Ravenel is concerned.

That the decree is, in these and other respects, contrary to equity.

Yeadon, for defendants.

Petigru, contra.

DUNKIN, Ch., delivered the opinion of the Court.

It is true that the bond adduced, is not the bond of Mrs. Pringle, but of the trustee. Yet the bill sets forth expressly, that by what is called the consent decree of May 1841, Mrs. Pringle became the purchaser of her husband's estate, and undertook, among other things, to pay his four children \$17,701.64, as the amount of their shares, and that she

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executed a bond to William *Ravenel for his wife's share, (\$1,425.41,) which was afterwards assigned by him to J. R. Pringle, as trustee of his marriage settlement. The answer made no issue on this allegation. On reference to the Master's report, which constituted the basis of the decree of May, 1841, in schedule No. 3, (c) Mrs. Pringle is made the purchaser of certain property, and charged with the payment of \$17,701.66, as the balance due to the children. Among the property, of which Mrs. Pringle is thus set down as the purchaser, is the Cannonsborough House, valued at \$24,000, and the plantations on Santee, valued at \$42,000. In her will, Mrs. Pringle devises the first, as "my house in Cannonsborough, where I reside," and the second she devises to her four children, as "my plantation and all my lands on Santee River, in the parishes of Prince George, Winyaw, and St. James, Santee;" and she afterwards provides, that these, and the other beneficial interests under her will, shall be taken, by her several devisees, in full satisfaction of any demand on herself, or her estate, or the estate of her deceased husband.

(c) Schedule No. 3, accompanying the Master's report, is as follows:

Schedule No. 3.

Adjustment with Mrs. Pringle.

Dr.		Cr.	
To Santee Plan-		By property due	
tation	\$42,000 00	her, as by	
To Cannonsbo-		Schedule No. 1	\$36,000 11
ro' House.....	24,000 00	By one third of	
To 42 Negroes,		Mr. Pringle's	
\$400	17,200 00	estate, by	
		Schedule No. 2	13,429 85
		By debts of es-	
		tate, assumed	
		by Mrs. P.....	16,968 41
			\$65,498 34
		Balance	17,701 66
	\$83,200 00		\$83,200 00

To balance due by Mrs. Pringle to estate of Mr. P..... \$17,701 66

It is nevertheless true, that, although the Master recommended the adjustment set forth in schedule No. 3, and this recommendation was approved and confirmed by the Court, in the decree of May, 1841, yet the same decree recommends, that the Master convey this same property to James R. Pringle, who had been substituted for the original

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trustee to the marriage settlement of *1807, and it further directs, that the trustee shall pay out of the trust estate the \$17,701.66, due to the children of James R. Pringle, deceased. Accordingly, instead of a bond from Mrs. Pringle, to William Ravenel, as set forth in the bill, a bond was executed by James R. Pringle, trustee under the marriage settlement of Mrs. Pringle, to himself as trustee to the marriage settlement of William Ravenel and wife, for \$4,425.41, in obedience (as is recited) to the decree of May, 1841. It need hardly be said, that this decree, as well as every thing done under it, is the act of the parties themselves. But it is evident, that the property purchased by Mrs. Pringle, and for which this sum of \$17,701.66, was in part the consideration, became, by the declaration of the decree, part of the trust estate under the marriage settlement, and her trustee was directed to pay the amount out of the trust estate, and so it is admitted, or rather stated, in the defendant's answer. In her will, Mrs. Pringle seems not to have distinguished very precisely between her own estate, and the estate held under the marriage settlement. But, by the terms of the settlement, she was authorized to dispose of the estate among her children in such proportions as she thought fit. Each of the four children

had a claim of four thousand four hundred dollars on the estate which she had purchased. The trust estate was augmented by the transfer of this property, and the trustee charged with the payment of that debt. Mrs. Pringle's will, substantially, declares that the share devised to each shall be received discharged of the incumbrances held by them mutually. This is no more than a legitimate exercise of the discretion vested in her under the power of appointment.

The only question presented by the grounds of appeal, or argued by the counsel, was in relation to the bond of 29 May, 1841. This bond is the creature of the decree of the same date. Mrs. Pringle may well have regarded this as a claim on her "estate" as she so treats the property from which this bond was to be paid. But the intention cannot be mistaken. Regarding the bond, however, as that of the trustee, and the property devised as part of the trust estate, a case of

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satisfaction, and not *of election, is presented. In devising the property, which by the decree was made part of the trust estate, the testatrix declares that it shall be taken by the several devisees, discharged of the respective liens created by that decree. This operates a satisfaction of the bond. It is an appointment to each of so much of the estate less the incumbrance. Such is the manifest object of the testatrix, and so much she was fully competent to do under the settlement of 1807.

The decree of the circuit Court is affirmed.

DARGAN and WARDLAW, CC., concurred.
Decree affirmed.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT COLUMBIA, SOUTH CAROLINA—MAY TERM, 1851

CHANCELLORS PRESENT.

HON. JOB JOHNSTON,
" B. F. DUNKIN,
" G. W. DARGAN,
" F. H. WARDLAW.

3 Rich. Eq. *361

*ADDITIONAL RULES OF COURT, ADOPTED MAY TERM, 1851.

1. No Master, or Commissioner, of this Court, shall hereafter be appointed Receiver.

2. The annual return of the Master, or Commissioner, required by the 15th clause of the Act of 1840 shall be accompanied by the following oath, viz:—"I, A. B. do solemnly swear that the foregoing return contains a full account of every estate, and also of all moneys, bonds, notes, certificates of stock, or other evidences of choses in action, which are in my hands, possession, or management, by virtue of my office, or of any order or decree of the Court; and that the said return contains a full account of all moneys, received, or paid out, by me, relating to the said estates.—So help me God." Which affidavit shall form part of the said return, and precede the said Master's, or Commissioner's, signature thereto.

J. JOHNSTON,
BENJ. F. DUNKIN,
GEO. W. DARGAN,
F. H. WARDLAW.

May 19, 1851.

3 Rich. Eq. *362

*GEORGE BROWN v. THE CHESTER- VILLE ACADEMY SOCIETY and Others.

(Columbia. May Term, 1851.)

[Schools and School Districts 5.]

The 10th section of an Act of the 18th December, 1818, incorporated the C. A. Society for 21 years, and the 11th section vested in the

corporation escheated property to a certain extent: a clause in an Act of 1846 enacts, "that the Act passed on the 18th December, 1818, incorporating the C. A. Society, be revived and continue in force for the period of 14 years:"—*Held*, that by the Act of 1846, both the 10th and 11th sections of the Act of 1818 were revived.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 6; Dec. Dig. 5.]

[Corporations 37; Escheat 7.]

An Act of the Legislature vested in a corporation "all such property as hath heretofore, or may hereafter accrue to the State," in Chester district, which by the Act to regulate escheats "hath escheated to the State:"—*Held*, that the corporation were entitled to property which escheated after the passing of the Act.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 105; Dec. Dig. 37; Escheat, Cent. Dig. § 19; Dec. Dig. 7.]

Before Dargan, Ch., at Chester, June 1850.

This case will be understood from the circuit decree, which is as follows.

Dargan, Ch. James M. Egger was a person of illegitimate birth. He was possessed of a personal estate. He died in 1842, intestate. There being no person who could claim as his next of kin, his estate escheated or reverted. The administration of the intestate's estate has been granted to William Kirkpatrick, who is a defendant. There are two parties claiming this estate as escheated property, by virtue of grants from the State, namely—the Chesterville Academy Society and the complainant. The Chesterville Academy Society was incorporated in 1818, (8 Stat. 296-7). And the same Act by which the Society was incorporated, pro-

vides, "that all such property as hath heretofore, or may hereafter accrue to the State in said district of Chester, on account of property which by an Act entitled "An Act to appoint Escheators and regulate escheats," hath escheated to the State,—provided, the same do not amount to more than three thousand dollars, shall be, and the same is hereby vested in the said corporation, for the use of the Chesterville Academy, and the said corporation is hereby vested with all the powers necessary for receiving said property, and for dis-

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*posing of the same for the benefit of the said Academy: Provided, nevertheless, that such escheats shall not affect any citizen or friendly alien, but that in all cases such citizen or friendly alien, shall have liberty to plead the statute of limitations in all proceedings under the existing laws regulating escheats, in like manner as the said statute may now be pleaded in actions between citizens of this State." The charter was to continue of force for twenty-one years. It therefore expired in December, 1839. In 1846, in the general corporation Act of that session, it was enacted "that the Act passed on the 18th day of December, 1818, incorporating the Chesterville Academy Society, be revived and continue in force for the period of fourteen years." (11 Stat. 397). By an Act of 1847, (11 Stat. 438) all the right, title and interest of the State, in and to the estate of James M. Egger, late of Chester district, in the hands of William Kirkpatrick, administrator of the said Egger, was declared to be vested in George Brown, and his heirs forever. From these various Legislative Acts, arise the conflicting claims of these parties.

In some of the Acts granting escheated property to educational institutions, the State has reserved a power of otherwise disposing of the property, in case any strong equitable claim should be presented. And it has been argued that such must be the construction of the grant in this case, under the proviso, "that such escheats shall not affect any citizen or friendly alien." I am of a different opinion—I think that the proviso was to enable citizens and friendly aliens to plead the statute of limitations. It was intended to obviate the maxim, "nulum tempus occurrit regi." It evidently means this and nothing more. This maxim had been incorporated in the Act to regulate escheats, except as to lands claimed under grants or actual possession for five years prior to the 4th of July, 1776. (7 Sect. Act. 1787, 5 Stat. 48).

It will scarcely be doubted that on the expiration of the first charter of the Chesterville Academy Society, in 1839, all its rights under the grants of escheated property ceased. And it is equally clear, that if the Society has any rights of that kind, it must be under

the revival of the charter in 1846. That

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Act *simply revived the old charter for 14 years. It is silent as to any grant of escheated property.

We will recur to the charter of 1818. The Act incorporating the Society is found in the general incorporation Act of that year. The 10th section of that Act (8 Stat. 296) enacts, "that the members of the Chesterville Academy Society, and those persons who may hereafter become members thereof, be and the same are hereby declared a body politic and corporate, in deed and in law, by the name and style of the Chesterville Academy Society." That is the Act of incorporation. What follows in the 11th section is a grant to the corporation thus created, of escheated estates in Chester district, under certain conditions, but is no part of the Act of incorporation. The Society was a perfect corporation without it. Then follows the Act of 1846, which enacts "that the Act passed on the 18th day of December, 1818, incorporating the Chesterville Academy Society, be revived and continue of force for the period of fourteen years." What is here revived? In the judgment of this Court, it is that part of the general incorporation Act of 1818, incorporating the Society, and not that part of it which grants escheated property.

There is another view of the case which strikes me with considerable force. The language of the 11th section is peculiar. What is the extent of the grant? It is, "all such property as hath heretofore, or may hereafter accrue to the State in said district of Chester," which, by the escheat laws, "hath escheated to the State, provided," &c. It gives the property "which hath heretofore or may hereafter accrue," but not that which hath or may hereafter escheat. When the Act speaks of property accruing, the provision is both prospective and retrospective. When it speaks of property escheating, it seems only to grant that which hath escheated. The clause might read thus:—All the property that has or may accrue to the State on account of property which has escheated, is vested, &c. Whence these studied distinctions of language? It may be that the Legislature intended to limit the grant to property which had already escheated, and to which the State had an inchoate right; but

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*which would not accrue to the State, or become perfect and vested until after office found. The language is so different from that employed in other grants of escheated property for similar purposes, that I am inclined to think there is a meaning in the apparently studied form of language, in which the grant is expressed. In all the other Acts of this kind, which I have examined, the language is simple, and the

property that has escheated or may escheat is granted.

It is ordered and decreed, that the defendant, Kirkpatrick, account for, and pay over to the complainant, the estate of the said James M. Egger. It is also ordered and decreed, that the costs be paid out of the funds of the estate of the said intestate.

The Chesterville Academy Society appealed, on the following grounds.

1. Because the Act of 1846, reviving the Act of 1818, incorporating said society, revived the whole of the latter Act, and not a part thereof; and the decree deciding that it was only revived in part, is erroneous, and ought to be reversed.

2. Because it was manifestly the intention of the Act of 1818, that said society should receive all property which had escheated, and all property which might escheat after the passing of said Act, until said society had realized the sum of three thousand dollars; and the decree of the Chancellor is, therefore, erroneous in deciding that it was property only which had escheated anterior to the passing of said Act that vested in said Society.

Gregg & McAlilly, for appellants.
Williams, contra.

JOHNSTON, Ch., delivered the opinion of the Court.

The 10th section of the general corporation Act of 1818, (8 Stat. 296-7,) incorporates the Chesterville Academy Society for twenty-one years; and the 11th vests in them escheated property to the extent of \$3,000.

A clause in the general corporation Act of

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1846, (11 Stat. 397,) enacts "that the Act, passed on the 18th day of December, 1818, incorporating the Chesterville Academy Society, be revived, and continue of force for the period of fourteen years."

It has been contended, that without a revival of not only the 10th but the 11th sections, the right granted to the Society in the escheated property, was lost to them.

I do not mean to assert that this position is erroneous,—because the point has not been argued. But, in my opinion, it is far from clear. By the expiration of their corporate existence,—by the efflux of their charter, the society certainly lost their corporate capacity; and so were disabled as a corporation from enforcing a remedy against persons who might interfere with their property or rights. But is it true, that upon the cessation of their charter, all the property and rights of a corporation became lost to them? May it not be that they are rather suspended, for want of capacity to assert them: and that they are re-instated by the mere revival of the corporation? Does not the revivor prevent a breach of continuity in the charter.

But the investigation of this point is un-

necessary, because, in my opinion, the reviving statute applies not only to the 10th but to the 11th clause of the Act of 1818.

If the words of the statute of 1846 are to be applied according to their literal meaning, neither the 10th nor the 11th clause is revived. That statute professes to revive an Act of a particular date by the title of an Act incorporating the Chesterville Academy Society. But no such Act exists, or ever existed. The only Act of that date, relating to corporations is an Act for incorporating sundry societies. Of these the Chesterville Academy Society is one. We must therefore apply the words of the reviving statute to that Act. But we have no more right to restrict the phraseology of the reviving Act to the 10th clause of it than to apply it to every clause in it. Indeed, a literal construction would compel us to say that the whole Act was revived; and every society mentioned in it re-incorporated.

This, however, was clearly not the intention of the Legislature, and we are therefore

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forbidden to adopt a literal construction. The Act, of 1846, was manifestly intended to apply to only so much of that of 1818 as related to the Chesterville Academy Society. But having arrived at this conclusion only by means of a free construction; are we warranted in re-adopting a narrow construction, for the purpose of limiting the revivor to the clause by which the society was given a corporate character, leaving out another clause by which further privileges were conferred upon it? I think not. Both the clauses in question are to be considered as clauses relating to the incorporation of the society; and are both revived.

Upon the other view suggested in the decree, I am equally clear. The words relating to vesting escheated property are clearly not employed with a studied reference to grammatical rules. "Hath escheated" has not reference to time preceding the enactment, but is used loosely in reference to the accrual of the right, intended to be vested in the corporation.

It is ordered that an account be taken of the value of escheated property already received by the Chesterville Academy Society; and, if found to be less than they were entitled to receive under their charter, that John L. Harris, administrator de bonis non of James M. Egger, and Reubin Cassels, administrator of said Egger, do account for the assets of said Egger's estate, and, according to the amount thereof chargeable to them, respectively, in a due course of administration, apply said assets towards making up the amount of escheated property to which said Society (taking into computation what it may have already received) is by its charter entitled.

The costs to be paid as directed by the Chancellor's decree now under review.

DUNKIN, DARGAN and WARDLAW, CC., concurred.

Decree modified.

3 Rich. Eq. *368

*C. H. COLDING v. J. N. BADGER and Others.

(Columbia. May Term, 1851.)

[*Appeal and Error* ⇐962.]

An order dismissing a bill for want of prosecution comes properly within the discretion of the circuit Chancellor; and the Court of Appeals will not interfere with his decision, unless it be grossly erroneous.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3838; Dec. Dig. ⇐962.]

[*Equity* ⇐407.]

A commissioner cannot refuse to make a report upon the ground that the evidence is either too obscure, or insufficient; the plaintiff has the right to require a report either for or against him;—to which, if against him, he may file exceptions.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 895; Dec. Dig. ⇐407.]

[*Equity* ⇐362.]

Where a commissioner refused to make a report, on the ground that the evidence was too obscure, and there was laches, on the part of plaintiff, in failing to take proper steps to compel him to make one; *Held*, that the bill was properly dismissed for want of prosecution.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 760; Dec. Dig. ⇐362.]

Before Dunkin, Ch., at Barnwell, February, 1851.

The original bill was filed on the 16th day of March, 1842, and a supplemental bill was filed on the 29th of August, 1845. The object of the bill was for an account of the estate of John Badger, and involved a very considerable mass of testimony in the way of receipts and expenditures. The defendants closed their references in January, 1850. The case stood on the docket as continued at February Term, 1850, by the complainant. It was stated that this was done in consequence of the absence of Mr. Patterson from indisposition. At that term of the Court, the complainant retained Mr. Owens, as assistant counsel for the prosecution of his case. Nothing further was done until the 14th of November, 1850, when Mr. J. T. Aldrich, defendant's solicitor, served the following notice on Mr. Owens:—"The complainant is; the above cause is hereby notified that the defendants have long since closed their references in this cause, and that, on the first day of January next, a motion, on the part of the defendants, will be made before the commissioner, to make up his report; and if it shall turn out that the commissioner is unable to make up a report, on account of the obscurity of the materials furnished him, then the complainant is further notified

that a motion will be made, at the sitting of the Court, that the bill be dismissed for want of prosecution."—About ten days before the

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Court met, the commissioner informed *Mr. Owens that he should be unable to make up the report, for the want of materials, in the way of explanation and further evidence. Mr. Owens informed him that Mr. Patterson said there was no farther evidence to offer, and if the Commissioner could not make up the report, he (Mr. O.) could not help it.

The commissioner stated to the Court that there were a great many vouchers, on the part of the complainant, that required explanation; and that he had been unable, from the obscurity of the evidence, to make up a report. His Honor, the Chancellor, ordered the bill to be dismissed, for want of prosecution.

From that order the complainant appealed, and now submitted that the cause ought to be restored to the docket, to be heard on its merits.

1. Because, at various meetings held before the commissioner, the complainant furnished all his evidence in relation to the matters of account, and rested his cause, awaiting the commissioner's report.

2. Because it was the duty of the commissioner to report on the evidence, in order that the sufficiency of the evidence might be submitted to the judgment of the Court, on exceptions to the report.

Patterson, Owens, for motion.
J. T. Aldrich, contra.

JOHNSTON, Ch., delivered the opinion of the Court.

The case presented by this appeal came properly within the discretion of the Chancellor; and we should not be authorized to interfere with his decision unless it were grossly erroneous. So far from being so; we are all satisfied his discretion was very properly exercised.

We do not intend to say, that it was within the competency of the commissioner to withhold a report, upon the ground, that the evidence was either too obscure, or insufficient. Such a position would constitute him the exclusive judge of the evidence. The plaintiff had a right to require a report either for or against him; and if a report of the latter

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character were made,—he had *a right to except to it, and to take the opinion of the Court upon the effect of the evidence submitted.

But the plaintiff required no report,—took no measure to obtain one,—either by rule or otherwise. And when we consider the length of time the case had been pending; the time which had elapsed since the evidence was closed; and, especially, when we consider, that after the explicit notice served

on him in November, he totally abstained from taking any steps whatever: we think there was conclusive evidence of laches on his part, richly entitling the defendants to their motion. Were they to be forever hung up in Court? and, how else were they to secure themselves from interminable litigation than by moving for an order to dismiss the bill for want of prosecution?

It is ordered that the order be affirmed, and the appeal dismissed.

DUNKIN, Ch., concurred.
Appeal dismissed.

3 Rich. Eq. 370

INABINIT v. INABINIT.

(Columbia, May Term, 1851.)

[Wills \S 730, 733.]

Testator, having a plantation, about thirty-five negroes, furniture, &c. devised and bequeathed, by the 1st. clause of his will, to his wife, for life, his plantation, furniture, &c. and four negroes, with remainder to his children: in the 2d clause he declared that, as he had advanced to his married daughter, E. M. two negroes, one horse, &c. he desired "that as each one of my children marries or becomes of age, they are to receive out of my estate, two negroes, one boy and one girl, between the age of ten and twenty years, one horse," &c. "to make them equal with my said daughter." E. M.; and by the 3d clause, he bequeathed the remainder of his negroes, "not heretofore devised of," to all his children, to be equally divided among them. Testator left nine children, all of whom were minors—the youngest being six years of age—except E. M.:—*Held*, (1) that there could be no division of the negroes bequeathed by the 3d clause of the will, until the last child arrived at age or married, and received his two negroes, horse, &c. under the 2d clause; (2) that the annual income of the negroes bequeathed by the 3d clause, after using so much (if any) as may be necessary for procuring the articles given by the 2d clause, could not be used for the maintenance of the minor children, but should be distributed annually among all the children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 1788, 1825; Dec. Dig. \S 730, 733.]

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*Before Dunkin, Ch., at Orangeburgh, February, 1851.

Dunkin, Ch. James Inabinit died on the 7th March, 1849, leaving a will duly executed, on the seventh day of January, previous. The testator left a widow, the complainant in these proceedings, and who has also qualified as executrix of his will. He left also a daughter, the wife of the defendant, Daniel V. V. Funchess, and eight other children, all of whom are minors, the youngest about six years of age, (except the defendant, Mary C. Inabinit).

His estate consisted, principally, of the plantation on which he resided, and some thirty-five negroes.

The bill is filed for the purpose of having the trusts of the will declared, so far as may

be necessary for the instruction of the complainant in the discharge of her duty.

In ascertaining the intention of the testator, the Court is always at liberty to look into the condition of his family, and of his property. In this view, the general scheme of the testator seems clear enough.

His widow was left with a large family of young children. To her he devises, for her natural life, all his real estate, his household and kitchen furniture, &c. &c. and all things pertaining to the plantation use; also, four negroes, such as she might select from all his negroes.

The next provision in order of time, may be considered the bequest to his children, as they become of age or marry. Reciting that he had given to his married daughter, Eliza M. two negroes, Will and Hannah, one horse, saddle and bridle, and one bed and furniture, he directs that, as each of his other children marries or arrives of age, he or she shall receive, out of his estate, precisely the same advancement, so as to make them equal with his daughter, Eliza M. Funchess.

The real and personal estate, including the homestead and everything connected with it, as specified in the first clause, was given to his wife for life, "to be kept by her in quiet and peaceable possession, undisturbed by any

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person;" and, after *her death, was directed to be divided between his four sons; and his five daughters were "to receive, in lieu of said real estate, one hundred and fifty dollars each, as their portion of said real estate"—the remainder of the personal estate which his wife might leave at her death, was to be equally divided amongst testator's heirs; "but should any of them die without heirs, their part is to be returned, and be equally divided amongst my heirs."

The first question presented, relates to the payment of this sum to the daughters, in lieu and as their portion. His evident intention, as manifested in various parts of the will, was to establish equality among his children.

This sum is to be paid by the sons to the daughters, when the life estate terminates, and they (the sons) come into the enjoyment and possession of the real estate, as provided by their father's will.

The third and last disposing clause is as follows, viz: "The remainder of my negroes not heretofore divided of in my will, is to be equally divided amongst my children" (naming them): "but should any of my aforesaid children die without an legal issue, their part is to return back, and be equally divided amongst my remaining heirs. I do give the same to them and their heirs forever."

It should be premised that this clause follows immediately that clause of the testator's will, which directs that two negroes, between the age of ten and twenty years, should be received by each of his children, as he or she

respectively attained the age of twenty-one years, or day of marriage. Then follows this provision: "The remainder of my negroes not heretofore divided of in my will," &c. &c.

The rational construction seems to the Court to be, that the complainant, as executrix, was to have charge of the negroes, giving to each child two, as they married or became of age, and furnishing each, at that time, with the other articles to which he or she should at that period become entitled. "I desire that as each one of my children

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marries, or becomes of age, they are to *receive out of my estate two negroes," &c., "one horse, saddle and bridle, and one bed and furniture, to make them equal with my daughter, Eliza."

This necessarily implies that there should be in the hands of his executrix the means of giving to each child, out of the testator's estate, the same advancement as they respectively arrived of age or became settled in life, which the testator had himself furnished to his daughter, Mrs. Funchess. The testator probably contemplated that, until his children reached maturity or married, they would reside with their mother at the homestead, as they had resided with him, and would be supported and educated by her as they had been by him. When he specifies what each child is to receive out of his estate, at marriage or maturity, it excludes the idea that any part of the property was to be received by such child until that period; and it also precludes the presumption that, when that period arrived, any child should receive more than was thus specified. The scheme is very analogous to that of the testator in *Whilden v. Whilden*, (Riley Eq. Cas. 205,) although the testator has not in this will used precisely the same language to express his purposes. But, says Chancellor Harper, delivering the judgment of the Court, "if the testator had said nothing about the maintenance of his children, but had merely directed the estate to be vested till the youngest child should come of age or be married, the Court would, of itself, have done just what he has expressed. It would have provided for the maintenance of the children out of the income of the fund." In the will under consideration, the testator left, substantially, every thing to his wife, during her life, except the slaves, and of these, he bequeathed to her four for life. He does not expressly direct the remaining slaves to be kept together until the youngest child marries or becomes of age, but the law puts or keeps them in the hands of the executrix, to be disposed of according to the provisions of the will. In order to enable her to execute her trust, by giving to each child, at particular periods, two negroes and other property out of his estate, she must have pos-

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session of the estate. Like any *other trus-

tee, she must take care of the slaves, and, although nothing is said about maintaining those of the children who are under age and unmarried, yet, as Chancellor Harper declares, the law itself would provide for their maintenance out of the income of the slaves. In this case, as I have said, I think such intention of the testator is manifestly to be inferred by collating the various provisions of the will. Nearly all the children are under age. It is unnecessary, and would be premature, to express any opinion as to the character and extent of the estate which they derive under the testator's will.

It is ordered and decreed that the complainant carry into execution the will of her testator, according to the opinion hereinbefore declared. Parties to be at liberty to apply for further orders, if any such be necessary. Cost to be paid out of the estate.

It was suggested that the executrix had in hand about five hundred dollars, arising from the sales of the crop of the preceding year, hire of the negroes, &c. and that no disposition was made of this sum by the will. As to this fund, (as there is no general residuary clause,) it constitutes a case of intestacy. The fund is first applicable to the payment of the debts of the testator, and to the expenses incurred by the executrix in the discharge of her trust, including the costs and expenses of these proceedings; the balance remaining of the five hundred dollars, is to be distributed under the Act of 1791.

The defendants, Daniel V. V. Funchess and Eliza M. his wife, appealed, and moved this Court to modify so much of the circuit decree as decides, that there should be no present division among testator's children, of the slaves bequeathed in the third clause, upon the following grounds.

1. Because the expression, "the remainder of my slaves not heretofore divided of in my will," indicates testator's intention to have been, that such and so many of his slaves as in the second clause he desires to be given to his children, as they respectively marry or become of age, should be retained by his executrix for that purpose, and that the re-

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mainder afore*said, should be equally divided at once among his children, without waiting until the youngest child becomes of age, who is now about six years old.

2. Because the decree of his Honor, by thus postponing the testator's bequest to his children in the third clause of his will, operates injuriously to the elder children, and particularly to Mrs. Funchess, to whom the bequest is now necessary and important, and works no benefit whatever to their mother or her minor children, all of whom would have the slaves, &c. bequeathed to them, which would be ample for their support.

3. Because, under the construction given by his honor, it is respectfully submitted, that the widow of the testator, and the duly

qualified executrix of his estate, is obliged to act as the trustee of the estate and to hold all the negroes in trust, and to keep the estate open for many years, until the youngest child marries or becomes of age, while the slaves bequeathed to her for life, and the slaves which she should retain for the minor children, together with those which she would hold for the minors upon the division of the slaves in the third clause, as their natural guardian, would probably be as many as she could profitably manage.

Ellis & Brewster, for appellants.
 Munro & Dunkin, contra.

DARGAN, Ch., delivered the opinion of the Court.

In this case, very little need be said in addition to what has fallen from the Chancellor in his circuit decree. This decree must be modified, in one particular, so as to make it conform to the opinion of this Court.

The testator gave to his wife all his real estate, household and kitchen furniture, plantation tools of every description, provisions of all kinds, horses, hogs, cattle, and stock of every description, wagons, gears, bridles, saddles, and barouche, and every thing pertaining to the plantation use. He also gave her four negroes, to be selected by herself

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from among *all his negroes. This property she was to have and enjoy during her life, and at her death, the real estate was to be equally divided among the testator's four sons: and his five daughters are each to receive one hundred and fifty dollars in compensation for their portion of the land.

The testator then proceeds, in the second clause, to provide as follows:—"As I have already given unto my daughter, Eliza M. the wife of Daniel V. V. Funchess, two negroes, named Will and Hannah, one horse, saddle and bridle, one bed and furniture, I further desire, that as each one of my children marries or becomes of age, they are to receive out of my estate two negroes, one boy and one girl, between the age of ten and twenty years old, one horse, saddle and bridle, one bed and furniture, to make them equal with my said daughter, Eliza M. the wife of Daniel V. V. Funchess."

The testator then says:—"3d. The remainder of my negroes not heretofore divided of in my will, is to be equally divided amongst my children, Eliza M. Funchess, Mary Catharine, James Baltus, Vandy Vastine L., Elizabeth Lovicia, Rachael Owins, David Jacob, Barbara Dorcas E. E., and Absalome Moorer Inabinit; but should any of my children aforesaid die without an legal issue, their part is to return back, and be equally divided amongst my remaining heirs. I do give the same to them and their heirs forever."

One of the questions made on the circuit trial, and also on this appeal, is this:—at

what time did the testator mean that this division of the remainder of his negroes should take place, and his children be put into the possession of their respective shares thereof? The will does not, in terms, fix the time, though it is positive and express as to the gift. The construction that would give to the legatees under the third clause, a present right to a partition of the negroes, disposed of in that clause, is incompatible with other important parts of the will. The testator has been impartial in the disposition of his property among his children. He seems to have contemplated a perfect equality among them. He had given to his mar-

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ried *daughter, Mrs. Funchess, two negroes, a horse, saddle, &c. And his positive direction is, that as his children came of age or married, they should each receive, out of his estate, two negroes of a particular description, a horse, saddle, &c. All his children, with the exception of Mrs. Funchess, were and are still infants; the youngest not more than six years old. How can this provision be carried into effect:—how can this advancement of two negroes and the other articles, be made out of his estate to his children as they respectively come of age or marry, if the negroes are now to be divided? There is no fund in cash, or otherwise, from which this provision can be carried into effect. In fact, there is no property of any kind belonging to the estate which is to accomplish this end, unless resort is had to the negroes disposed of in the third clause. This is the view which the Chancellor has taken of this part of the subject. And in this the Court concurs.

This view of the case involves the necessary implication, that the negroes disposed of in the third clause, should remain in the hands of the executors, until the objects expressed in the second clause have been accomplished. And these are, that each one of the testator's children shall, at the proper time, receive the advancement provided for in that clause. The means of making these advancements, are a charge upon the negroes disposed of in the third clause; which negroes are to remain in the possession of the executors for this purpose, until the whole of this trust is performed: that is to say, until the last child entitled to take under the second clause, has received his or her advancement. After this a division may take place. In making the advancements under the second clause, the executors will resort, in the first place, to the stock of negroes belonging to the estate, for the purpose of getting negroes of a proper description to make the advancements. If none such are to be had from this source, they may be purchased from the income of the estate then on hand. If that be insufficient for this purpose, a resort may be had to some portion of the corpus of the estate in order to effectuate

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this intention of the testator. *But in the last named contingency, application must be made to this Court. The other articles to be advanced, namely, the horse, saddle, bridle, &c. must be provided for in the same way, as is indicated above, in reference to the negroes to be advanced.

So far this Court concurs in the views and in the decree of the Chancellor. But what is to be done with the income of the negroes disposed of in the third clause, until the time of the division? A portion of it will be absorbed, from time to time, in carrying into effect the provisions of the second clause. So much of it as may be necessary, will be applied to these purposes. But what is to become of the balance, and to whom does it belong? The circuit decree gives it for the maintenance of the minor children who reside with the widow, and who are thus entitled, according to the decree, until they are to receive their advancements. This Court is of a different opinion. It is not so given by the terms of the will, nor is there just ground for such an implication. The legacies given in slaves in the third clause are vested legacies, subject to be divested on certain contingencies. They are given in language, which imports a right to a present division. But this clause has been construed in connection with other parts of the will; so that, although the legacies are vested, the division and possession are postponed. This postponement takes place, because the property is subject to certain charges, which have been herein declared. Subject to these charges, the legatees under the third clause are entitled to an equal share of the annual income, to be paid annually as the income arises. In other words, so much of the annual income as remains, after obtaining the necessary articles for carrying into effect the provisions of the second clause, according to the rules hereinbefore laid down, must constitute a fund to be distributed so soon as the fund exists in equal shares among all the legatees mentioned in the third clause. The circuit decree is, in this respect, reformed. In all other respects, it is affirmed and the appeal dismissed.

JOHNSTON, DUNKIN and WARDLAW, CC., concurred.

Decree modified.

3 Rich. Eq. *379

*ALLEN W. NIX and Others v. ALMEDIA HARLEY and HENRY MILHOUSE.

(Columbia. May Term, 1851.)

[Account ↪1.]

Defendant purchased plaintiff's slave from a third person—remained in possession sometime,—and then re-sold her to the person from whom he had purchased,—all without notice of

any right in plaintiffs:—*Held*, that a bill would not lie to compel defendant to account for the price received by him, and the hire before the re-sale,—plaintiffs should pursue their remedy at law.

[Ed. Note.—Cited in *Holliday v. Poston & Son*, 60 S. C. 106, 38 S. E. 449.]

For other cases, see *Account*, Cent. Dig. § 1; Dec. Dig. ↪1.]

[*Equity* ↪427.]

Nine plaintiffs filed their bill against defendant for the specific delivery of a slave which they claimed as tenants in common: defendant pleaded the statute of limitations, which was sustained as to four of the plaintiffs who were of age four years before the filing of the bill—the other five being then infants: the effect of sustaining the plea as to four of the plaintiffs being to vest in the defendant four-ninths of the slave, *held*, that, under the prayer for general relief, the other five plaintiffs were entitled to a decree for the sale of the slave for partition.

[Ed. Note.—Cited in *Barr v. Haseldon*, 10 Rich. Eq. 60.]

For other cases, see *Equity*, Cent. Dig. § 1009; Dec. Dig. ↪427.]

Before Dunkin, Ch., at Barnwell, February, 1851.

Dunkin, Ch. The bill is, obviously, multifarious. There is no connexion whatever between the defendants. The complaint against them is in reference to different objects, and the relief sought entirely different. They form two distinct cases, and must be separately considered.

The complaint against Milhouse is that, knowing the rights of the plaintiffs in a negro woman, Jenny, he sold said slave for the purpose of defeating them. The prayer is, that he may account for the price, with interest. According to the testimony, the right of the plaintiffs, to the possession of the negro, accrued in June, 1844. The answer of Henry Milhouse is directly responsive to the charges and interrogatories of the bill. He avers that, in the latter part of 1845, or beginning of 1846, he purchased Jenny, for four hundred dollars from Charles Ray, who was in possession, and claimed the slave as his own property, and that he paid him the money; that the defendant held the slave for more than four years, and afterwards, to wit, in the spring of 1850, he sold her to the said Charles Ray, who was, and still is, a resident of Barnwell district, for the same sum as he had given for her. He positively denies that, at the time of his purchase, or of the subsequent sale, he had any knowledge

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*of the plaintiffs's right or that they ever applied to him for any information on the subject, which he would readily have afforded to them. The bill was filed on the 25th October, 1850.

On this state of facts, (and no other was attempted to be made out by the evidence,) it is difficult to perceive on what ground the plaintiffs are entitled to the aid of this Court, as against the defendant, Milhouse. The bill states that he was not in possession of the

plaintiffs's slave. It avers no demand. There is no reason to surmise that, in 1845 or 1846, when the defendant purchased the slave, he had any doubt about the title: it is mere surmise, against the positive denial of the answer, that he had any knowledge of the plaintiffs's right when he parted with the slave in the spring of 1850. If there be any principle on which the plaintiffs, under these circumstances, have any right to recover from the defendant the amount for which he sold the slave, it is a right for which they have a plain and adequate remedy in the ordinary tribunal.

The case against the other defendant, Almedia Harley, is for the specific delivery of a negro fellow named Jeff, and for an account of his hire since he has been in the defendant's possession.

The defendant, not conceding the plaintiffs's right, insists on the statute of limitations, as well as the want of jurisdiction.

The plaintiffs are the nine children of Elizabeth Nix, deceased, and they claim under a deed of their grandfather, dated December, 1815, by which their mother had a life estate in this and other slaves, with a valid limitation to the plaintiffs. The life tenant died on the 4th June, 1844; and, some two and a half years afterwards, the father, with some of the plaintiffs, his children, removed to the State of Florida. The defendant is a daughter of Colonel Tarlton Brown. It seems that Jeff was purchased by Colonel Brown, from Charles Nix, (the father of plaintiffs,) in 1843. Colonel Brown died in September, 1845.—On the 15th December, 1845, his negroes were divided, and Jeff fell to the lot of the defendant. The plaintiffs instituted these proceedings on the 25th October, 1850. At the time of the right

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*accrued, to wit, 4th June, 1844, all the plaintiffs resided in South Carolina. Three of them, to wit, Allen, Edward and Frances, were, at that time, more than twenty-one years of age, Allen being about twenty-eight—Edward, between twenty-six and twenty-seven—and Frances, some two years younger. Mary Ann became of age in March, 1846, more than four years prior to the institution of these proceedings. Four of the plaintiffs were, therefore, barred of their claim by the statute of limitations. The prayer of the bill is for specific delivery of the negro, Jeff, and an account of his hire; and the plaintiffs have established a title to only five-ninths. It is very clear that this would not entitle them to a specific delivery. If the action were detainue in the court of law, the plaintiffs would, necessarily, be nonsuited—for it is a joint action—the right is a joint right. In *Henry v. Means*, (2 Hill, 334.) and in *Bail. Eq. 535*, the rule is recognized that the right of the infant joint tenants may be preserved, although the adults be barred by the statute; and the Court consider the ac-

tion of trover as a proper mode of enforcing the right. "The action of trover," says the Court, "which is the one before us, does not seek the recovery of the specific chattel, but damages for the conversion. It is also clear that, in such an action, the jury may find damages exactly proportioned to the title proved. There is no technical unity in the thing to be recovered, which compels us to protect all from the bar of the statute, because it does not reach one."

But, in a bill for the specific delivery of a chattel, there is "a technical unity in the thing to be recovered."

The ground of jurisdiction in this Court, for the specific delivery of a slave, entirely fails, if the right of the plaintiff to the whole be not perfect. If the plaintiff can make out a title only to a third, or to two-thirds, he can have no specific delivery, and his remedy at law is as perfect, for the wrong done to his interest, as it would be in the case of any other chattel.

The Court is of opinion that the plaintiffs' bill must be dismissed, and it is so ordered and decreed.

Complainants appealed, on the following grounds, viz.:

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*1. That the complainants were not barred by the statute of limitations, and were entitled to relief on the case as made, both against Almedia Harley and Henry Milhouse.

2. That, even if some of them were barred, the others were entitled to relief, as against Almedia Harley, by partition or otherwise.

3. That the complainants were entitled to relief against Henry Milhouse, on the well established principle of equity, that if a person in possession of property undertakes to sell it, and delivers it accordingly, it is at the owner's option, either to pursue the property in the hands of the holder, or to affirm the sale, as the act of the voluntary agent, and recover the proceeds in his hands. Nor, in this case, was the remedy at law plain and adequate.

Bellinger & Hutson, for complainants.
J. T. Aldrich, Owens, contra.

WARDLAW, Ch., delivered the opinion of the Court.

The Chancellor properly remarks that this bill is multifarious, presenting two distinct cases that must be separately considered.

We will first consider the case against Milhouse. He bought the slave, Jenny, to which the plaintiffs were entitled in remainder after a life estate in their mother,—remained in possession of the slave for more than four years,—then re-sold the slave to the person from whom he had purchased—all without notice of any right in the plaintiffs. The bill states the fact that Milhouse had sold the slave, and prays that he may

be required to pay to the plaintiffs the price received by him with interest, and account for the hire before the sale. The claim of the plaintiffs is one strictly legal, which might be enforced by trover or assumpsit in the court of law, and no circumstance is stated requiring the peculiar intervention of this Court. It may be admitted to be a principle of equity, as stated by Chancellor Harper, in *Bryan v. Robert*, (1 Strob. Eq. 343), and *Hill v. Hill*, (1 Strob. Eq. 23,) that if a stranger in possession of my property undertakes to sell it, and delivers it accordingly, it is at my option either to pursue the property in the hands of the holder, or to

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affirm the sale as the act of a voluntary agent, and recover the proceeds in his hands. In both of these cases, the vendors had explicit notice of the adverse claims they had sought to evade by sales of the property; and although it may be true that the principle may be sometimes enforced against vendors who made such sales in good faith, believing themselves to be owners of the property sold; yet, certainly, it is the fact of notice of adverse rights that affects the conscience of vendors in such cases, and peculiarly justifies the interposition of this Court. I do not question, that if Milhouse had been properly brought before the Court for the specific delivery of some slaves in his possession, to which plaintiffs had legal title, and to account for the value of other slaves, in the same bill, which he had sold that the bill would be properly entertained in this Court for both purposes. But here plaintiffs proceed for the price of a single slave sold, and nothing more; and we think that for such a demand, strictly legal in its character, he should pursue his remedy in the court of law. We are the more moved to this course, because this defendant has been joined in a controversy with another defendant, with whom he has no community of interest. It is ordered and decreed that the bill be dismissed as to Milhouse, but without prejudice to the right of the plaintiffs to prosecute their claim elsewhere.

As to the case against Almedia Harley, we concur with the Chancellor that four of the plaintiffs are barred by the statute of limitations, and as to them the bill is dismissed. But we think that the other five plaintiffs are entitled to partition of the slave, they being tenants in common with this defendant. The remedy to be afforded, in a case in equity, depends upon the whole pleadings in the cause. The case may be so varied by the answer of defendants or the proofs that a plaintiff may be barred from the special remedy he seeks, yet, under the prayer for general relief, the Court will afford such remedy as is proper under all the circumstances of the case. Here the plaintiffs presented a case, in which, *prima facie*, the peculiar remedy prayed for,—specific delivery

of the slave,—was just and equitable; and they may not have had the means of know-

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ing, and were not bound to anticipate, what defences might be set up by the defendant. The whole case is before us, and in avoidance of further litigation, we will decide now upon the rights of the plaintiffs and the defences of the defendant. The effect of allowing the plea of the statute of limitations against the adult plaintiffs and disallowing it as to the infants is to vest four-ninths of the slave in the defendant and to leave the five younger plaintiffs each entitled to one-ninth. It is ordered and decreed that the defendant Almedia Harley deliver the slave Jeff to the commissioner of this Court for Barnwell district and that said commissioner proceed to sell said slave at public auction, on a credit of twelve months, and distribute the proceeds of sale among the parties according to their interests as herein indicated.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

Decree modified.

3 Rich. Eq. 384

CHARLES C. HAY v. FREDERICK J. HAY, Jr., et al.

(Columbia. Ma., Term, 1851.)

[Wills ⚡603.]

Testator devised and bequeathed his estate, real and personal, to his only child, S. B. "and the heirs of her body;" and if she should "die without living issue of her body, then, and in that case, all my estate, both personal and real, to return to the nearest heirs of my body by my mother's lineage;"—*Held*, that, in the real estate, S. B. took a fee conditional, and that there was no remainder to her issue, as purchasers.

[Ed. Note.—Cited in *Corbett v. Laurens*, 5 Rich. Eq. 323; *Gadsden v. Desportes*, 39 S. C. 143, 17 S. E. 706; *Bethea v. Bethea*, 48 S. C. 441, 443, 26 S. E. 716.

For other cases, see Wills, Cent. Dig. § 1354; Dec. Dig. ⚡603.]

[Perpetuities ⚡4.]

As to the real estate, the limitation over, on S. B.'s dying "without living issue," was void for remoteness.

[Ed. Note.—Cited in *Graham v. Moore*, 13 S. C. 119; *Gadsden v. Desportes*, 39 S. C. 144, 17 S. E. 706.

For other cases, see Perpetuities, Cent. Dig. § 26; Dec. Dig. ⚡4.]

The question,—whether, as to the personalty, there was a valid limitation to the issue of S. B., as purchasers,—ordered to be re-argued.

Whitworth v. Stuckey, (1 Rich. Eq. 404) explained.

[Witnesses ⚡65.]

A wife is not an incompetent witness, merely because of the conjugal relation, to prove, after the husband's death, that a parol gift, al-

leged to have been made by the husband in his lifetime, was, in fact, a loan.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 182; Dec. Dig. §§ 65.]

[This case is also cited in *Gadsden v. Desportes*, 39 S. C. 132, 17 S. E. 706, and distinguished therefrom, and in *Graham v. Moore*, 13 S. C. 118, as to the legal effect of the phrase "die without leaving lawful issue."]

Before Johnston, Ch., at Lexington, July 1850.

Johnston, Ch. This case was brought before me, by consent of parties, and heard

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the 24th day of July, 1850, at Lexington, where I was holding an extra term for the business of that district.

Of the numerous questions made by the pleadings, two only were submitted for adjudication; and I shall state only so much of the case as may suffice to render my decision of them intelligible—

The late Col. Frederick J. Hay died the 10th of August, 1849, leaving a widow, Susan Cynthia Hay; five sons, Charles C. Hay, Frederick J. Hay, (the younger) Rev. Samuel H. Hay, Thomas T. Hay and Oscar P. Hay; three daughters, Mary L. (the wife of Richard A. Gantt) Susan C. Hay (the younger) and Martha H. Hay; and a grand-daughter, Harriet Ford Hay, only child of a pre-deceased son, Wm. A. Hay.

He left about two hundred slaves, and a large landed estate, consisting of numerous tracts, described in the pleadings. All the slaves, and the larger portion of the land, he had acquired by his said wife, Susan, who was the only issue of her father, Charles Jones Brown, who died some fifty years ago.

Col. Hay left a last will and testament, dated the 19th of July, 1848, and a codicil thereto, dated the 8th day of September, 1848, both duly executed: by which, among other things, he disposed of the slaves and land acquired by his marriage, among his wife, children and grand-child.

After his death, a will left by his wife's father, the said Charles J. Brown, came to light. It was duly executed, so as to pass real estate, the 7th of July, 1798, and is in the following terms:—"I give and bequeath to my loving daughter, Susan Cynthia Brown, and the heirs of her body, all my worldly estate, both real and personal; provided, if my said daughter, Susan Cynthia Brown, should happen to die without living issue of her body, then, and in that case, all my said estate, both personal and real, to return to the nearest heirs of my body, by my mother's lineage."

Mrs. Hay, and all those of her children, who are of age, and capable of consenting, acquiesce in Col. Hay's will, and raise no claim in opposition thereto, under Brown's

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will. But it is *contended, in behalf of the infant grand-daughter, Harriet Ford Hay, that Brown's will limits the slaves and land,

which Col. Hay acquired by his wife, in remainder to her issue as purchasers; and that it was not in Col. Hay's power to deprive them of this interest by his will.

The first of the two questions submitted to me, is whether the will of Charles J. Brown creates the limitation contended for; and this inquiry is made for the benefit not only of the grand-daughter, but of all the parties who are not sui juris and capable of consenting to the dispositions of this property made by Col. Hay.

I shall, in the first place, apply the words of Brown's will to the personal property—the slaves.

The words of direct gift to Mrs. Hay and the heirs of her body, without more, would certainly have given her this property absolutely; this admits of no doubt. But it is as well settled in this State as any question can be, though perhaps not as satisfactorily, that where an express limitation of personalty to one and the heirs of his body, or issue, is followed by a limitation over, to take effect on the failure of such heirs or issue, at the death of the first taker,—this limitation over reflects back upon, and gives construction to, the first words, and creates a remainder, to such heirs, or issue, of the first taker as shall be living at his death. This was settled, after much discussion, in the construction of Bell's will, (*Henry v. Archer*, Bail. Eq. 535) and has been the doctrine ever since; and I am bound by it.

The question, then, is; is there such a limitation over in this case? I think not.

The property is to go over "if" (or when) Susan Cynthia Brown "shall happen to die without living issue."

If the word "living" were omitted, and the limitation over had been upon "Susan's" dying "without issue," it admits of no doubt that this would not have been a limitation over to take effect definitely at Susan's death, but at any time after her death, however remote,

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when she might prove to be "without *issue;"—that is, as the cases have ruled, upon an indefinite failure of issue.

The subtle reasoning upon which the doctrine was founded, is constantly baffling the common sense meaning of terms, and therefore the doctrine itself is rarely recalled to the mind without an effort. But it is settled and established beyond doubt; and is therefore the rule by which this Court must proceed.

The words of the will before me, are precisely the words which have always been thus held insufficient to create a valid limitation over, (and therefore insufficient to convert the heirs or issue of Mrs. Hay's body into purchasers in remainder.)—except that the word "living" is prefixed to the word "issue." What sort of difference can that make? The property is not to go over when Mrs. Hay is "without issue," but when she is

"without living issue." Is not this one and the same event? Is not the contingency of being without living issue, liable to be as remote, as that of being without issue?

A man can never be without issue while the issue are living; nor be said to have issue when they are dead. By issue, wherever referred to in the cases, is meant living issue;—and the phrase "without issue," which has been judicially interpreted to signify a failure of issue, necessarily imports, that wherever and whenever the failure occurs, it has arisen in consequence of there being, at that time, no living issue. The word living, creates, in law, no qualification of the word to which it is prefixed and the decision must be precisely the same as if it were not in the will.

The word "living" is not the only one in this sentence which seems to be surplusage. The words "of her body" are equally so;—and add nothing to the word "issue," which necessarily as issue, is "of the body."

Until satisfied on that point, I could not avoid the conjecture that the copy furnished me was incorrect, and that the word living had been mistaken for leaving; a word that has been held to indicate the time of the first taker's death; as pointing out the juncture when he leaves (separate or departs

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from,) his *issue,—who are then left living behind him. The word living has no such power. It has no reference to the act of the dying ancestor, but simply to the quality of the issue; and the quality it describes, is one always intended in law, whether it be used or not, when issue are spoken of in such a connexion.

But it was argued that though all this be conceded, still there is a circumstance in this limitation over, sufficient to confine the event on which it depends to the death of Mrs. Hay;—and that is, that the limitation over is to a person or persons in esse.

There are cases in which a limitation over, otherwise too remote, has been tied down to a definite period by such a circumstance. But to whom is the property limited over here?

To the nearest heirs of Brown's body, by his mother's lineage. Whether the persons to take were in esse, can only be ascertained by the description of the giver, for they are not named. Who or what is meant by "heirs of my body, by my mother's lineage?"—and how are we to ascertain which of them is meant?

If no person can be brought under the description, the person intended to be described could not have been in esse. The limitation over is to nobody: there is no such limitation.

Now, whom did the testator intend to describe, as not heirs of his mother's body, but of his own,—and while proceeding from his own body, being of his mother's lineage, in exclusion of his father's? And which

of these (if this can be found out,) did he regard as the nearest?

What did the testator mean? Several hypotheses have been suggested. It was supposed that, by nearest heirs of his body, he meant his next of kin; and that his intention was to limit over to his next of kin in the maternal line.

But, in the first place, I do not know by what authority we are to divert the meaning of the technical words "heirs of my body" from their technical import, unless there was something in the context to guide us to another application of them. We are not at liberty to conjecture. And what is there

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in the context to show us what interpretation, other than the technical one, conforms to the intention?

In the next place, if we suppose that next of kin were intended, what is there to show that the reference was to next of kin existing at the death of Mrs. Hay, and not next of kin existing when her issue should ultimately fail? The reference to a class of persons, by description, capable, in indefinite succession, of coming within the description, and claiming the property, does not, as Sir William Grant says in one of the cases, (*Massey v. Hudson*, 2 Merivale, 135,) "obviate the objection of remoteness;"—it is not a reference to persons in esse, as definite persons, for whom a personal enjoyment was intended.

Another hypothesis was, that the testator referred to his mother's nearest relations, or next of kin. But this is liable to the same objections as the one we have already considered: it is merely conjectural, and it does not point us to a definite time.

A third conjecture was, that Mr. Brown may have contemplated the possibility of having other issue, besides Mrs. Hay, to whom he wished the property to go over, in case she should die issueless, either in his lifetime or afterwards. The answer, in the latter case, is still the same as that which has been given to the previous hypothesis. In the former case, (her pre-decease of the testator,) the answer is, that the will would have taken effect in Mrs. Hay, or in the other issue of Brown alternatively and not first in the former and then in the latter, by way of limitation over. If it took effect in Mrs. Hay, there was to be (in the case supposed) no limitation over.

But, after I have gone through this will, in every way it has been presented, I confess my inability to comprehend what the testator can have meant by the limitation over; and I incline to the opinion that it is void, for uncertainty: for the only remaining supposition, (besides these which were suggested by counsel,) is the absurd one that the limitation over was intended for the heirs of testator's body, (meaning Mrs. Hay and her issue); that is, that he intended to limit over

to them, to take effect only upon the contingency of their own deaths and extinction.

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*I will now apply the words of the will to the realty.

The words of direct gift, of themselves, create, in Mrs. Hay, a fee conditional, descendible, *per formam doni*, to the heirs of her body. The limitation over, as we have seen, is too remote as to the personality. It is equally so as to the realty. Indeed, words which would be sufficient to tie down a limitation over, of personality, to the death of the first taker, are sometimes insufficient to produce that effect as to lands;—of which we have examples in *Forth v. Chapman*, (1 P. Wms. 663.) and in our own case of *Mazyek v. Vanderhorst*, (1 Bail. Eq. 48.) But even if the limitation over were within proper time, it has not the same effect upon the preceding limitation, in cases of real estate, that is allowed to it in cases of personality. In the latter case, we have seen (as was decided in the cases on Bell's will, Bail. Eq. 535.) that such a limitation over converts the issue, or heirs of the body, mentioned in the words of direct gift, into purchasers in remainder. But the same judge, whose opinion was established in these cases, held, in *Whitworth v. Stuckey*, (1 Rich. Eq. 411.) that when real estate is concerned, the direct gift is unaffected by the limitation over; and that was the only question, in relation to the construction of the will of Fraser, which was considered and discussed by him in that case. As it has been sometimes supposed that the learned Judge had investigated the direct words of limitation, apart from the words of limitation over, I have thought it worth while to re-examine his opinion, and I find that he assumes the legal construction of the former; and, taking that construction for granted, proceeds to consider what he regarded the real question, viz.:—Whether the limitation over had any effect to control or qualify it. "There is no question," says he, (Id.) "that, if there had been no more in the will than a gift to a son, for and during the term of his natural life, and, at his death, to the lawful issue of his body, this would have given an estate tail, or fee conditional, under the rule in Shelley's case. The question is upon the effect of the limitation over, if he should die without leaving issue of his body living at the time of his death. Does

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*this, according to the established rule of law, sufficiently indicate the testator's intention that the first taker should be restricted to a life estate, and the issue take as purchasers?" It is with reference to this question that he proceeds to an examination of the cases, which he closes by a remark upon *Gilman v. Elvey*, that the Court, in the construction of the will in that case, did "not resort to the limitation over in the event of the son's not leaving issue living at the time

of his death, to confirm its conclusion:" which observation shows that he kept the question which he had proposed to discuss steadily before him: (Id. 412.)

In *Forth v. Chapman*, (1 P. Wms. 663.) it was held, that upon the same words of the same will, limiting over real and personal property, the limitation over of the former would be void for remoteness, while that of the latter would be supported—an authority that has been followed ever since;—and there is nothing more unreasonable or inconsistent in holding, as in *Henry v. Archer*, and in *Whitworth v. Stuckey*, (1 Rich. Eq. 411.) that the effect of a limitation over to convert the word "issue," mentioned in a preceding limitation, into a word of purchase, is different, according as the subject be real or personal estate.

The decision in *Forth v. Chapman*, (1 P. Wms. 663.) turned upon the different qualities of the two species of property; a subject that had been previously considered, and with the same result, in *Target v. Gaunt*, (1 P. Wms. 433;) where the different natures of the property are considered.

Where is the inconsistency? One of them, (real estate,) is descendible—the other, (personal estate) never is so, nor can it be rendered inheritable by any words you can employ. Now, where real estate is limited to one and the heirs of his body or issue, and then limited over, (upon any contingency, however near,) the primary objects of the grantor's bounty are those to whom he has expressly given his estate in the first instance, and it is contrary to his intention that the ultimate limitation shall ever take effect while there are any of the former to

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enjoy what *he designed for them. If you take advantage of the limitation over to convert the heirs or issue mentioned in the direct gift into purchasers, you not only invert the intended order of the bounty, but you are destroying the very estate he intended to create in the first instance. He intended to create an estate descendible indefinitely *per formam doni*; you arrest the descent, and turn it into a new channel. He intended the amplest efflux of the primary estate:—that issue should succeed to issue in the enjoyment of it, while there shall be issue to enjoy. But you mar this intention when you declare that the first issue shall take by purchase, that no other issue shall take, and that when the first issue are dead, though there be succeeding issue, they shall not enjoy as such. In cases of real estate, therefore, to allow the words of ultimate limitation to control the prior words and change their operation, would be a complete defeat of the primary and leading intention of the grantor. Nor is there any necessity to do so. If the limitation over be sufficiently near, as to time, it may be allowed to stand by way of executory devise, without abridging the

prior disposition. The two dispositions may stand, in all their amplitude, as separate things, according to the terms and intention of the donor; and so they should stand. Is there any instance in which the limitation over of realty has been allowed to arrest the efflux of the prior estate?

But does this reasoning apply to personalty? It is not descensible. When it is attempted to be limited to one and his issue, the issue cannot take by descent; and if they are to derive any benefit under the conveyance, it must be by purchase. They cannot take in succession, as in cases of real estate. But, as was argued by Chancellor HARPER, in *Henry v. Archer*, where there is a gift to them, there is an expressed intention that they shall enjoy, if, in the circumstances, the law will allow it; and where there is a limitation over after a gift to issue, there is a clear declaration that the issue are preferred over the ultimate remaindermen, in the affection of the grantor. If the limitation over is to take effect at a given time, the will or other instrument shews us that whatever

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issue may happen to exist at that time, *are intended to take before the ulterior limittee. Now the question is reduced to this, in every such case—is the limitation over good? Is it within time? Can he, for whom it was intended, take? If he can, then any other person who can, at that juncture of time, shew a stronger intention in his favor, is better entitled than he, and should, in effectuation of the intention, be preferred before him, as far as the law will allow it. Now, in the case we have supposed, (of a limitation over at a lawful time, after issue,) any issue existing at that time, can shew a superior intention in their favor; and are entitled on the score of intention. And as they cannot lawfully take by inheritance or succession, must be allowed to take in a different way, by way of purchase, or the intention is defeated.

Thus we see that the decisions in *Henry v. Archer*, and in *Whitworth v. Stuckey*, though they establish different rules, establish the same principle; and the apparent discrepancy arises from the diversity of subjects to which it is applied. The intention is the Pole Star, and both these cases steer to it from different points.

The other question relates to a parol gift of slaves, which the administrator of William A. Hay, the pre-deceased son, alleges was made to him in his lifetime, by his father, Col. Hay. This gift is disputed, and it is contended that the slaves were loaned, not given. Mrs. Hay proves a loan, beyond doubt; and if I could receive her evidence, it would be decisive of the question. (a)

(a) Mrs. Hay's testimony was, that she heard William A. Hay say that he held the negroes as a loan. R.

Her competency is not liable to the objection of interest on her part; but I think it is settled, not only that husband and wife are excluded from testifying for or against each other, during their joint lives, but that even after the dissolution of the marriage relation by the death of one of the parties, the survivor is incompetent to testify in relation to the rights or estate of the deceased. See *Footman v. Pendergrass*, (2 Strob. Eq. 322,) *Mayrant v. Guignard*, (3 Strob. Eq. 112,) and

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*O'Conner v. *Mayerbank*, (43 Eng. Com. Law Rep. 228 (S. C.) 4 Maning & Grayer Rep.)

The ground of the doctrine is one of social policy, not interest; it arises from the confidence essential to the relation; and it is not necessary that the subject of the evidence should have been imparted to the survivor in express confidence. Whether that is the case or not, he or she shall not be allowed to make use of it in evidence; because such is the intimacy of the relation of husband and wife, that there should be no reserve between them; and if either of them were put under fear that whatever of his or her rights might happen to be exposed to the other,—whatever that other might chance to see or hear, might be brought to public view,—this would create a condition of tormenting and intolerable oppression, and would lead to a degree of jealousy and suspicion and reserve utterly destructive of domestic peace and happiness.

The other members of the family whose testimony has been brought to bear against the gift, have attempted, by releases, to divest themselves of their interest. Whether the releases have effectually removed their interest, it is unnecessary to consider or determine, because their testimony relates, not to the facts, but to their opinion of them. Independently of this, there is little in evidence from which the inference of gift or no gift is to be drawn, beyond the bare fact that the slaves were put into the possession of the son by the father, and were employed by the son in planting. Now while, as I have said in *Henson v. Kinard*, (3 Strob. Eq. 371,) I do not think this amounts ipso facto, to a gift in law, it is such a circumstance as may amount to evidence of it; and should be so held if the other circumstances are equivocal, as they are in this case. I am of opinion that there was a gift, but would prefer that the parties would take an issue, for which leave is hereby granted them, if they make up the issue within three months after my opinion is filed. Having now given the opinion of the Court, which the parties desired to take upon the two questions submitted by them, it is left to counsel to propose a decree upon those points, and the remaining points of the case.

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*The defendant, Harriet F. Hay, appealed, on the following ground:

That his Honor should have decreed that, both as regards the real and personal estate devised and bequeathed in the will of Charles J. Brown, the said will contains a good and valid limitation to such persons as shall, at the death of Mrs. Susan C. Hay, answer the description of heirs of her body then living, as purchasers.

The complainant, C. C. Hay, gave notice that he appealed, and would move to reverse and modify so much of the Chancellor's decree as establishes a gift, (of certain slaves,) on the following grounds, and in the following particulars, viz.:

1st. In this: That if a gift be established generally, it is respectfully submitted that the Chancellor should have expressly excepted the negroes, which were proved to have been sent for a special and temporary purpose.

2d. In this: That if the Appeal Court should decide that the limitations in the will of Charles J. Brown are good, then it will be submitted that the supposed gift was valid only during the life time of F. J. Hay, Sen., whose marital rights did not attach beyond that period.

3d. Because (as it is respectfully submitted) the Chancellor erred in rejecting the testimony of Mrs. Susan C. Hay, (the widow of F. J. Hay, Sen.,) who was a competent witness, and her testimony admissible.

4th. Because the testimony of the other witnesses for the complainant, C. C. Hay, executor, negated the supposed gift.

The complainant, C. C. Hay, also gave notice that, by his notice of appeal, he did not mean to waive his right to an issue, but (if need be) an application would be made for an issue at the hearing in the Appeal Court.

Bellinger & Hutson, for complainant.
James T. Aldrich, for Harriet F. Hay.

JOHNSTON, Ch., delivered the opinion of the Court.

This Court is satisfied with so much of the decree as relates to the real estate; and it is ordered that the same be affirmed.

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*It is quite satisfactory to my mind, to find that the case of *Whitworth v. Stuckey*, as I interpreted it in the decree, is corroborated by the amplest authority.

"It remains," says Mr. Jarman, (2 Jarm. 359, 360; chap. 39, division 2, § 5.) "to be observed that where a devise to a person and his issue,—or to him and the heirs of his body,—(b) is followed by a limitation over, in case of his dying without leaving issue living at his death, the only effect of these special words is to make the remainder contingent on the described event.—They are not

considered explanatory of the species of issue included in the prior devise (c) and, therefore, do not prevent the prior devise taking an estate tail under it. (d) The result simply is, that if the tenant in tail has no issue at his death, the devise over takes effect; if otherwise, the devise over is defeated, notwithstanding a subsequent failure of issue. In *Doe d. Gilman v. Elvey*, (4 East, 313; S. C. 2 Jarm. 333,) the circumstance of there being a limitation over on failure of issue at the death of the prior devisee, does not appear to have given rise to an argument against an estate tail. The only doubt, it is conceived, could possibly be, whether it would have the effect of rendering the remainder expectant on the estate tail, contingent on the event of the devisee in tail leaving no issue at his death. (e) The affirmative, however, seems to be the better opinion, as the courts would hardly feel themselves authorized, without a context, to reject the clause 'living at his decease.' But words of an equivocal import would certainly not have the effect of subjecting the remainder to such a contingency." (f)

Upon the subject of the loan, we think it advisable that an issue be made up, as indicated in the decree: the parties asserting the loan to be the actors: and it is ordered that they have leave to make up said issue, to be heard at the next term of the Court of Common Pleas for Barnwell district.

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*As to the competency of Mrs. Susan Cynthia Hay (widow of Col. Hay) to testify on that issue; we are of opinion, that the circumstance of her being the widow of the donor or lender is not sufficient to render her incompetent: and that the decree on that subject should be reversed: and it is so ordered.

Our own cases, referred to in the decree, are cases where the husband or wife of the witness were still living. My own opinion is that the reason of incompetency extends also to cases where the marriage relation has been terminated by death. But the question is one of law, and the testimony in this case is to be applied to a legal right; and the statute, in such cases, requires us to yield to the judgments of our law courts. The case of *Caldwell v. Stuart*, (2 Bail. 574,) which, if quoted, was overlooked at the hearing, is conclusive upon us.

It is unnecessary to say anything further here upon the question of the loan or gift. It is reserved until the return of the issue, hereinbefore directed.

It is ordered that the questions in relation to the effect of Brown's will upon the per-

(c) *Hutchinson v. Stephens*, 1 Keen, 240.

(d) 2 Jarm. 330.

(e) See *Lyon v. Mitchell*, 1 Mad. R. 467, as to personality: and note 2 Jarm. 360.

(f) See *Broadhurst v. Morris*, 2 Barn. & Adolph. 1; S. C. 2 Jarm. 309.

(b) *Wright v. Pearson*, 1 Ed. 119; S. C. 2 Jarm. 272; S. C. Amb. 358; S. C. Fearn. C. R. 126.

sonalty which passed under it be reargued at the next term, in connexion with the verdict upon the issue, if then returned, or separately if the issue shall not have been tried before that time. At present we are not prepared to decide it; and, therefore, reserve our judgment.

It will, also, be understood that we reserve our judgment upon the question whether those parties who have signified their willingness to abide by Col. Hay's will will not be allowed (if they desire it,) to retract, in the event that the issue of Mrs. Hay be declared entitled to take the personalty, in remainder, as purchasers, or if the gift contended for in the pleadings be established. This matter is here stated that the attention of parties and their counsel may be drawn to the subject.

It is ordered that all questions not herein decided be reserved until further hearing and further order.

DARGAN and WARDLAW, CC., concurred.

DUNKIN, Ch., concurred in the result.
Decree modified.

3 Rich. Eq. *398

*E. J. HIGGENBOTTOM v. WM. H. PEYTON.

WM. H. THOMSON, Ordinary, v. WM. H. PEYTON.

(Columbia. May Term, 1851.)

[*Husband and Wife* ⚭8.]

By marriage settlement, made in 1826, and not recorded until eight months after its execution, the wife's share in her father's estate was conveyed to a trustee for the use of the wife and the heirs of her body; proceedings were then pending in the Circuit Court of the United States in which the father's estate was interested; in 1832, his real estate was sold by the Marshal and bond taken for the purchase money: The U. S. Court ordered the wife's share to be paid to the husband in right of his wife; this was not done, and, in 1850, after the death of the husband, the U. S. Court ordered the bond, which remained unpaid, to be transferred to the State Court of Equity for Barnwell, subject to its decree:—*Held*, that the marital rights of the husband had not attached on the wife's share, and that she was entitled to it, as against the creditors of the husband, under the provisions of the marriage settlement.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 21; Dec. Dig. ⚭8.]

[*Husband and Wife* ⚭31.]

At the sale by the Marshal of the father's personal estate, one S. at the request of husband and wife, bid off a number of slaves as trustee for the wife, and gave his bond for the purchase money: this bond was afterwards settled by giving credit as for money to which the wife was entitled, as her share of her father's estate: S. permitted the slaves to go into the possession of the husband, who kept possession of them, using them as his own till his death:—*Held*, that, although the marriage settlement was void as against creditors, the

parol trust created by the purchase by S. was valid; and that the marital rights of the husband had not, under the circumstances, attached on the slaves: per Harper, Ch., in *Peyton v. Enecks*, in note.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 178–195, 883, 884; Dec. Dig. ⚭31.]

[*Husband and Wife* ⚭11; *Trusts* ⚭17, 18.]

A trust in personal property may be created by parol; and when such a trust is properly created in favor of a feme covert, it is not regarded as being executed, so as to be liable to creditors, by the mere circumstance of the property going into the possession of the husband: per Harper, Ch., in *Peyton v. Enecks*, in note.

[Ed. Note.—Cited in *Trustees v. Bryson*, 34 S. C. 412, 13 S. E. 619.

For other cases, see *Husband and Wife*, Cent. Dig. § 56; Dec. Dig. ⚭11; *Trusts*, Cent. Dig. § 17; Dec. Dig. ⚭17, 18.]

[*Husband and Wife* ⚭29.]

[By a marriage settlement made in 1826, and not recorded until eight months after its execution, the wife's share in her father's estate was conveyed to a trustee for the use of her and the heirs of her body. Proceedings were then pending in the federal court in which the father's estate was interested. In 1832 his real estate was sold by the marshal, and bond taken for the purchase money. The federal court ordered the wife's share to be paid to the husband in his wife's right, but this was not done; and in 1850, after the husband's death, the federal court ordered the bond to be transferred to the state court, subject to its decree. *Held* that, the husband having never reduced the fund to possession, nor given an order to the trustee for the fund, his marital rights had not attached to the wife's share, and she was entitled to it under the provisions of the marriage settlement, as against his creditors.]

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 167; Dec. Dig. ⚭29; *Fraudulent Conveyances*, Cent. Dig. § 97.]

Before Dunkin, Ch., at Barnwell, February, 1851.

This case came before the Court on exceptions, by Lucy J. Enecks, one of the defendants, to the Commissioner's report.

Dunkin, Ch. The exceptions of Lucy J. Enecks arise out of this state of facts. She was a daughter of Elijah Gillett. On her marriage with George W. Collins, in 1826, he executed an informal settlement of all that part of lands and tenements, goods and chattels, rights and credits, bequeathed to and left her by her deceased father and mother. This transfer was made to James Higginbottom, who was named trustee for

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the said Lucy, *and the lawful heirs of her body. The trusts were "for her only proper use, benefit and behoof, and the lawful heirs of her body." Proceedings were, at that time, pending in the Circuit Court of the United States, in which the estate of Elijah Gillett was interested. In 1832, his real and personal estate, in the hands of the executor, was sold. The real estate was sold by the Marshal, and purchased by General Erwin, who gave his bond for the purchase money, about \$8,270. The complainant's bill, in that suit, was dismissed; but the Court,

without being called on to make distribution, proceeded, by its decretal order—which Chancellor Harper afterwards styled “unusual and peculiar”—to direct that one-fourth of the fund should be paid to J. Higgenbottom, in right of his wife, Julia; one-fourth to George W. Collins, in right of his wife, Lucy; one-fourth to J. S. Powell, in right of his wife, Lavinia; and the remaining fourth part to Aaron Gillett. It does not appear that this order was made at the instance of Collins, or that he ever took any steps to avail himself of it. If the money had been received by him, I suppose it could hardly be questioned that he would be construed a trustee for his wife, under the settlement of 1826.

But Collins departed this life several years since, never having received this money, and the bond of General Erwin still remained unpaid. By a decretal order of the Circuit Court of the United States, made on the 25th November, 1850, the bond of General Erwin was ordered to be delivered by the Clerk of the United States Court, to the Commissioner in Equity for Barnwell district, to be held by him, subject to the decree of the State Court of Equity. It will be perceived that the only question is, whether the marital rights of George W. Collins attached—whether he held the fund absolutely. It is directed to be paid to him “in right of his wife,” and I think it stronger than the case of *Peyton v. Enecks*, MS. 1845, Barnwell. (a) in which Chancellor Harper sustained the

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*wife's rights under this settlement. It is

(a) The following is the decree of Chancellor HARPER, in *PEYTON*, Administrator of Collins, v. *ENECKS*.

[*Husband and Wife* ⇨ 119.]

[By marriage settlement, not recorded till eight months after its execution, a wife's share in her father's estate, which was then involved in litigation in the federal court, was conveyed to a trustee for her “only proper use, benefit, and behoof.” At the sale by the marshal of the father's personal estate, one S., at the request of husband and wife, bid off a number of slaves as trustee for the wife, and gave his bond for the purchase money. This bond was afterwards settled by giving credit as for money to which the wife was entitled as her share of her father's estate. S. permitted the slaves to go into the possession of the husband, who kept possession of them, using them as his own till his death. Held that, although the marriage settlement was void against creditors, the parol trust created by the purchase by S. was valid; and hence the marital rights of the husband did not attach to the slaves.]

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 425; Dec. Dig. ⇨ 119.]

HARPER, CH. On the 13th September, 1826,

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George W. Collins, in contemplation of *his intended marriage with the defendant, then Lucy Gillett, conveyed to a trustee all the estate of the intended wife, in trust for her “only proper use, benefit and behoof.” The only property she was then entitled to was an undivided share of her father's estate, of whom she was a residuary legatee. The estate was then involved in litigation, in the Federal Court. This deed was not recorded till the 30th May, 1827, eight months after its execution.

ordered that the second exception of Lucy J. Enecks be sustained.

The creditors of G. W. Collins appealed, on the following grounds, viz.:

1. Because the marital rights of G. W. Collins had attached to his share of the fund in the Federal Court.

2. Because the said exception contravenes the decision of Chancellor Harper, who expressly decided that the marriage articles referred to were null and void as against creditors.

3. Because the said exception contravenes

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the decisions of *this Court, not only on gen-

At the sales of the estate of Elijah Gillett, the father of the defendant, Lucy, one Stephen Smith, at the request of Collins and wife, bid off a certain number of slaves, as trustee for Mrs. Collins, and gave his own bond for the purchase money. This bond, if I understand correctly, was afterwards settled, by giving credit as for money, to which Mrs. Collins was entitled, as her share of her father's estate. The trustee, Smith, permitted the slaves to go into possession of George W. Collins, who kept possession of them, using them as his own, till his death, in 1836. At the time of his death, Collins was largely indebted, by judgment and otherwise, and some of his creditors are proceeding to enforce their claims by action at law, against the complainant, his administrator.

After the death of Collins, by an arrangement between his widow and the administrator, it was agreed that the property, in his possession at the time of death, including the slaves claimed by the wife, should be sold, she reserving her claim to the proceeds, and the property was sold accordingly. The objects of the bill are, that the creditors may be restrained from proceeding at law—that an account may be taken of the estate of Collins, and that the rights of the defendant, Mrs. Enecks, in the proceeds of the property, sold by the administrator, may be declared. I take the marriage contract to be void, for want of recording, and the case must be decided as if it had never existed. The question, then, is, whether the husband, Collins, during his lifetime, reduced into his possession his wife's share of her father's personal estate, so that his marital rights attached upon it. By his purchase at the sale, I suppose the legal title to the slaves vested in Smith, as trustee for Mrs. Collins. A trust of personal property may be created by parol; and, if the trustee had remained in possession of the slaves, hiring them out, and paying over the proceeds of their labor to the wife, I do not perceive how any question could have arisen. The case of *Perryclear v. Jacobs*, (2 Hill's Eq. 504,) is very similar to the present, and, for the most part, must govern it. In that case, it was held that an assignment might be made by parol of an undivided share of an estate, to which the wife was entitled, to a trustee, for the separate use of the wife, and that, reduced into the trustee's possession, the property remained subject to the wife's equity, as in the hands of the executor. There was no question of recording a parol agreement; and the property never having come into the husband's possession, his creditors did not trust him on the faith of it, and had no right to look to it. If the trustee, Smith, purchased for the wife, and by the consent of the husband, the money in the

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hands of the executor, to which he *might otherwise have been entitled, in right of his wife,

eral principles, but in relation to this very claim, set up by Mrs. Enecks.

4. Because the said decision is contrary to evidence, law and equity.

Bellinger, for appellants.

Patterson, Graham, contra.

DUNKIN, Ch. delivered the opinion of the Court.

In the proceedings in the Federal Court, the validity or effect of this marriage contract was not involved in the issue. Nor were the proper parties before the Court for that purpose. So, in *Gillett v. Powell*, (Speers Eq. 142,) Chancellor Harper expressly declares that, in the case then before the Court, no question was made as to the validity of the marriage settlement of George W. Collins, and that nothing is concluded respecting it in the judgment then to be pronounced. In truth, the Court, in that case, considered only the effect of the decree in relation to the rights of J. S. Powell, who had survived his wife, Lavinia, whose marital rights were embarrassed by no marriage settlement, and who insisted on the benefit of the Federal decree. Collins never interposed

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any claim, departed this life in 1836, *his

was applied to pay for it, it forms a similar case.

In that case, however, the property was not permitted to go into the possession of the husband; and as, in this case, it was in his possession, and he may have gained credit on the appearance of property, it would seem to come within the mischiefs of the recording Acts. But there is great difficulty in applying them. Suppose the trustee had purchased of any other person, and the executor, with the husband's assent, had paid the money, should I be authorized to say that this transfer to the trustee must be in writing?—that it is a marriage contract, or settlement, and must be recorded? If not, and the property were permitted to go into the hands of the husband, subject to the trust, the trust would be good as against him; and, if it would be void as against creditors, it would be on the ground of fraud; and, apart from the recording Acts, this must mean actual intentional fraud. But it has nowhere been held that the mere circumstance of giving a man the appearance of property, by putting it into his possession, of itself constitutes such fraud. I perceive no evidence of any actual fraudulent intention. The deed, securing the estate of the wife, was not kept secret. It was recorded, long before the property came into the hands of the husband; and, if creditors, afterwards, trusted him on the faith of it, they had the same means of notice as if the instrument had been recorded in due time: and this would have been valid without a schedule. It is said, in *Perryclear v. Jacobs*, that, if the trustee "should permit chattels to go into the hands of the husband, this might, perhaps, be construed a surrender of the trust, and the marital rights attach upon them, so as to render them liable to creditors." But this was before the

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late *decisions that, when a trust is properly created in favor of a feme covert, it is not regarded as being executed, so as to be liable to creditors, by the mere circumstance of the property going into the possession of the husband. Those are cases of marriage settlement duly

widow, Lucy J. surviving him; and, in 1850, the fund, in the Federal Court, still remaining a chose in action, was, by the order of that Court, transferred to the Court of Chancery, for Barnwell district, "subject to the decree of the State Court of Equity."

In the circuit decree I have said, that, if Collins had actually received the money, he would have taken it affected with the trusts of the ante-nuptial settlement executed by himself, and, that receiving and holding in a fiduciary relation, his marital right would not attach. I have heard nothing to remove that judgment. But suppose he had not left this to implication or judicial inference, but had given an order on the registry of the Federal Court, or on the obligee of the bond, to pay the money to Higgenbottom, the trustee of the settlement, to be held by him subject to the trusts thereof, as Chancellor Harper has said in *Peyton v. Enecks*, on what principle could the creditors of Collins complain? The lands sold were his wife's inheritance. The decree directed the proceeds to be paid to him in right of his wife. By the settlement of 1826, Collins had transferred all the right to these lands to Higgenbottom, the trustee, and the settlement was recorded in eight months thereafter. He had never reduced the fund into his possession,

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and was bound not to *reduce it into his possession, but to do every thing in his power to secure the efficiency of the trust, and he had done so. Instead of giving an order to the trustee for the fund, Collins merely refrained from doing any act inconsistent with his covenant, and left the bond in the custody of the Federal Court, who have transferred

recorded. But, if this trust was duly created, if there was no necessity for registration, and if there was no actual fraud, it must come within the same rule. The trust must be held not to be executed, and not liable to creditors, unless by the intervention of this Court. It is usual to direct a reference as to the terms of the settlement. But the settlement, now to be made, is between the present husband and wife, as of the wife's equity, in the hands of the complainant: and I understand it to be agreed that it shall be to the sole and separate use of the wife.

It is, therefore, ordered and decreed, that it be referred to the Commissioner, to inquire and report a proper person to be appointed the trustee of the defendant, Lucy J. Enecks, and whether such trustee ought to give any, and what security, for the faithful discharge of his trust; that the Commissioner take an account of the sales of the property sold as the estate of George W. Collins, and inquire and report what portion of the proceeds of the said sale were derived from the trust property of the defendant, Mrs. Enecks; and that, upon a trustee being appointed, the Commissioner transfer and assign the amount of such portion of such proceeds to such trustee, in trust, to the sole and separate use of the wife for life; to the use of husband for life, if he shall survive his wife; at the death of the survivor, to the issue of the said wife then living; and, if no issue of the wife, to the survivor absolutely.

the administration of the fund to the State tribunal.

The Court are all of opinion that the rights of Mrs. Enecks are not precluded by any judgment heretofore pronounced, and that, on the general principles of this Court, she is entitled to the fund under the provisions of the marriage settlement. The decree of the circuit court is affirmed and the appeal dismissed.

JOHNSTON, DARGAN and WARDLAW, CC. concurred.

Appeal dismissed.

3 Rich. Eq. 403

J. S. & L. BOWIE v. JOHN G. FREE and Others.

(Columbia. May Term, 1851.)

[*Fraudulent Conveyances* ⇨ 183.]

Where a judgment, confessed for a much larger amount than is actually due the plaintiff, and intended not only to secure the amount actually due but also to defraud other creditors of defendant, is set aside, at the suit of creditors, for the actual fraud, the plaintiff in the judgment will not be allowed to retain its lien, as against the other creditors, for the amount actually due him.

[Ed. Note.—Cited in *Dickinson v. Way*, 3 Rich. Eq. 417; *Garvin v. Garvin*, 55 S. C. 371, 33 S. E. 458.

For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 582; Dec. Dig. ⇨ 183.]

Before Dunkin, Ch., at Barnwell, February, 1851.

Dunkin, Ch. The complainants are creditors of John G. Free. The object of the proceeding is to set aside a judgment confessed by John G. Free, to his co-defendants, H. B. Rice and Allen F. Free, on the 18th January, 1849. It seems, from the evidence, that, about the year 1845, John G. Free set up a country store, in Barnwell district, not far from Buford's Bridge.—Desiring to obtain credit from the wholesale dealers in Charleston, he was introduced by the defendant, H. B. Rice, to the complainants, J. S. & L. Bowie, "as a responsible purchaser, a man of property, and a hard working, honest man." This recommendation not only obtained him

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credit with the Messrs. Bowies, *but with Wily, Banks & Co. and with others. In September, 1848, J. G. Free was in debt to the Bowies to the amount of \$1828.87, and to Wily, Banks & Co. \$1,158.04, and was, at the same time, considerably indebted to other dealers in Charleston. He became embarrassed, and was threatened with suits. Under these circumstances, he, on the 19th December, 1848, gave his promissory note to his co-defendants, H. B. Rice and Allen F. Free, for the sum of six thousand seven hundred and fifty-four dollars and thirty-eight cents (\$6,754.38,) and, on the 18th January, 1849, he

confessed a judgment on the said note, with interest from the date thereof, on which judgment a fl. fa. was issued and lodged with the sheriff of Barnwell district. On the second day of July following, the property of J. G. Free was taken to satisfy said execution, and was sold for about two thousand dollars, nearly the whole of the property being bid off by the defendants, H. B. Rice and A. F. Free. In the mean time, suits at law were pending against John G. Free, at the instance of the complainants and other creditors, and judgments were entered thereon, at Spring and Fall Term, 1849. This bill was filed on the 15th August, 1849, charging that the judgment of the 18th January, 1849, was fraudulent. The answers of John G. Free and H. B. Rice were filed on the 29th December, 1849, and an amended answer of the latter on the 29th January, 1850. Some time in 1849, but at what time does not appear, J. G. Free made an assignment of his books, notes and accounts to H. B. Rice and Allen F. Free. One of the witnesses (Bratham) said that, in 1849, he saw an advertisement, calling on the creditors of J. G. Free, to make payment to him, (Rice,) and that the advertisement was signed by Rice as assignee.

At Fall Term, 1850, for Barnwell district, John G. Free was admitted to the benefit of the insolvent debtor's Act, on executing the usual assignment. In his schedule, he includes any interest he may have in the books, notes and accounts assigned by him to H. B. Rice and Allen F. Free.

All the defendants admit that no such sum as \$6,754.38 was due by John G. Free to H.

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B. Rice and Allen F. Free, on the *18th December, 1848. Rice says that, about that time, he and John G. Free made a calculation of what was due by J. G. Free to A. F. Free, (who had been his ward,) and also of his indebtedness to Rice, as well as of the debts for which Rice was liable, and "found the same to be about \$4,754.38, for which J. G. Free proposed to give them a confession of judgment, but, as the amount of the notes of J. G. Free, on which Rice was indorser, could not be ascertained, and as J. G. Free might require subsequent indorsements, it was agreed that the sum of \$2,000 should be added and included in said judgment, to cover any amount that might be omitted, as well as any further indorsements."

It seems that John G. Free was appointed guardian of his brother, Allen F. Free, about 1841. He had made regular annual returns to the Commissioner. His last return, previous to the confession of judgment, was in January, 1848. The whole amount due to his ward, according to those returns, including a calculation of interest on the annual balances, was six hundred and four dollars and thirty-four cents. One of the witnesses,

who was a surety on the guardianship bond, but was subsequently released, testified that, in December, 1848, or January, 1849, he had a conversation with Allen F. Free, in which he stated that he and his brother had had no settlement; that there were transactions between them, but that he did not suppose the amount due him exceeded seven hundred dollars. The whole amount due by J. G. Free to H. B. Rice, in January, 1849, including interest on his open accounts, appears by the statement filed with his answer not to have exceeded six hundred and ninety-four dollars, and the notes for which he says he was responsible, amounted, by that statement, to about one thousand or one thousand and fifty dollars. The whole amount of indebtedness and liabilities not exceeding seventeen hundred and fifty dollars. It is not suggested that any "further indorsements" were asked or obtained, by John G. Free from H. B. Rice. It is not the least remarkable feature of the transaction that, at that time, January, 1849, when John G. Free was utterly bankrupt, about to be pressed by debts ex-

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ceeding three times *the amount of his property, he should confess a judgment, a large proportion of which was to indemnify the plaintiff against future indorsements. But, according to the statement of H. B. Rice, filed as a part of his answer, and according to the sworn returns as guardian, by John G. Free, the whole amount for which his co-defendants, Rice and A. F. Free, had any claim against him, in January, 1849, scarcely exceeded twenty-three hundred dollars, and they took from him a sealed note for six thousand seven hundred and fifty-four dollars thirty-eight cents, with a confession of judgment thereon. Upon this judgment execution was issued, and, in July, 1849, the defendant's property was sold by the sheriff, and purchased by the plaintiffs in the execution, for about two thousand dollars, leaving subsequent execution creditors, to the amount of nearly five thousand dollars, wholly unsatisfied.

There are some remarks of Chancellor Harper in the case of Hipp & Vansant v. Sawyer, (MS. Lexington, February, 1830, affirmed by Court of Appeals, book D, 311.) which seem not inapplicable. Part of that case related to a deed which was attacked as voluntary, but which was attempted to be sustained, because a part of the alleged consideration had been paid.—"Now," says the Chancellor, "if this had been proven, I should think the difference between the actual payment and the ostensible consideration, a strong circumstance against the deed. It does not follow that, because a consideration was paid, a conveyance cannot be fraudulent as to creditors. In Twine's case, there was a consideration. Even if the full value was paid, and it appeared that the transaction was concerted between the grantor and grantee, to enable

the former to defeat creditors by changing the land into money, which he could more easily put beyond the creditor's reach, I presume the conveyance would be considered fraudulent. Lord Mansfield says, in the case of Cadogan v. Kenneth, (Cowper, 434.) 'But, if the transaction be not bona fide, the circumstance of its being done for a valuable consideration, will not alone take it out of the statute. I have known several cases where persons have given a fair and full

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*price for goods, and where the possession was actually changed, yet, being done for the purpose of defeating creditors, the transaction has been held fraudulent, and therefore void.' He instances the purchase of a house and goods, with a view to defeat a sequestration out of Chancery, and of goods to defeat an execution, and adds—"The question, therefore, in every case is, whether the act done is a bona fide transaction, or whether it is a trick and contrivance to defeat creditors.' The inserting of a false consideration in the deed," continues Chancellor Harper, "shews the transaction to be, in some degree, colorable. It indicates that they thought the true consideration inadequate and insufficient to support the deed." The Chancellor says, the defendant, probably, did pay some debts of the grantor, and intended him to hold the land not subject to the claims of creditors, and he may have supposed this a benevolent and unexceptionable transaction: "but the law," says he, "pronounces it fraudulent." In the same case, the validity of a confession of judgment, given by the defendant, Sawyer, to his co-defendant, Martin, was impeached: it was for \$8,377. The complainants alleged various grounds, all of which were examined by the Chancellor. Among others, "The confession of judgment to Martin," says he, "was made during the pendency of complainants's suit at law against Sawyer, and just before the judgment; and though a debtor may, without fraud, prefer one creditor to another, yet the circumstance is entitled to considerable weight when the transaction is, otherwise, of so doubtful a character as the present. According to Twine's case, the making of a conveyance, in satisfaction of a debt, during the pendency of the suit, is one of the badges of fraud, and the confession of a judgment comes within the same reason." After discussing the various circumstances, the Chancellor concludes "that presumptions against the judgment were strong enough to impose on the defendant the burden of shewing that it was bona fide, and founded on consideration, and that he had failed to do so. Roberts, in his Treatise on Fraudulent Conveyances, (p. 490,) says, 'though the debt be bona fide due, the judgment, quoad other

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*creditors may be mala fide confessed, i. e. may be confessed with intent to delay, hinder or defraud others of their just and law-

ful actions, and such intent is to be gathered from the circumstances of each case." "In the present case," says the Chancellor, "I am not satisfied that any debt was bona fide due; but, if there was, or if defendant was under liabilities against which he was not sufficiently secured, I am satisfied the judgment was mala fide confessed for an extravagant amount, with intent to cover all the property of Sawyer, and to hinder and defraud other creditors." The judgment in favor of Martin was declared void, and he was decreed to account for all property which he had received under it.

If *Hipp & Vansant v. Sawyer* be law, (and it seems to be well sustained, not only by reason, but by the authority of elementary writers as well as by that of the distinguished jurist who pronounced the judgment) it is decisive of this cause. It may be conceded that John G. Free was indebted to his co-defendants, but why was a judgment taken for three times the amount? Why was a note given for the precise sum of six thousand seven hundred and fifty-four dollars and thirty-eight cents, but to hold out the appearance of bona fide indebtedness to that particular amount? But, say both the defendants, H. B. Rice and John G. Free, it was partly to secure Rice against "subsequent indorsements." The judgment was confessed January, 1849. The existing indebtedness and liability of Free to the plaintiffs in the judgment was ascertained (say they) to be about four thousand seven hundred and sixty-four dollars, thirty-eight cents (\$4764.38). J. G. Free's property was worth about \$2000—yet they added two thousand dollars to the amount of this lien, "as John G. Free might require subsequent indorsements." It is not suggested that any subsequent indorsements were ever made. But that is not the inquiry. Can it be supposed that it was in the contemplation of the parties to increase the indebtedness of John G. Free on the faith of this judgment? On the other hand, is it not apparent, from all the circumstances, that although some indebted-

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*ness existed, and the defendant, Rice, was under liabilities for J. G. Free, yet, in the language of Chancellor Harper, "the judgment was mala fide confessed for an extravagant amount, with intent to cover all the property of John G. Free, and to hinder and defeat other creditors who were about to press their demands?"

My opinion is, that the judgment in favor of H. B. Rice and Allen F. Free must be declared null and void—the original indebtedness of their co-defendant, John G. Free, is unaffected. It is only determined that they can take no advantage and derive no security from the judgment which has been mala fide confessed.

It is, therefore, ordered and decreed, that the judgment of the 18th January, 1849, be

set aside—that the defendant, H. B. Rice, pay into the hands of the Commissioner the sum of seven hundred and seventy-six dollars and sixty-two cents, with interest, (being the price at which he re-sold the slave Anthony,)—that the lease of the land and buildings bid off by H. B. Rice on 2d July, 1849, be re-sold by the Commissioner, on a credit until 1st January, 1852, secured by bond bearing interest and personal security, and that H. B. Rice account for the rent thereof since 2d July, 1849—that the slaves bid off by the defendant, Allen F. Free, be sold by the Commissioner, on a credit until 1st January, 1852, secured by bond bearing interest, personal security, and a mortgage of the slaves, and that Allen F. Free account for the hire of said slaves since 2d July, 1849. It is further ordered and decreed that the aggregate amount of the several sums thus to be realized be paid to the execution creditors of the defendant, John G. Free, according to their respective legal priority. It is finally ordered that the Commissioner take an account of the amount due by the defendants for rent and hire as aforesaid, and that he report thereon; and also that he report on the execution debts of the said John G. Free, with the dates thereof, and the amount due on the same—costs to be paid by the defendants.

The defendants, Henry B. Rice and Allen

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F. Free, moved to *reform the circuit decree—because, under the circumstances of the case, the judgment at law, mentioned in the pleadings, ought to be permitted to stand as a security for the amounts really and bona fide due to the said defendants respectively.

Patterson, for motion.

J. T. Aldrich, contra.

DUNKIN, Ch. delivered the opinion of the Court.

It is too long and too well settled to be now called in question, that a debtor has the right to make a preference among his bona fide creditors. Nor is it any violation of the statute 13 Eliz. c. 5, that this preference is given by confession of judgment, as was ruled by the King's Bench in *Holbird v. Anderson*, (5 T. R. 235). Nor is the judgment void because confessed for a larger sum than the amount actually due. *Bank of Georgia v. Higginbottom*, (9 Peters, 48 [9 L. Ed. 46]). It has been repeatedly held, too, that a judgment, or other security, may be taken for future responsibilities, or future advances. Chancellor Kent expresses the opinion that this doctrine should be taken with the limitation that, where a subsequent judgment or mortgage intervened, further advances after that period could not be covered.

The policy of permitting such preferences, and especially of creating liens so uncertain,

and, in some sort, ambulatory. has been frequently called in question. Some judges have declared that, if the subject were res integra, a different rule would be adopted. All the cases, however, hold that the transaction must be marked by good faith, an honest determination to secure the just rights of a creditor; and that it be not a mere cloak to secure the property of the debtor, or to protect it from the claims of his other bona fide creditors. It would be a mockery of justice to hold the transaction valid, because one creditor was secured by a scheme, the leading purpose of which was to defeat and defraud all the other creditors. The inquiry in this, and in all similar cases, is as to the true intention of the parties; and

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in solving this inquiry all the circumstances are to be considered. In itself, it is no fraud to take a judgment for a larger amount than is actually due. The amount may not be ascertained, or may not, at the time, be susceptible of accurate statement. But why take the judgment for an amount three times greater than any sum supposed to be due, and with a minuteness of dollars and cents, which holds out the appearance that an account of indebtedness had been taken, and the amount due accurately ascertained and adjusted at that precise sum? Why was this delusion continued even to the day of sale of the debtor's property, and no intimation given, either on the record, or otherwise, that the judgment was, to a great extent, fictitious? But it is not proposed to repeat, or enlarge upon, the observations made in the decree. The Court did not doubt that something was due by John G. Free to both his co-defendants, and that one of the objects of the judgment was to secure that indebtedness, but justice must be hoodwinked not to perceive that the debtor had other and ulterior purposes to answer, which formed a principal consideration for his conduct, and to which his co-defendants were necessarily privy. The decree of the circuit Court does not impair the original contract of indebtedness, but only declares void the security thus unlawfully obtained.

The principal, and perhaps the only ground of appeal is that the Chancellor should have permitted the judgment to stand for the amount actually and bona fide due by the debtor, John G. Free. This question has been heretofore very fully considered in our own Courts, and the cases of *Miller v. Tolison*, (Harp. Eq. 145 [14 Am. Dec. 712];) *Fryer v. Bryan*, (2 Hill Eq. 56,) and *Parker v. Holmes*, (2 Hill Eq. 95,) have definitively settled that, when a judgment or other security is successfully impeached for reasons of this character, it cannot be allowed to stand for any purpose prejudicial to the rights of the other creditors.

It is ordered and decreed that the appeal be dismissed.

JOHNSTON, DARGAN and WARDLAW, CC. concurred.

Appeal dismissed.

3 Rich. Eq. *412

*JANE C. DICKINSON v. RICHARD WAY and HENRY B. RICE.

(Columbia. May Term, 1851.)

[*Executors and Administrators* ⚡144.]

Where a judgment, confessed for a much larger amount than is actually due the plaintiff, and intended not only to secure the amount due, but, also, to defeat other creditors, is set aside, at the instance of a creditor, for the actual fraud, the whole judgment is set aside so far as creditors are concerned, and the plaintiff must stand upon the original indebtedness.

[Ed. Note.—Cited in *Garvin v. Garvin*, 55 S. C. 371, 33 S. E. 458.

For other cases, see *Executors and Administrators*, Cent. Dig. § 582; Dec. Dig. ⚡144.]

Before Dunkin, Ch., at Barnwell, February, 1851.

Dunkin, Ch. The complainant is the widow and administratrix of Josiah Dickinson, deceased. In October, 1849, the defendant, Richard Way, being indebted to her as administratrix in a considerable amount, confessed a judgment thereon, upon which judgment execution has been issued, but the complainant has been unable to realize any part of the amount due thereon, inasmuch as the whole of the property of her debtor has been taken to satisfy an execution of the defendant, H. B. Rice; that the property thus seized consists of three slaves, several horses, cattle, provisions, &c. The execution in favor of H. B. Rice was entered on the 11th February, 1848, for the sum of one thousand seven hundred and seventy-six dollars, eight cents. The judgment was confessed on two notes, each for the sum of \$885.44. One note bears date 14th February, 1848, payable, with interest, one day after date. The other is dated 11th February, 1848, payable, with interest, six months after the date thereof. The charge is that this judgment was fraudulently confessed, for a much larger amount than was due, and with a view to cover the whole property of the defendant, Way, from his bona fide creditors. The debt to the complainant was of some years' standing before she obtained judgment thereon. Many of the remarks which might be made in this case have been anticipated, in the judgment of the Court in the cause of *Bowie v. Free & Rice*, heard at this Term. Quoting Roberts, (page 490) it is there said, "though the debt be bona fide due, the judgment quoad other creditors may be mala fide confessed, i. e.

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may be confessed with intent to delay, hinder and defraud others of their just and law-

ful actions, and such intent is to be collected from the circumstances of each case." The question is not whether any thing was due, but (as urged in that case) "whether the act done was a bona fide transaction, or a contrivance to defeat creditors." It is added that the insertion of a false consideration in the deed or in the judgment is an indication that the transaction was, in some degree, colorable.

It appears, from the testimony, that the defendant, Richard Way, is an ignorant man, knows little about business, and (as the witness said) cannot write. The answer of the defendant, H. B. Rice, admits that the judgment of 11th February, 1848, was for a much larger sum than was due. Indeed, it is very clear, from the statement filed with his answer, that one of the notes, on which the judgment was confessed, to wit, that of the 14th February, 1848, included every dollar that was at that time between the parties. The other note is for exactly the same amount, and is payable, with interest, six months after date. The inquiry is, for what purpose was this note given, and why for this precise amount? The defendants differ very materially in their statements. Rice says that, at the time of the confession, he agreed to take up a debt of \$300, due by Way to Edward Hayes, secured by a mortgage of two negroes, and that the second note was intended to include this debt, as also Way's account with him for the current year, (1848,) "and for any further pecuniary accommodation the said Richard Way might require of the defendant (Rice) in the mean time." Richard Way's account of the transaction is, that at the time of confessing the judgment to his co-defendant, he was much embarrassed, and owed more than he was worth—that his co-defendant was well informed of his embarrassed situation, and, "assuming to act a friendly part towards him, suggested the propriety of confessing a judgment for double the amount the defendant was due him, assigning for a reason therefor that such an act would prevent the other creditors of this defendant from suing him, and that thereby this defendant might

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be able to save a considerable portion of his property—that, not knowing what to do, he adopted the suggestion," &c. But that his co-defendant afterwards proceeded to purchase up outstanding claims against him, &c. The testimony of Edward Hayes as to the conduct of both the defendants in relation to this mortgage debt, creates a strong doubt whether, at the time of confessing the judgment, the defendant, H. B. Rice, had assumed to pay this debt to Hayes. It is also very clear that some of the demands now claimed by Rice, were not in existence at the date of the judgment—for instance, the note to Freeman, given 24th April, 1849, and the note to Kittrell, dated 26th February, 1849. The evidence of Kittrell in relation to this

matter is very pregnant. He says that he had a demand against Richard Way, for \$180—that, on the 3d July, 1848, he had a conversation with the defendant, H. B. Rice, in relation to the judgment which he held against Richard Way. Rice said the debt was all just, and he did not know how Way could object. The witness offered his claim to Rice for \$125. Rice declined it, and witness employed Mr. McKenzie (a member of the bar, since deceased,) to set aside this judgment. He employed him to sue Way for the money, and to put Rice on his oath about the judgment. He told him if it had to go to the Court of Equity, to carry it there. Witness afterwards received a message from Rice, and had an interview with him. It was at Graham's Turn-Out, where Rice lived. Rice told witness, that if he (witness) and Way could agree about any property of Way, to be taken in payment of his debt, he (Rice) would make it good to him, as he held the eldest judgment. Witness got four head of cattle and ten head of sheep. It seemed to be understood that he (witness) was to be paid if he would take property, and stop the case that he had directed to be brought. Witness wrote to Mr. McKenzie to drop the suit. Afterwards witness took a receipt from Rice for forty dollars, by note on Way, dated 26th February, 1849. This note now makes part of Rice's demands.

On the 19th June, 1849, the defendant,

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Rice, made out a *statement of the amount due by Way to him, on account of Hayes's debt, Kittrell's note, \$44, and Freeman's, as well as Way's account, for the year 1848, and interest thereon, the whole amounting to \$595.57, for which aggregate sum he took a note from Way of that date, and gave him a receipt. All the circumstances lead to the conclusion that, at the time of the confession of judgment, 11th February, 1848, only one note was due, by Way to Rice, and that the other note was given, and the judgment confessed, on double the amount really due; for the purpose, as averred in Way's answer, of covering all his property, and preventing his other creditors from suing him, and thereby enabling him to save a portion of his property. This, at least, was his view. There are many difficulties in adopting the version of H. B. Rice. Why was no written statement prepared at the time, setting forth the object of the judgment? Why was the second note taken for exactly the amount of the other note, but payable, with interest, six months after date, and judgment confessed six months before the note was due? How is the statement now made, by Rice, reconcileable with his asseveration to Kittrell, in July, 1848, that the whole amount of the judgment was justly due to him and he did not know how Way could say to the contrary? Courts should afford little encouragement to contracts such as that alleged by

the defendant, H. B. Rice. His co-defendant, embarrassed beyond the means of extrication, confessed a judgment to him, not only for what is due, but for double that amount. "This was done," says the defendant, Rice, "to include the store account of the defendant, Way, for the then current year, which had just commenced, (11th February, 1848,) and for any further pecuniary accommodation the said Richard Way might require of his co-defendant in the mean time." And all this was to depend on an understanding between the parties, was to be kept to themselves, and the judgment, for a fictitious amount, was to stand as a security to the plaintiff, and a scarecrow to the other creditors of the defendant. The debt to the complainant, Jane C. Dickinson, was due long

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before the judgment to Rice; *so was the debt to Kittrell. Rice's own demands, in February, 1848, amounted to more than half the value of the defendant, Way's, property.

If, under these circumstances, a judgment of this character could be sustained, it would afford an irresistible inducement to the insolvent debtor to avail himself of such suggestions as Way says were made to him; and, to a creditor in Rice's situation, not only to obtain security for his debt, which other creditors had not, but to keep his debtor in his power, and put other creditors at defiance.

Good faith and public policy unite in condemning agreements of this character.

But the intrinsic evidence, arising from the papers themselves, not less than the parol testimony, confirm the answer of Way, to wit, that no more was due to Rice than the amount of the first note, and that the second note was executed, and the judgment confessed, for the aggregate amount of both notes, for the purpose of covering the whole property of Way, and thereby enabling him to hinder, delay and defeat his bona fide creditors.

The sheriff testified that, under the several executions in his office, of which the defendant, Rice, held the eldest he had sold out the defendant, Richard Way, in December, 1849, and January, 1850; that the amount of the sales was \$1592. Part of the property sold was the two slaves mortgaged to Edmund Hayes.

The Court is of opinion that the judgment of the 11th February, 1848, must be declared void; but that the defendant, Rice, is entitled, under Hayes's mortgage, to receive the amount due on the note, to secure which the same was given.

It is ordered and decreed, that the judgment of the 11th February, 1848, be set aside; that, after payment to the defendant,

Henry B. Rice, of the sum of three hundred dollars, with interest from the 19th June, 1846 the surplus of the sales made by the sheriff be paid over by him to the execution creditors of Richard Way, according to their

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respective legal *priority. Costs of these proceedings to be paid by the defendants.

The defendant, Henry B. Rice, appealed, and submitted that the decree of the circuit Court ought to be reformed, so as to permit the judgment at law, mentioned in the pleadings, to stand as a security for the amount really and bona fide due to the said defendant, from his co-defendant, Richard Way.

Patterson, for appellant.

Owens, contra.

DUNKIN, Ch., delivered the opinion of the Court.

The principles involved in this case are precisely the same as those discussed in *Bowie v. Free and Rice*, ante, p. 403, heard at these sittings. The evidence is still more direct and abundant; and this Court is well satisfied with the conclusions both of law and fact. The only ground of appeal presented by the brief is that considered and disposed of in *Bowie v. Free*. But it has been suggested in this Court that the property of the defendant, Way, is more than sufficient to satisfy the complainant and his other judgment creditors, and that the judgment of his co-defendant, H. B. Rice, should not be absolutely set aside, but that he should have the advantage of it after the other judgments have been satisfied. One of the grounds, on which the judgment of Rice was set aside, was its tendency to prevent the other creditors of Way, by simple contract or otherwise, from pressing their demands to judgment, and so far as creditors are concerned, he cannot be permitted to derive any advantage from his lien, but must stand on the original indebtedness and come in ratably with the other existing creditors of Way. But, as between Way and Rice, the validity of the judgment was not put in issue by the pleadings, nor was any thing intended to be concluded. These remarks are made in deference to the suggestions of counsel,

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and to prevent misapprehension; but *none of the facts are before us, either as to a supposed surplus, or the existence of any other than judgment creditors.

It is ordered and decreed that the appeal be dismissed.

JOHNSTON, DARGAN and WARDLAW, CC., concurred.

Appeal dismissed.

3 Rich. Eq. 418

A. J. COUNTS v. JOSEPH CLARKE.

(Columbia, May Term, 1851.)

[Equity ⇨345.]

Whatever may be the impressions of the Court as to the merits of the case, if the answer is contradicted by but one witness, the bill must be dismissed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 722; Dec. Dig. ⇨345.]

Before Dunkin, Ch. at Barnwell, February, 1851.

Dunkin, Ch. This is a petition to compel the specific performance of an agreement for the sale of three lots in the town of Clinton, formerly Blackville. It is charged that, on the 22d June, 1848, defendant agreed to sell the three lots to the plaintiff for one hundred and twenty-five dollars. That the defendant drew a written obligation to that effect, which he placed in the hands of Luder F. Behling, to be delivered to the plaintiff whenever he should pay him for the defendant the sum of fifty dollars. The plaintiff and Behling both lived in Blackville. The defendant is a carpenter; was employed on the Rail Road, and resided at the time, some three miles from Graniteville.—Plaintiff alleges that he took possession of the lots, put a fence around them, and dug a well. That the improvements thus made are worth forty dollars. That in August or September, 1849, plaintiff informed Behling that he was ready to pay the purchase money and receive a title for the lots, and requested him to write to defendant to come to Blackville, receive the money, and make him titles for the lots; but that defendant refused to comply. The answer of the defendant admits, that he agreed to sell two (not three) lots to plaintiff for \$125, the plaintiff paying \$50 in cash, and giving his note for \$75. That plaintiff, not being able at the time to

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pay the cash, defendant agreed to give *him a few days to do so, and, as defendant was leaving Blackville, he placed in the hands of L. F. Behling, an agreement to make titles to plaintiff on receiving his note, for \$75—that this agreement was to be delivered to plaintiff on payment of the \$50; that this paper was signed only by himself; was placed in the hands of defendant's agent, and was never in the possession of the plaintiff; that the agreement with him was altogether in parol, and defendant relies on the statute of frauds; that some three months afterwards, having ascertained that the plaintiff had not complied, defendant withdrew the paper from Behling's possession, and considered the matter at an end; that plaintiff was not then in possession of the lots, and if he ever took possession, it was not with the consent of defendant, or under any contract, but as a trespasser; that defendant never heard any thing more on the subject, until eight or nine months after he had withdrawn the pa-

per, and when the lots had risen in value; that the plaintiff then wished to renew the contract, but avowed his inability to pay any money; that it was not until eighteen months after he had withdrawn the paper that any money was offered to him, and after the lots had greatly risen in value, and that he refused then to renew the agreement. The witness, Luder F. Behling, proves the contract as alleged, and that a note or agreement to make titles was left by defendant with the witness, to be delivered to the plaintiff on payment of \$50. This was in June, 1848. That it remained in witness's possession until April or May, 1849; that defendant then came to Clinton, asked to see the paper, read it and kept it.—That the plaintiff let the witness have money to pay for the lots, but whether this was before or after he had given up the agreement to the defendant, he cannot say; that two or three months after the agreement, plaintiff fenced in the lots and dug a well; he has put thirty or forty dollars worth of work on them.

It appeared from the evidence of this witness, and others, that the real estate in Clinton had risen in value one hundred per cent. within the last two years. These lots are now worth \$250 to \$300; the annual rent is

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worth \$20. The evidence is all in *writing, and has only been partially incorporated into the statement.

It is difficult to maintain on this testimony, that there was any such written agreement between the parties as is required by the provisions of the statute. Assuming the construction insisted on by the plaintiff, there was a parol agreement on the 22d June, 1848, that on the payment of fifty dollars within a reasonable time, he was to receive the written engagement of the defendant to make titles, on payment of the balance. Until payment of the fifty dollars all was in parol. After the tender of the fifty dollars, and the refusal of the defendant to give his obligation to make titles, there was the breach of a parol contract—no more. Suppose the defendant had agreed to make him a title on payment of \$125, and in order to be ready had prepared and executed a conveyance, which he put in his desk, and three or six months afterwards, finding that the plaintiff had not called to comply, he took out the deed and put it in the fire. Could the plaintiff, on afterwards tendering the money, allege that there was any written agreement, or give any strength to his claim in consequence of the execution of the conveyance? But it is scarcely urged by the plaintiff that the evidence establishes any concluded written agreement between the parties. It is said, however, that there are acts of part performance which take the case out of the statute. The requisites which will authorize the interposition of a Court of Equity, to

compel the performance of a parol contract for the sale of lands, are enumerated in *Thomson v. Scott*, (1 McC. Ch. 38). It is there said, that when the plaintiff relies on part execution, he must show that the part execution was by mutual consent. If the purchaser took possession, that he was put in possession by the vendor, or that he went in by his consent. If this is not shown, that then his entry partakes more of the nature of a trespass than a part execution of the contract. The party seeking the performance of the contract must also make out, by proof, that he has done all that good faith required of him. The appeal to this Court is to make an exception to the statute, and can

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*only be successfully invoked in favor of good faith, as well as diligence, and to prevent fraud.

The evidence leaves great doubt in some important points. The agreement was made in June, 1848. The fifty dollars was to be paid within a reasonable time, says the plaintiff. This payment seems to have been intended as well to bind the bargain, as to secure the defendant in the balance.

It is rather apparent that, in April or May of the following year, the plaintiff had not paid the fifty dollars, or offered to do so. If he had, Behling would have delivered him the note or obligation to make titles, for up to that time it was still in his possession for that purpose. But the plaintiff does not allege or aver that he offered to comply until August or September, 1849, and it is very certain, from Behling's testimony, that four months before that time, the defendant had withdrawn the paper from his possession. In the interim, since the contract of June, 1848, real estate had risen greatly in value. Then as to the possession: Clarke says there was no contract that the plaintiff should take possession; that if taken, it was not with his consent, and that the plaintiff was not in possession, to his knowledge, when he withdrew the paper in April or May, 1849. It is not easy to infer from any part of the testimony that the plaintiff took possession or was in possession, with the consent or even with the privity of the defendant. Behling says that, "defendant knew plaintiff was in possession when he refused to deliver up the paper, and long before." But this is very indefinite. "It is necessary," says Mr. Sugden, "that the act (of taking possession) should unequivocally refer to, and result from the agreement, and such that the party would suffer an injury amounting to fraud, by the refusal to execute that agreement."—(Sugden, 118). He then shows that, if the act be such as easily admits of compensation without executing the agreement, the provisions of the statute must be maintained, and refers to 2 Sch. & Lef. 6, in which Lord Redesdale thought it was abso-

lutely necessary for Courts of Equity, in these cases, to make a stand and not carry the

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decisions further. The improvements made by the plaintiff are worth thirty or forty dollars, and the annual rent of the lots is worth twenty dollars; any injury, therefore, done to the plaintiff in consequence of taking possession, not only "admits easily of compensation," but the remedy is, perhaps, in his own hands.

It is ordered and decreed that the petition be dismissed, each party to pay his own costs.

The petitioner appealed, on the following grounds.

1. Because there was sufficient writing, and sufficient evidence of it, to take the case out of the statute of frauds.

2. Because there was sufficient performance on the part of the plaintiff, in taking possession, (by at least the implied consent of the defendant,) and offering to pay the money, even before demand made, to authorize the Court to compel a specific performance of the contract on the part of the defendant.

Owens, for appellant.

Bellinger, contra.

JOHNSTON, Ch. delivered the opinion of the Court.

There was but one witness to contradict the answer, in any of the particulars to which it relates:—either as to the parol agreement, or as to the terms of the written agreement,—or the conditions upon which it was placed in the hands of Behling; or as to the fact of the possession being taken under the agreement (whether considered as parol or written). The rule of evidence in this Court, therefore, necessarily compelled it to dismiss the bill; whatever might be its impressions as to the merits of the case.

It is ordered that the decree be affirmed and the appeal dismissed.

DUNKIN, Ch. concurred.

Appeal dismissed.

3 Rich. Eq. *423

*ISAAC KINARD v. STEPHEN HIERS.

(Columbia. May Term, 1851.)

[*Frauds, Statute of* §119.]

Plaintiff having an equitable interest in land, of which he was in possession, and which was about to be sold at a judicial sale, agreed, by parol, with defendant, that he, defendant, should purchase it for the benefit of plaintiff's wife and children: defendant stated the agreement to several persons, and his statements were calculated to stifle competition among bidders, and actually did prevent one person from attending the sale and bidding: defendant purchased the land at about half its value, and then refused to comply with his agreement:

Held, that defendant's conduct was fraudulent; and he was not allowed to retain the land.

[Ed. Note.—Cited in *Lee v. Lee*, 11 Rich. Eq. 583; *Coney v. Timmons*, 16 S. C. 385; *Lamar v. Wright*, 31 S. C. 71, 73, 9 S. E. 736; *Jacobs v. Mutual Ins. Co.*, 56 S. C. 561, 35 S. E. 221.

For other cases, see *Frauds*, Statute of, Cent. Dig. § 270; Dec. Dig. \S 119.]

Before Dunkin, Ch. at Barnwell, February, 1851.

Dunkin, Ch. In 1843, a tract of land, belonging to the complainant, and containing about three hundred acres, was sold by the sheriff, and bid off by James Patterson, Esq. for sixty dollars. It is alleged that Patterson took and held the title under an agreement, that the complainant "should have the right to redeem on the payment of the purchase money and interest." The complainant retained possession of the premises but the sheriff's title was made to James Patterson. In January, 1846, James Patterson conveyed the premises to George Kinard, the brother of complainant, for seventy-nine dollars sixty cents, which seems to have been the amount paid by James Patterson in 1843, including the interest and expenses. The testimony is very full and satisfactory, that George Kinard took the conveyance upon the agreement that, when the complainant paid him the amount, with interest, he, George Kinard, was to make titles to the wife and children of the complainant. George Kinard died before the money was paid. Adam Kinard and Hansford Kinard were the two sons of George Kinard, and administered on his estate. They proved the repeated acknowledgments of their father as to the agreement; and, after his decease, they consulted with A. P. Aldrich, Esq. as to the mode by which they could carry out the agreement between their father and uncle. He advised that the land should be sold by the ordinary, and be bid off for the amount paid by George Kinard, with interest and

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the expenses of sale. The land was accordingly sold under the order of the ordinary, on the 7th August, 1848. Mr. Aldrich testifies that, the ordinary being sick, he conducted the sale for him. A calculation was made of the amounts due and the expenses, and the administrators were advised to run the land to a few dollars over the amount.

The land was set down by the auctioneer to the complainant; but when the return was made to witness, the land was set down to the defendant, Hiers. All the parties were present—the administrators, I. Kinard and Hiers. The matter was freely talked over, and they all appeared to have the same general understanding as related by the two Kinards, who were sworn as witnesses, and were the administrators. One of these witnesses, Adam Kinard, says, "the land was ordered to be sold by the ordinary,

for partition, and, when witness was coming up to the sale, the defendant, Stephen Hiers, riding with him, told him there was an understanding between him, Hiers, and the complainant, for Hiers to bid off the land; but Hiers told witness not to let the land go for less than the amount due to George Kinard. That the bargain was, that Stephen Hiers was to bid off the land for Isaac Kinard, and that if Isaac Kinard paid the bid and expenses of sale and interest, by the first of January, 1850, he, Hiers, was to settle the land on Isaac Kinard's wife and children; and, if he did not, the land was to be Hiers's." The amount due, with interest and expenses of sale, was about \$110. Hiers bid off the land at \$116. Isaac Kinard, complainant, was living on the land at the death of George Kinard, and at the time of the sale by the ordinary. "It was generally known (says the witness) in the neighborhood how the land was held by George Kinard for his brother Isaac, and that the children and widow of George Kinard desired that Isaac Kinard should have the benefit of said agreement. He (witness) said the land was worth more than it brought at the ordinary's sale." Hansford Kinard was in the company, riding up to attend the ordinary's sale, and confirms, in every particular, his brother's statement as to what passed, and especially as to the agreement between the defendant and com-

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plainant. This witness said he "was not well acquainted with the land—that at the time of the sale, other men said they would have given more for the land if it was not that Hiers was going to befriend Kinard.

Michael Hiers proved, among other things, that the agreement between the complainant and defendant was generally understood in the neighborhood at the time of the sale—that the witness intended to be a bidder at the sale, and would have given more than the land brought; but in consequence of the understanding between Hiers and I. Kinard, he did not attend the sale: as Kinard was a poor man, he did not wish to interfere with him.

It was fully proved, and, indeed, is admitted in the answer, that, on the first Saturday of January, 1849, the complainant tendered to the defendant the full amount due under the agreement, and demanded a title, or a bond for titles, which was refused.

The principle which seems applicable to this case is stated in *McDonald v. May*, (1 Rich. Eq. 98.) "If purchases be made by one representing himself to be acting under an agreement with a debtor, and for his benefit, when, in fact, there was no agreement, the advantages thus obtained shall be taken away from him on the ground of fraud." That was a case in which the alleged agreement related to lands, and the agreement, as well as the evidence of it, was in parol,

which the Court deemed inadmissible. The principle is again noticed in *Schmidt v. Gatewood*, (2 Rich. Eq. 177.) "A party who enables himself to purchase at an under rate, by representing that he is buying for another, is liable to have his purchase set aside for fraud." If there be no agreement, that "serves only to enhance the fraud; such cases steer entirely clear of the statute of frauds.—The evidence of the purchaser's representations is received, not for the purpose of substantiating the supposed agreement, but for the purpose of showing the means by which he effected his fraudulent design, and, when received, it is employed, not for the purpose of enforcing the contract, but for that of setting it aside."

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*The land of Isaac Kinard was evidently worth at least double the amount at which it was bid off by the defendant. It is equally clear that he stated to several persons, and that such was the general understanding, that he was acting for the complainant, and with a view to befriend him, and, in consequence of this understanding, one person in particular, who would have bid more for the land, was prevented from attending the sale, "because he did not wish to interfere with the complainant, who was a poor man." If, then, there was in fact (as insisted by the defendant) no agreement or understanding that he was bidding for anybody but himself, he was guilty of a fraudulent misrepresentation to the several witnesses who testified on the subject. It is, therefore, ordered and decreed, that the premises described in the pleadings, be sold by the Commissioner, on a credit until 1st January next, secured by bond bearing interest, with personal security, and a mortgage of the premises—that the defendant account for the rent of the premises since first Saturday in January, 1849—and that after deducting this sum from the amount of his bid, \$116, with interest from 7th August, 1848, the difference be paid to him from the sales to be made by the Commissioner, and that the surplus of said sales be paid over to the complainant—costs to be paid by the defendant.

The defendant appealed, on the following grounds.

1. Because, if there was fraud in the conduct of the defendant, it arose after the sale of the land by the ordinary, and existed in the refusal of the defendant to perform his alleged contract.

2. Because, this being a judicial sale for partition, the proceedings cannot be set aside, unless for fraud in procuring it, or in the manner in which it was conducted.

3. Because the supposed agreement related to lands, and parol evidence of a promise to purchase and re-convey should not have been received, and that complainant had no interest whatever in the land at the time of the sale by the ordinary.

4. Because there was no promise proved to purchase and reconvey the land to the

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plaintiff, but the promise or agreement *was (as proved) that the defendant, upon certain conditions, would settle the land on complainant's wife and children. There was no proof of any demand to comply with this agreement; but, on the contrary, it is in proof that Kinard desired the land conveyed to him, in order that he might make a speculation by conveying it to Chitty.

5. Because Kinard had no authority to bring this suit alone, for his wife and children were interested and should have been parties; whereas his Honor has ordered the land sold, and the proceeds paid to complainant.

6. Because his Honor has ordered the defendant to account for the rent of the land since the first Saturday in January, 1849; whereas, it appears by the pleadings and proof, that the defendant has never been in possession of the land, but has been kept out, and the same since the sale has remained and the use thereof has accrued to the complainant and his vendor, Chitty, who is now in possession.

Owens, for appellant.

Patterson, contra.

WARDLAW, Ch. delivered the opinion of the Court.

The question in this case is, whether the defendant shall avail himself of the statute of frauds to protect his legal title to a tract of land, in which the plaintiff had an equitable interest, where defendant acquired his title, by purchase at a judicial sale, for half of the value of the land, upon his representations calculated to stifle competition among bidders, and actually preventing the competition of one bidder, that he was buying for the benefit of the plaintiff. In the construction of the statute of frauds, Courts of Equity have adopted, as a general principle, that, as the statute is designed as a protection against fraud, it shall not be set up as a protection or support of fraud. 1 Story Eq. § 330. These Courts will not execute, specifically, contracts concerning lands which are not manifested in writing as required by the statute; but they will cancel conveyances obtained by fraudulent misrepresentations in

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parol, or impose upon *the legal owners the character of trustees. The doctrine on this topic is expressed with force and discrimination in *McDonald v. May*, (1 Rich. Eq. 95.) In the circuit decree of the Chancellor in that case, it is said:—"The statute of frauds, it appears to me, has no application here. This branch of the case does not proceed upon the contract,—does not look to an execution of the contract,—but founds the remedy upon a fraud, by the practice of which the purchaser

obtained possession of the plaintiff's property. Can it admit of a doubt that, if a bidder at sheriff's sale, either of real or personal property, represents that he has contracted to purchase in the property for the debtor's benefit, when, in fact, there never was such a contract, and in consequence becomes the purchaser, he shall not be allowed to retain the advantage he has thus unjustly obtained? It seems to follow that all the purchases by the purchaser here, must be deemed liable to a trust in his hands. For although it appears that no proof can be made that his representations drove off any particular competitor, and it is proved that the majority persisted in bidding, and made the property bring a pretty full price, proof of actual injury is not necessary when actual fraud is established." The Court of Appeals, in the same case, say: "We are satisfied with the view taken by the Chancellor, that, if purchases be made by one representing himself to be acting under an agreement with a debtor, and for his benefit, when, in fact, there was no agreement, the advantages thus obtained should be taken away from him on the grounds of fraud." Again, in *Schmidt v. Gatewood*, (2 Rich. Eq. 162,) the doctrine is reiterated, with the additional remark, that where competition is fraudulently destroyed or reduced, it matters not whether, in fact, there was an agreement or not for the benefit of the debtor.

In *Meador v. Jackson*, (MS. Col. May, 1837,) the conveyance of a purchaser was set aside, who had bought lands of the defendant in execution at sheriff's sale, at a price much under their value, on the grounds, that the purchaser had urged the sheriff to make the sale,—and, by his assurances that he was

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*buying for the benefit of the defendant in execution, had overcome the reluctance of the sheriff to sell under the circumstances of the case,—and had thus been enabled to buy at a great sacrifice.

The case before us seems to be completely within the scope of the principles announced in the cases cited.

It is argued that the whole fraud of the defendant in this case, consists in the refusal to execute a contract of which the evidence required by the statute is not exhibited. I cannot perceive why fraud may not consist in the unconscientious employment of a statute to protect one from fulfilling his agreement. If a son prevent a father from making a devise to another, by verbal assurances that the object of bounty shall receive without the devise all the benefit intended by the testator, the son shall not be allowed to reap any reward from procuring his father to omit the requirements of the statute. If May and Jackson, in the cases quoted above, had fulfilled their contracts for the benefit of the debtors, their conduct would never have become the subject of investiga-

tion in court; but as they attempted to acquire advantage to themselves, from professions of benevolence to the debtors in the first instance, cajoling others from the genuine liberality of buying for the full price, they were ousted of the profits of their deceitful schemes.

It is objected that the plaintiff here did not have the legal title of the lands purchased by defendant; and that the heirs of plaintiff's brother, George Kinard, are the persons really defrauded, and yet are not parties to the suit. No objection for lack of parties is made by the pleadings, and the Court can hardly be expected *sua sponte* to demur for the exemption of perpetrators of fraud. And the plaintiff, although not the legal owner, is in possession of the lands, holding them subject to the lien of a debt charged upon them for the purchase money. He is in the nature of a mortgagor in possession.

Whether the wife and children of plaintiff, in a contest with him, may not maintain, successfully, that they are the real beneficiaries whom defendant has attempted to de-

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fraud, is a question *that may arise hereafter when fraud is fixed upon the defendant by the decree of this Court. It is not for him to insist now upon technical defects that he has waived by the course of his pleading.

Whether the plaintiff may not be a trustee for his wife and children to the extent of his recovery in this case, will be best settled in a suit between the father and his family.

The circuit Chancellor, in requiring defendant to account for the profits of the land, overlooked the fact that plaintiff had remained, ever since the purchase by defendant, in possession of the land and in receipt of the profits. The decretal order in this respect is rescinded; in all other particulars, it is ordered that the appeal be dismissed and the decree be affirmed.

DUNKIN and DARGAN, CC. concurred.

JOHNSTON, Ch. I cannot concur in the decree.

If the defendant had complied with his agreement, it would be impossible to attribute a particle of fraud to him. His only fraud, therefore, consists in his non-performance of his undertaking: and there is no more reason to take this contract out of the statute of frauds than any other parol contract relating to land. If fraud, consisting in the mere non-performance of an agreement, or the injury resulting from it, be sufficient to take it out of the statute, every case of non-performance is taken out of it, and the statute is a nullity.

I feel very sure that this case does not fall within the principle stated in *McDonald v. May* and *Schmidt v. Gatewood*. The principle there stated is, that a fraudulent representation made at a sale of land, by which

the purchaser enables himself to obtain the land at an under-value, to the injury of its owner, is good ground for setting the sale aside: and, then, the purchaser must be directed to deliver up his deed, or re-convey the property,—not by way of executing an agreement, but by way of restoring the property to the condition it was in before the fraudulent sale.

If we apply that principle here, we shall

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simply vacate the sale: and how would that benefit the plaintiff? What right has he to a conveyance?

It is singular, it seems to me, to set aside the sale, in a proceeding to which the legal owners, the heirs of George Kinard, are no parties, and in the absence of any complaint on their part. And I am of opinion that it is equally singular to assume in the absence of these parties, that, if the sale were set aside, and the defendant ordered to re-convey to them,—they would be bound to transfer the title to the plaintiff. Resolved into its elements, the decree proceeds upon these principles; and not being prepared to go that length, I cannot concur in it.

It is a mistake, also, to assume that the sale in this case was fraudulent. The sale was fair, and no complaint is made that it was otherwise. How, then, does the principle of *McDonald v. May* apply: in which the very gist of the case was that, independently of all agreements, the sale was fraudulent?

Decree modified.

3 Rich. Eq. 431

R. W. BROUGHTON and Others v. ROBERT TELFER and E. WATERMAN.

(Columbia. May Term, 1851.)

[Evidence 370.]

Where plaintiff in his bill alleges the execution and delivery of a deed, under which defendant claims, and calls for its production, defendant, upon his producing it at the trial, cannot be required to prove its execution and delivery.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1574; Dec. Dig. 370.]

[Deeds 51.]

Where one by his will recognizes and confirms a deed he had previously made, he establishes the sealing and delivery of it against all who claim as volunteers under him.

[Ed. Note.—Cited in *Carrigan v. Byrd*, 23 S. C. 91.

For other cases, see Deeds, Cent. Dig. § 97; Dec. Dig. 51.]

[Slaves 22.]

A conveyance by deed, prior to the Act of 1841, of slaves in trust to allow the slaves to be practically free, is valid:—the trustee holds the slaves practically discharged from the trusts whether they be legal or illegal.

[Ed. Note.—Cited in *Ford v. Dangerfield*, 8 Rich. Eq. 106.

For other cases, see Slaves, Cent. Dig. § 94; Dec. Dig. 22.]

[Slaves 7; Trusts 153.]

Where a party executed a conveyance of slaves to trustees, for the benefit of the slaves themselves, and died, in 1839, eight years after the deed bore date, leaving a will, bearing even date with the deed, by which he ratified the deed: *Held* (1) that, if under the deed any interest in the slaves resulted to the grantor, and through him to his next of kin, the will amounted to a waiver and abandonment of such interest, and (2) that the will operated to prevent the grantor from re-acquiring title to the slaves under the statute of limitations.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. § 20; Dec. Dig. 7; Trusts, Cent. Dig. § 198; Dec. Dig. 153.]

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[Judgment 570.]

*Some suggestions upon the question,—when is the dismissal of a prior bill a bar to a second suit?

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028-1034, 1036-1040, 1042-1045, 1165; Dec. Dig. 570.]

[This case is also cited in *Parris v. Cobb*, 5 Rich. Eq. 470, without specific application.]

Before Dargan, Ch. at Charleston, February, 1850.

On the 6th June, 1831, William Remley, of Georgetown district, executed a deed, by which, after reciting that he was the father of certain slaves, namely, Elizabeth, Catharine, Ann, Eliza, Cinda and Harriet, and that, being unable to emancipate them, he desired to give them the benefit of their labor, and to suffer them to enjoy, as far as practicable, all the privileges of free persons, &c. in consideration of the love and affection which he bore to said slaves, and of the sum of \$5, and for "divers other good and valuable considerations," he "granted, bargained, gave, conveyed and delivered" unto Thomas J. Smith, Thomas L. Shaw, Eleazer Waterman and Robert Telfer, the said slaves, in trust, to treat them with kindness;—protect them in their just rights; exact from them no wages; permit them to go where they please, and to appropriate to their own use the proceeds of their time and labor: and, in the further trust, that, if any attempt should be made to enslave them, to convey them to some non-slaveholding State, &c.

On this deed, which was recorded in the register's office for Georgetown on the 9th November, 1831, was indorsed a probate by Solomon Cohen, the subscribing witness, who swore that he saw "William Remley sign, seal and, as his act and deed, deliver the foregoing deed in trust, for the uses and purposes therein expressed."

On the same day the deed bore date, William Remley executed his last will and testament, in which he referred to and recognized the deed, and by which he bequeathed his whole estate to the trustees in the deed named, in trust for the slaves Elizabeth and others in the deed named, and appointed the trustees executors.

William Remley died in Charleston (to

which place he removed about two years before his death) in September, 1839.

On the 5th June, 1845, the plaintiffs, as

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heirs at law of William Remley, filed a bill for an account against the defendant, Robert Telfer, in which they stated that William Remley was the owner, at the time of his death, of the aforesaid slaves and their issue and other property; that defendant had taken possession of the personal estate of William Remley, as executor in his own wrong; and charged that defendant pretended to hold said slaves under a deed of trust from William Remley to himself and others; and, also, pretended that William Remley left a will by which he disposed of his estate to the use and benefit of said slaves, &c.

Defendant answered and denied that he had interfered with the property of William Remley, or that he had any estate, at the time of his death, and filed with his answer a copy of the will.

On the 5th March, 1846, plaintiffs's bill was dismissed by an order as follows:

"It appearing in this case that the defendant has denied, by his answer, ever having had possession of the property claimed by the complainants, and there being no evidence to contradict this allegation, I am of the opinion that the bill should be dismissed, and it is so ordered, and that the complainants do pay the costs of suit."

On the 26th August, 1846, Richard W. Broughton, one of the plaintiffs, filed a petition in the Ordinary's office for Charleston, praying that the executors in the will named, be required to produce and prove the will, and qualify thereon, or renounce their executorship. On the 7th September, of the same year, defendant made seizure of the slaves under the Act of 1800; and on the 29th June, 1847, the will was admitted to probate, and the defendant, Robert Telfer, and Eleazer Waterman, qualified as executors.

On the 19th August, 1847, plaintiffs filed their present bill against Robert Telfer and Eleazer Waterman, in which, alleging their recent discovery of the will and deed, they charged that the trusts thereof were void, and prayed an account, and that the slaves be decreed to belong to the estate of William Remley.

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*The defendant, Robert Telfer, answered, and amongst other things said, that William Remley, soon after the deed was recorded, informed him of it; that defendant accepted the trust, but that the other trustees never accepted; and that defendant, until his seizure of the slaves, had never exercised any decided acts of ownership over them.

Dargan, Ch. The complainants have, in a manner entirely satisfactory to me, proved themselves the nearest of kin, and the distributees of William Remley, deceased. They filed a bill against these defendants on the

5th of June, 1845, in regard to the same subject matter of controversy, arising in the present bill, namely, the estate of William Remley, and the slaves alleged by them to have been illegally emancipated. On the 6th of March, 1846, by a decretal order of the Court, the bill was dismissed with costs. On the 19th of August, 1847, they filed their present bill, to which the defendants oppose as a bar the former bill and the decree thereon. I am far from being clear, that the defence is not good, and the complainants not concluded. But waiving that question, I proceed to consider the case on its merits.

The first question that occurs, relates to the due delivery of the deed of the 6th of June, 1831. The deed purports to have been signed, sealed and delivered in the presence of Solomon Cohen. And in the probate thereunto attached, Cohen makes affidavit that he saw the grantor sign, seal, and as his act, deliver, the foregoing deed in trust for the uses and purposes therein expressed, and that he subscribed the same as a witness. The deed was recorded on the 9th day of November, 1831, in the office of Register of Mesne Conveyances, in Georgetown district, where Remley and Telfer then resided. Soon after the execution of the deed, Remley informed Telfer that he had made a deed and recorded the same, and that he, (Remley) had made the defendant, Telfer, a party to the deed. Telfer, in his answer says, that he accepted the trust, but that the other trustees named in the deed never did accept the said trust, nor act under the deed. The defendant, Tel-

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fer, had possession of the original on *this trial, but when it was delivered to him, or by whom, did not appear. It would seem that it had never been delivered to him personally before its registry. Whether it had been delivered to any person before that time, for the defendant, or in his behalf, did not appear. But that it was done, I think probable, from the import of the deed and the probate of the subscribing witness, who was a good lawyer, who knew how to advise, and was not likely in his probate to have fallen into the inadvertence of swearing to the delivery if it had not actually taken place. Remley, himself, in his will, speaks of the deed as a valid subsisting and effectual deed, by which he acknowledges himself to have disposed of the slaves mentioned in it. These are the facts mentioned as bearing on the question of delivery. I think they are sufficient to establish the due delivery of the deed.—The question of delivery is always a question of intention. Was a delivery intended and consummated? Did the grantor mean to do an irrevocable act? If the persons provided for in this deed of trust had been Remley's legitimate children, could there be a doubt that the delivery of the deed was sufficient? I think not.

Having arrived at the conclusion that the delivery of the deed is sufficiently proved, the next question is as to the validity of its provisions. The case presents a perfect parallel to that of *Carmille v. Carmille*, (2 McMull. 454.) It cannot be distinguished from it.

There, as here, there was a conveyance by deed to trustees of slaves;—the condition of the trust, in both cases was, that the slaves should enjoy their freedom. In this case, as in that, there was an open and undisguised attempt to evade and defeat the Act of 1820, which declares "that no slave shall hereafter be emancipated but by Act of the Legislature." I have never been satisfied with the decision in *Carmille v. Carmille*. I cannot pass it without expressing my dissent and disapprobation. It is founded upon what I conceive to be a very erroneous construction of the Act of 1820. That Act declares that there shall be no emancipation but by

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the Legislature. But the decision in *Carmille v. Carmille* declares that the emancipator has only to be secure of his trustee to effect the emancipation of his slaves, whom he desires to manumit, in as perfect a manner as if the Act of 1820 was not on the Statute Book. He is thus enabled to do by indirection, and through a very flimsy and barefaced evasion, that which the law inhibits from being done by direct means. The decision is not in harmony with the spirit, the policy, or even the language of the Act. It would have been better to have held these evasions a fraud upon the law, and to have given the Act a construction which would have made such a deed as this simply void and inoperative, not only as to the trusts, but as to the title which it was intended to pass; and in the case of wills, to have held the bequest charged with such trusts void, and the slaves distributable as residuary or intestate property. But *Carmille v. Carmille* stands in the way of such a decision, supported as it has been by a recent case: *Carmille v. Carmille*, and similar cases, led to, the Act of 1841. But in the case before me, the Act of 1841 does not operate. The deed and the will were both executed, and the testator, Wm. Remley, died before the passage of that Act. The case must be decided by the law as it stood before the Act of 1841; by the Acts of 1800 and 1820. I am bound to submit to the authority of *Carmille v. Carmille*, and of *McLeish v. Burch & Taylor*, [3 Strob. Eq. 225] decided by the Court of Errors, at May Term, 1849. And, according to these decisions, the complainants have no right.

There is another aspect in the case unfavorable to the claims of the complainants. Whether we consider the slaves to have been illegally manumitted by Remley in his life, or, which is the same thing, to have been done by his grantee or legatee after his death; in either case, the slaves were liable to manucaption under the Act of 1800. And

they were formally seized for this purpose by the defendant, Telfer, previous to the filing of this bill.

If either the deed or the will conferred on
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him a title, that *title was discharged of the illegal trust. They became his property absolutely. If he attempted to execute the illegal trust, and suffered the slaves to go at large, in conformity with the directions of the trust, then they were illegally manumitted by him, and were liable to manucaption. But he had a right to capture them himself. *Linam v. Johnson*, (2 Bail. 137,) *Mays v. Gilham*, (2 Rich. 160.) And if he was the first captor, he would be re-invested with a good title against all the world. This the defendant, Telfer, did in the most formal manner.

The bill must be dismissed with costs, and it is so ordered and decreed.

The complainants appealed.

Northrop, for appellants.

James Simons, contra.

WARDLAW, Ch., delivered the opinion of the Court.

The appellants present objections, in various forms, to the evidence of delivery of Remley's deed of June 6, 1831; but their course of pleading in the suit dispensed with any proof of this fact. In their bill, they expressly state the execution of this deed and the delivery of it to the defendant, Telfer, and call for the production of it by him. When the deed was produced upon this demand no proof of its execution was needed; and it seems none was required on the trial. If proof of the deed were necessary, it is furnished in the explicit and unequivocal recognition of the deed by the grantor in his will; and the will is admitted by both parties. Our cases have settled, as to parol gifts, that from the declaration of a donor that he has given a chattel, it must be presumed that he has given with all the formalities necessary to transfer the title. So, where one by his will recognizes and confirms a deed, he establishes the sealing and delivery of it against all who claim as volunteers under him. The notions suggested in some of the grounds of appeal,—that a deed cannot be delivered where the grantee is ignorant of its existence, and that actual deliv-

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ery of the chattels must be superadded to their symbolical delivery by deed,—have not sufficient plausibility to require refutation.

If the execution of this deed be established, there is an end of the plaintiffs's case. Several decisions by the ultimate tribunal of this State, (*Carmille v. Carmille*, 2 McM. 454; *McLeish v. Burch*, 3 Strob. Eq. 225; *Vinyard v. Passalague*, 2 Strob. 536,) leave us no right to question, that a conveyance of slaves by deed, upon such trusts as are here declared, passes the title to the grantee practically discharged from the trusts, whether

these be legal or illegal. If the trusts be legal, as they were held to be in cases like the present not governed by the Act of 1841, which made them unlawful, the beneficiaries being slaves could have no standing in Court to compel the execution of the trusts, which were thus of imperfect obligation, depending upon the benevolence of the trustee. If the trusts be considered illegal, they are simply void, and do not impair the title of the trustee as owner.

The case of the plaintiffs would not be helped, if we should concede the doctrine of these cases to be erroneous; and that as no beneficial interest was conferred upon the trustee, there was a resulting trust to the grantor, which upon his death enured to his next of kin. Remley's will, which, although executed coterminously with the deed, speaks at the death of the testator in September, 1839, ratifies the deed; and this ratification may be treated as amounting to waiver and abandonment by the grantor of any interest resulting to him, and through him to his next of kin. The Court would be inclined to lay hold of any such defence, where one comes to be relieved against his own act as contrary to the policy of the law.

This recognition of the deed by the grantor in his will, satisfactorily disposes of the objection to the decree, that the grantor's possession of the slaves for eight years from the date of the deed until his death, reinvested him with title, by operation of the statute of limitations. It is impossible to regard that possession as adverse, and ef-

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fectual to defeat the party's former *deed, when he declares at his death through his will that the possession was always in subordination to the deed.

If the title to the slaves was in Remley at his death, and Telfer's ownership rested on his manucaption of them as unlawfully manumitted, there would be much force in the argument, that his office of executor, whensoever he qualified, was assumed at the death of the testator; and that his manucaption was in his character as executor, and consequently, his legal title impressed with a trust for the legatees, or distributees, accordingly as the deceased was testate or intestate as to these slaves. It would not be equitable to press a fiction of law, such as the retroactive operation of probate of a will from the death of a testator, to work injury to an individual against the right of the case; but here the seizure was after the institution of proceedings to compel the executor to make probate of the will, and the fiction would lead to no unconscientious results. It is unnecessary, however, to determine any thing on this point, as we hold the deed to bar the plaintiffs.

For the same reason, we avoid expressing the judgment of the Court on the question

as to the bar of the former decree; but some suggestions on this point may be allowed. A former decree between the same parties, or their privies, as to the same subject matter, is a bar to further litigation, although it be merely a decree dismissing the bill, unless it be expressed that the dismissal is without prejudice; 2 Story Eq. § 1523. In this case, the parties are the same as in the former suit; the subject of controversy is the same, except that plaintiffs allege their discovery of the existence of the deed since the termination of the former suit, and the decree dismissing the bill is absolute in its terms, although proceeding on the ground that there was no evidence of Telfer's having ever had possession of the slaves. The reasons on which the Court proceeds in its judgment, usually do not control the extent of the judgment, which is conclusive as to all matters that should then be brought into litigation. Does the discovery of new evidence of itself remove the bar of a former decree, or only serve as a basis for a bill of

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review? Is the *evidence in question here, in fact newly discovered, or such as proper diligence on their part would have enabled the plaintiffs to use on the former trial?

The plaintiffs must have had some inkling of the deed when they filed their bill in the former suit, for that contains various charges concerning such a deed; and in the progress of the cause, they might have obtained fuller information concerning the deed, for a copy of the will was filed with defendant's answer to the first bill, and the will has explicit reference to the deed. It is more satisfactory to the Court, however, to decide against the plaintiffs on the merits of their case as now presented, than to estop them by a technical bar.

It is ordered and decreed that the appeal be dismissed, and the circuit decree be affirmed.

JOHNSTON, DUNKIN and DARGAN, CC. concurred.



Appeal dismissed.

3 Rich. Eq. 440

W. P. THOMASSON v. R. E. KENNEDY, Adm'r, and Others.

J. M. COOPER v. W. P. THOMASSON and Others.

(Columbia, May Term, 1851.)

[Execution  353; Sheriffs and Constables  120, 122.]

Where a sheriff sells land under fi. fas. and executes titles to the bidder, the eldest fi. fas. to which the money, if received by the sheriff, would be applicable, are satisfied to the extent of the bid, although the money be not, in fact, paid to the sheriff, and the plaintiffs in such executions must look to the sheriff; and the facts, that such executions were marked

'wait orders,' that the sale had been agreed on between the defendant in execution, who received the amount of the bid, and the purchaser, and was a mere formal sale to perfect the title of the purchaser, and that defendant in execution had sufficient property, at the time, to satisfy all judgments against him, will not exonerate the sheriff from his responsibility.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1076; Dec. Dig. ⚡353; Sheriffs and Constables, Cent. Dig. §§ 205, 225; Dec. Dig. ⚡120, 122.]

[*Sheriffs and Constables* ⚡122.]

If the defendant in execution himself applies the amount of the bid to the eldest executions according to the priority of their liens, that will excuse the sheriff; but the onus of showing that is upon the sheriff.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 224; Dec. Dig. ⚡122.]

[*Appeal and Error* ⚡104.]

Where a Chancellor, directing an issue at law, ordered that the depositions of certain witnesses, who had been examined by commission or before the Commissioner, be read on the trial of the issue—*held*, that an appeal, on the ground that the witnesses were incompetent, would not lie from the act of the law court al-

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lowing the *depositions to be read,—the appeal should have been from the order of the Chancellor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 711; Dec. Dig. ⚡104.]

[*Equity* ⚡383.]

The principles stated upon which new trials of issues at law will be directed.

[Ed. Note.—Cited in *Shaw v. Cunningham*, 9 S. C. 273; *Ivy v. Clawson*, 14 S. C. 273; *Woolfolk v. Graniteville Mfg. Co.*, 22 S. C. 336; *Rynerson v. Allison*, 30 S. C. 537, 9 S. E. 656.

For other cases, see Equity, Cent. Dig. § 787; Dec. Dig. ⚡383.]

[*Witnesses* ⚡105.]

A witness who, if liable at all, is liable no matter which way the decision goes, is competent.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 210; Dec. Dig. ⚡105.]

[*Evidence* ⚡271.]

The question was, whether a judgment at law was satisfied, and plaintiff in the judgment died after subpoena served and before his answer was put in: *Held*, that the answer of the plaintiff in the judgment, to a rule at law to show cause why satisfaction should not be entered on the judgment, could not be read as evidence for his administrator.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1102; Dec. Dig. ⚡271.]

[*Evidence* ⚡157.]

Where the issue between creditors is, whether the judgment of one is satisfied, the testimony of the defendant in the judgment is not higher evidence of satisfaction, than that of other witnesses.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 463; Dec. Dig. ⚡157.]

[*Equity* ⚡380.]

[Cited in *Sloan v. Westfield*, 11 S. C. 450, to the point that issues to courts of law are directed by courts of equity for the purpose of informing the conscience of the chancellors; and, if this purpose be achieved, a court of equity will not narrowly examine the process of the law court. Collisions between the two courts should be discouraged, and minute dis-

agreements as to principle or procedure will not be noticed.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 809; Dec. Dig. ⚡380.]

[*Sheriffs and Constables* ⚡120.]

[A sheriff who sells land under execution and executes title to the purchaser, is liable to the execution plaintiff as for money had and received, though the amount of the bid was not in fact paid to him.]

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 205; Dec. Dig. ⚡120.]

Before Dunkin, Ch. at York, June, 1849.

Dunkin, Ch. Daniel Thomas, a debtor, much embarrassed, left the State some years since.—His property was sold, partly by the sheriff of York, (the complainant, Thomasson,) partly by R. Macbeth, former sheriff of Union, and partly by B. Johnson, the present sheriff. It seems by the report, that part of the funds realized from the sales, are in the hands of the commissioner of York, part in those of the commissioner of Union, and part is due by sheriff Johnson. The commissioner was ordered to publish a notice for the creditors of D. Thomas to establish their demands before him, and that he should report them, and also upon the assets to be marshalled. The cause was heard upon the commissioner's report, and exceptions thereto. Several exceptions embrace the same matter. The Court will proceed to consider the principal points made. The exceptions on the other points seem to the Court sufficiently answered by the report of the commissioner thereon, or are otherwise untenable, and are, therefore, overruled.

The claim of the administrator of Allen DeGraffenreid, deceased, has been sent to a jury, and no further remark upon it is now necessary or proper.

The first exception of the junior creditors, relative to the ten dollars, is sustained.

The second and third exceptions are over-

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ruled: the sheriff *probably advanced the money to the creditors before he received it from the defendant.

The fifth exception relates to this state of facts, viz:—at April sales, 1842, sheriff Johnson sold to J. A. Stevenson, a tract of land under executions against D. Thomas. The bid was \$2,205, and the sheriff executed and delivered to the purchaser a conveyance of the premises. The commissioner has charged Johnson with only the sum of \$735 as received on this sale. It is said the land was sold by Thomas to Stevenson at private contract, and that the balance was received by Thomas himself from Stevenson, but it is also suggested that he (Thomas) applied the money to the oldest existing unsatisfied execution. When the sheriff made the sale in April, 1842, the judgments of Wm. Dawkins and of A. W. Thomson, amounting to some \$4,500, were open and yet unsatisfied. The principles on

which the exception insists are well sustained by the authorities cited in the argument.—*Davis v. Hunt*, (2 Bail. 412) ruled, that the sheriff having sold the land under executions and executed titles to purchaser, acknowledging by his deed the receipt of the purchase money, is liable as for money had and received, although in fact the money may not have been paid to him. The eldest judgment creditor is entitled to the action, and the money; for it is also held, in *O'Neill v. Lusk*, (1 Bail. 220,) that a payment to the sheriff after *fi. fa.* lodged, discharged the defendant, although the sheriff neglect to pay over the money, or to credit it on the execution.—and also in *Perry v. Williams*, (Dud. 44.) that when the sheriff's sale is perfected, the oldest executions in his office are satisfied to the amount of the sale. The only matter open for inquiry is, whether the whole amount of the sales were in fact applied to the oldest judgments then in existence against the defendant, *D. Thomas*. This does not appear from the report, and the difference between \$735 and \$2,205, ought to be deducted as of April, 1842, from the oldest executions reported to be unsatisfied.—But if sheriff Johnson can prove

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that this difference was in fact applied by *Thomas*, as he, *Johnson*, ought to have applied it, he is entitled in equity to the benefit of such proof, and the commissioner may enquire and amend his report accordingly. The inquiry will also embrace the matter included in the 6th, 7th, 8th and 9th exceptions.

It is ordered and decreed that the report of the commissioner be re-committed for the purpose of reforming the same according to the principles herein stated and the testimony to be submitted.

The issue ordered by Chancellor Dunkin was tried at October Term, 1849, and a motion for a new trial of the issue at law was made in June, 1850, before his Honor, Chancellor Dargan, who pronounced the following decree.

Dargan, Ch. These cases were tried together at the present term.

Allen DeGraffenreid, deceased, the intestate of the defendant, Richard E. Kennedy, had two judgments against Daniel Thomas; one for \$3006.95, and the other for \$782.00.—upon both of which executions were lodged in 1839.

Thomas having proved insolvent, and his property having been sold by the sheriff, sundry of the creditors of the said Thomas have filed their bills for the purpose, among other things, of having the executions of DeGraffenreid, which were senior to theirs, declared satisfied. The case came on to be heard at June Term, 1849, and the presiding Chancellor ordered an issue at law to be made up to try the question, whether anything be due on the two executions of A. DeGraffenreid v. D. Thomas, in which the junior execution creditors shall be plaintiffs, and the adminis-

trator of DeGraffenreid, defendant, and that at law, the depositions of the witnesses examined before the commissioner, whose testimony was taken by commission, be received in evidence.

An issue at law was accordingly made up, and said issue was tried at the Court of Common Pleas for Union district, at October Term, 1849, when the jury charged with the issue, returned the following verdict:—"We

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find for the plaintiffs in the issue that there is nothing due upon the executions within mentioned."

The present is a motion to set aside the verdict, and for a new trial, on various grounds. I shall not enter into the consideration of the various grounds in detail.

The first relates to the competency of the witnesses, *Johnson* and *Satterwhite*. The last named witness was surety to *D. Thomas*. They were sued, and judgment obtained against them both. *Satterwhite* paid the debt, and he, in that way, is a creditor of *Thomas*. But the Court having published an order for the execution creditors of *Thomas* to present and prove their demands—*Satterwhite* has presented no claim. I incline to think he is competent. *Johnson's* competency is questioned, on the following state of facts. As sheriff, he sold land of *Thomas* for about \$2200. Seven hundred dollars of this sum he applied to the payment of a debt or debts in his office, and the balance, secured by notes, he transferred to *Thomas*, who passed them off to third persons. The execution creditors of *Thomas* are seeking in these proceedings to make *Johnson*, (who is also a party) liable for the misapplication of the amount which he transferred to *Thomas* from the proceeds of the sale of his land. It is said that, on this account, he is interested, and, therefore incompetent. But, on the contrary, it appears that whether the DeGraffenreid executions are removed or not, by a decree of satisfaction, the demands of the prior execution creditors are sufficiently large to absorb, not only the funds on hand, and now subject to distribution by the Court, but also any amount of liability which sheriff *Johnson* may have incurred by the misapplication of the before mentioned fund, which he is alleged improperly to have paid to *Thomas*. From this state of facts, it must seem that *Johnson*, if liable at all, is liable at all events, and his liability does not depend upon the question, whether the DeGraffenreid executions are satisfied or not. He is, therefore, indifferent, and is not incompetent from interest.

The deposition of both these witnesses had been taken before the last Court, and the

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Chancellor ordered the depositions of the witnesses, that had been examined before the commissioner or taken by commission, to be received in evidence on the trial of the issue

at law. This was accordingly done.—And were I less strongly impressed that the witnesses were competent, I should not feel at liberty to modify the order of the Chancellor who ordered the issue, or to reverse his decision as to the competency of those witnesses.

As to the other grounds relied on as sufficient to induce the Court to set aside the verdict, I am of the opinion that they are insufficient;—I am entirely satisfied with the verdict of the jury. I have come to the same conclusion that they did, and on the same evidence. The motion is refused.

The two executions of A. DeGraffenreid v. D. Thomas, mentioned in the foregoing part of this decree, are hereby declared to be satisfied, and it is so ordered and decreed.

From the two circuit decrees and the verdict of the jury, appeals were taken, on various grounds, which appear in the opinion delivered in the Court of Appeals.

Thomson, Herndon, for appellants.
Dawkins, Williams, contra.

WARDLAW, Ch., delivered the opinion of the Court.

These cases relate to the marshalling of the assets of Daniel Thomas, an insolvent debtor, whose property was sold by the sheriffs of Union and York. The cases were first heard by Chancellor Dunkin, at the sitting for Union, in June, 1849, on exceptions to the commissioner's report, as to the debts and assets of Thomas.

One of these exceptions is as to the extent of the liability of B. Johnson, sheriff of Union, in the following state of facts.—Thomas and one Stevenson had agreed as to the price of a tract of land belonging to Thomas; and on the sale day in April, 1842, the land was sold by the sheriff, under executions in his office against Thomas, and bought by Stevenson at his bid of \$2205. Sheriff Johnson having received \$735 from the purchaser, and allowed him to settle for the balance

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(§1470) *with Thomas, the defendant in the executions, conveyed the land to Stevenson. It does not appear that the creditors of Thomas were consulted about this arrangement. At that time, there were in the sheriff's office two executions (fi. fas.) against Thomas, open and unsatisfied, both marked "wait orders," namely, one of Wm. Dawkins, for about \$564 entered October 31, 1840; and one of A. W. Thomson, entered Feby. 27, 1841, for about \$2823, of which about \$485 was for arrears of interest. There were also in the sheriff's office many executions of an older date against Thomas, standing open, but as these have not been presented to the commissioner, on the call for creditors, they are presumed to be satisfied. The Chancellor decided that sheriff Johnson was liable for the whole sum of Stevenson's bid, and

that to the extent of this liability, the elder executions were extinguished. This appeal, in behalf of the sheriff, insists that he is not liable beyond the money actually received by him; and it is urged, that the sale was merely formal to perfect Stevenson's title; that no creditor was injured, inasmuch as the elder executions were not pressing for collection, and junior executions were not in existence; and that other property of Thomas remained sufficient to satisfy all the executions against him. The authorities cited by the Chancellor fully sustain the principles of law asserted in the decree; and the facts relied upon do not take this case out of these principles. The sheriff is a ministerial officer, required to execute the judgments of the Courts, by levy, sale, and application of the proceeds according to fixed rules; and he is not to judge what circumstances may justify departures and exceptions from these rules. To allow him to misapply the proceeds of his sales, upon conjectures as to the solvency of defendants in execution, would furnish room for much fraud, to the injury of many persons whose interest in particular cases may not be seen. The rights of the community are best protected by the rigid exaction of duty from public officers. Where the sheriff ventures to constitute an interested party his agent for the disbursement of the funds of his office, he must be responsible

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for the faithful performance of the agency. In this case, if Thomas has applied the amount intrusted to him to the payment of his creditors according to the priority of their liens, the sheriff has the opportunity of proving this fact and exempting himself from responsibility, under the instructions of the Chancellor in re-committing the report, and this is treating him with much liberality.

A. W. Thomson, one of the judgment creditors of Thomas, appeals from the overruling of his exception to the commissioner's report—that he was not allowed interest from the day of the sheriff's sale, on the aggregate of principal and interest due to him on that day. Where creditors have been obstructed in their remedies for satisfaction, by the act of this Court in assuming the administration of the assets of debtors, the Court will generally preserve the proportion of the debts to the assets existing at the time of the obstruction, so as to secure equality among the creditors, and prevent undue profit to some by the delay. In many cases, however, where the funds in the custody of the Court have produced no interest, from a proper sacrifice of productiveness to safety, it may be that none of the creditors shall receive interest. In the case before us, the discussion of this difficult doctrine is unnecessary, after the conclusion we have attained on the appeal of sheriff Johnson. The sum of \$1470, applicable in his hands to the payment and extinguishment of the executions according to

their priority, is more than sufficient to satisfy the first execution, and to satisfy all the arrears of interest on the second execution, which is that of the appellant. So, that the balance then remaining due to the appellant, is necessarily principal; as the payment must be first applied to the extinguishment of interest. Whether this creditor may be entitled to interest afterwards on this balance from sheriff Johnson or other person, will depend on facts as to which we are uninformed; as whether prompt demand of payment was made, and whether the sheriff, or other custodian of the funds, has made profit upon them, or has mixed them with his private funds. These remarks may be applied to other creditors, and to all the funds now in controversy. The principles

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*may be more intelligently and more definitely settled, when we have the further report of the commissioner upon the facts.

On another exception to the commissioner's report, as to two judgments of Allen DeGraffenreid against Daniel Thomas, the Chancellor directed an issue to be made up in the Court of Common Pleas for Union district, between the junior judgment creditors of Thomas, as plaintiffs, and the administrator of DeGraffenreid, as defendant, to try whether any thing was due on these judgments; and he further directed, that the depositions of the witnesses before the commissioner, whether taken by him, or by commission, should be received in evidence on the trial of the issue at law. This issue was tried at October Term, 1849, of the Court of Common Pleas for Union, when the jury returned a verdict for the plaintiffs in the issue, that nothing was due upon said judgments. At the sitting of this Court for Union, in June, 1850, a motion for a new trial of this issue, on various grounds, was made before Chancellor Dargan, and refused by him, and the same grounds are now presented to us on appeal.

The first ground is, as to the competency of the witnesses, Satterwhite and Johnson.

The testimony of these witnesses was received by the commissioner, was recognized by the Chancellor, and was ordered by him to be received at law. If there be any error as to their competency, it is the error of this Court, and not of the law court, which conformed to the request of the Chancellor; and the appeal should have been from the order of the Chancellor, and not from the verdict of the jury. This is not a mere nicety as to practice, but a grave matter of principle, affecting the comity which should prevail between co-ordinate tribunals.

Appeals should be discouraged which are calculated to bring the courts of Law and Equity into collision. Issues to the court of law are directed by this court, for the purpose of informing the conscience of the Chancellors; and if this purpose be achieved, we

do not examine the process very narrowly. If, upon a particular issue, we might suppose that the law court was in some error as to

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the law, we should not grant a new *trial of the issue upon this express ground; for this would imply the arrogant pretension on our part, that we understood the law better than those to whom its administration was committed by the polity of the State. But we would look to the materiality and importance of the supposed error. If the verdict were, upon the whole, satisfactory, no notice would be taken of minute departures from our notions of principle or procedure. But, if we regarded the supposed mistakes of the court trying the issue, to be so material, that our consciences were not satisfied as to the general result of the trial, while we should not undertake to rectify the rulings of the other court, we might order the parties to try the issue again, and request of the other court that a particular course should be pursued as to the points on which we were dissatisfied. In the case under consideration, there is much testimony leading to the same conclusion besides that of the witnesses to whom objection is made—the result attained by the Jury is in conformity to the opinion of the commissioner who first heard the evidence, and to the opinion of the chancellor on the circuit, to whom the application for new trial was made;—and is satisfactory to this Court.

Moreover, if the questions as to these witnesses were properly before us, by appeal from the order of the Chancellor, we should disallow the applicant's motion.

Much doubt as to the competency of Satterwhite might have been entertained, if his payment, as surety of the judgment against Thomas and himself, had been made after the passage of the Act of 1849, (11 Stat. 556.) but the payment was antecedent to that Act, and the Act is prospective in its terms. Perhaps, equal doubt as to his competency may arise—putting the statute aside—from the application of the equitable doctrine of subrogating a surety who has paid the debt of his principal to the rights and remedies of the creditor. There is force in the view that Satterwhite has presented no claim against Thomas, under the call upon creditors, but it is not clear that he was precluded from claim at the time of his examination. The appeal as to Satterwhite was abandoned, and

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properly, for the *question as to his competency was not raised in time. The objection was not made before the issuing of the commission to take his testimony, nor urged upon the trial of the issue.

As to Johnson, his competency is clear enough. His liability for the bid of Stevenson does not depend upon the question of satisfaction of DeGraffenreid's judgments; for if these be removed, those of Dawkins and Thomson remain, more than sufficient to

absorb the whole sum of his liability. If liable at all, he is liable at all events; it makes no difference to him whether he is to pay one or the other of these parties.

Other grounds of appeal object to the verdict of the jury, because the answer of DeGraffenreid to a rule in the Common Pleas to show cause why satisfaction should not be entered on his judgments, was not received as evidence on the trial of the issue. It is insisted that such answer to a rule should be treated as an answer to a bill, where the party dies, as here, before putting in answer to the bill, after service of subpoena upon him. It is conclusive reply to these grounds, that the evidence was not offered before the commissioner, nor to the Judge on the trial of the issue. Again, an answer to a rule is a mere declaration, without cross examination, of an interested party in his own behalf; and is not evidence in any court on the trial of an issue between adverse parties. If the Court of Common Pleas, on the return of the rule, had directed an issue to the jury as to the satisfaction of these judgments, surely the declaration that he had not been paid, by the plaintiff in execution, although under oath, would not be heard on the trial of the issue. An answer to a rule has little analogy to an answer to a bill. In the former evasion and prevarication are quite practicable; it is more hazardous and difficult to frame untrue responses to the searching interrogatories of a bill.

The same reasoning disposes of the ground, that DeGraffenreid by his indemnification of the sheriff, declared his execution to be unsatisfied.

Another ground objects, that the best ev-

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idence of the satisfaction of the judgments was not produced, because Thomas himself was not examined as a witness by the plaintiff. It is a palpable mistake to suppose that the testimony of Thomas was better evidence, that is, of a higher grade, than that of any other witness who was examined; and the defendant in the issue had all the benefit, in argument on the effect of the evidence, of the presumption against the claim of the plaintiffs arising from their failure to produce this witness.

The other matters of objection to the verdict do not require particular notice.

The remaining ground of appeal is, that the estate of DeGraffenreid should be reimbursed for the costs and expenses of a suit at law, by the children of Thomas against the sheriff of Union, for selling, as the property of Thomas, certain negroes claimed by these children. It seems that DeGraffenreid indemnified the sheriff in the sale of these negroes; and that the proceeds of sale have increased the assets of the debtor, of which the estate of DeGraffenreid gets no portion. If DeGraffenreid were to be regarded merely

as a volunteer in this act of indemnity, it would be difficult to demonstrate that he should be rewarded for the offence of common barratry. But he is worse than a volunteer. By holding up, as subsisting claims against Thomas, these judgments, which were, in fact, satisfied, he has attempted a fraud on the other creditors, and has stirred up the protracted and expensive litigation in this court. It is quite as reasonable that his estate should be burdened with the whole expenses of litigation in this court, as that it should be reimbursed for his expenses in another tribunal, quite competent to regulate the incidents of its own judgments. However, directions as to costs are reserved until the amended report of the commissioner be made.

It is ordered and decreed that the appeal be dismissed, and the circuit decrees be affirmed.

JOHNSTON, DUNKIN, and DARGAN, CC. concurred.

Appeals dismissed.

3 Rich. Eq. *452

*E. B. WHEELER and JOSEPHINE and SARAH F. LIVINGSTON v. W. W. DURANT and S. M. STEVENSON.

(Columbia. May Term, 1851.)

[Wills \S 88.]

S. C., by instrument under her hand and seal, attested by three witnesses, (who subscribed without an attestation clause, and simply after the word "witness,") and addressed "to all whom it may concern," gave "in consideration of the natural love and affection which I bear to my grand-children, and others herein-after mentioned, the following property:

"To Josephine and Sarah L., I give all the interest I have in the estate of Joseph L.—it consisting principally of a bond for the payment of some fourteen or fifteen hundred dollars, secured by a mortgage of nine negroes.

"To Laura and Sarah C., viz: to Laura a feather bed and furniture, one set silver teaspoons, and one silver hoop and chain for scissors, and to Sarah, &c.

"To my daughter P. my wearing apparel and my books.

"To my daughter M. one feather bed and furniture.

"And I hereby appoint S. S. and E. W. trustees to this deed, with the full understanding that the above property does not vest in another of the parties until my death."

Under proceedings in equity to marshal the assets of Joseph L., S. C. purchased some of the mortgaged negroes, and the proceeds of the sale were allowed her on account of the lien of the mortgage; S. C. executed a will, which after her death was admitted to probate, by which she revoked the instrument; the negroes purchased by S. C. went into the possession of defendant as agent of S. C., and, after her death, E. W., as trustee, and the cestuis que trust, Josephine and Sarah L., filed their bill against defendant, without making the personal representative of S. C. a party, claiming the negroes under the instrument; at the trial the instrument was not produced, and to prove its execution, delivery, loss and contents, O. W.,

one of the attesting witnesses, testified, that he saw the instrument executed; that it was subsequently delivered to him by E. W. to be registered—and he referred to the copy on record for its contents; that a day or two before the trial, E. W. told him it was lost, and got him to assist him to search for it, which search proved ineffectual: *Held* that plaintiffs were not entitled to recover.

[Ed. Note.—Cited in *Alexander v. Barnett*, 5 Rich. 198; *Babb v. Harrison*, 9 Rich. Eq. 116, 70 Am. Dec. 203.

For other cases, see Wills, Cent. Dig. §§ 208-217; Dec. Dig. ⚭88.]

[Trusts ⚭249.]

Johnston, Ch., doubted whether the instrument was testamentary; he held, 1st, that the plaintiff's remedy, if they had any, was against the personal representative of S. C. for the money collected on the bond; 2d, that the delivery and loss of the instrument were not proved.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 355; Dec. Dig. ⚭249.]

Wardlaw and Dunkin, CC., held that the instrument was testamentary, and had been revoked;—they thought the delivery and loss sufficiently proved.

Dargan, Ch., doubted whether the instrument was testamentary; he thought the delivery proved *prima facie*, and held, 1st, that the proof of loss was insufficient; 2d, that plaintiff's remedy was against the personal representative of S. C., and not against the defendant.

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*Before *Johnston, Ch.*, at Marion, February, 1851.

Johnston, Ch. On the 7th of October, 1843, one Sarah Conner executed the following instrument, to wit:

South Carolina, Marion District.

To all whom it may concern, I, Sarah Conner, do hereby, in consideration of the natural love and affection which I bear to my grandchildren, and others hereinafter mentioned, give the following property:

To Josephine Livingston and Sarah Franklin Livingston, I give all the interest I have in the estate of Joseph Livingston,—it consisting principally of a bond for the payment of some fourteen or fifteen hundred dollars, secured by a mortgage of nine negroes.

To Laura D. Conner and Sarah C. Conner, viz: to Laura a feather bed and furniture, one set silver teaspoons, and one silver hoop and chain for scissors, and to Sarah, &c.;

To my daughter Picket, my wearing apparel and my books:

To my daughter Mary Eliza Picket, one feather bed and furniture;

And I hereby appoint Samuel M. Stevenson and E. B. Wheeler, trustees to this deed, with the full understanding that the above property does not vest in another of the (probably any of the) parties until my death.

Witness my hand and seal 7th of Oct. 1843.

Sarah Conner, [L. S.]

Witness—M. C. Durant, O. P. Wheeler, E. B. Wheeler.

Sarah Conner is now dead; but during her life time, under proceedings in this court, a

certain portion of the negroes mortgaged by Joseph Livingston as aforesaid, now amounting to seven, were sold to satisfy said mortgage and the demands of all of his creditors, and were bid off by her, and are now in the hands of the defendant, Durant, as her agent.

The bill is against Durant, setting up a claim to the said negroes, under the aforesaid instrument, on behalf of Josephine and Sarah F. Livingston.

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*If the instrument is testamentary, it has not been admitted to probate; and besides, it is revoked by a will, executed by Sarah Conner the 15th of July, 1844, which has been admitted to probate. But the plaintiffs contend that it is not testamentary, but on the contrary, that it is a deed, and is to be allowed as such, under the authority of *Dawson v. Dawson*, 2 Rice Eq. 34, and *Jaggers v. Estes*, 2 Strob. Eq. 343 (49 Am. Dec. 674.)

The first difficulty of the plaintiffs is, that the deed, if it be such, is not duly proved. The original is not produced; and, in order to let in secondary proof, it is necessary to prove its loss, as well as its execution and contents. The only witness to this point is O. P. Wheeler, who states that he saw it executed, and that it was subsequently delivered to him by E. B. Wheeler to be registered; and he refers to the copy on record for its contents. This may suffice if the deed is proved to be lost. But all that the witness can say on that subject is, that a day or two before the hearing, E. B. Wheeler told him it was lost, and got him to assist him to search for it, which search proved ineffectual. The proof of loss is manifestly nothing but the declaration of E. B. Wheeler.

Suppose this difficulty overcome; the next thing incumbent upon the plaintiffs, is to show that the instrument was intended as a deed. An instrument purporting to be a deed may have a present operation to pass the right to property, though it provided that the enjoyment of the property shall be postponed to a future time.

In *Dawson v. Dawson* and in *Jaggers v. Estes*, it was held, that the postponing of the enjoyment till the death of the donor does not render the instrument testamentary, it, upon its face, or from the circumstances, it was intended to operate in present, and not to remain ambulatory.

The difference between a deed and a will is not exactly what it is stated to be in *Welch and Kinard*, Speers Eq. 256. It is there intimated, that the proper definition of a will is, the declaration of a party as to what is to be done with his property after

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his death. But a better definition, is the declaration of a party, made by an instrument intended to be ambulatory and revocable, as to the disposition of his property after his death. A deed may declare how the

property is to be enjoyed after the death of the grantor, and such a deed is, according to our decisions, as effectual as one which gives present enjoyment. It is a deed and not a testament, if the instrument is intended to have a present and not a future operation; if it is intended to pass the right in present; to be a perfected and executed contract,—and not revocable or ambulatory.

But here the witness says he heard nothing from Mrs. Conner at the execution of this paper, showing her intention in respect to it. He saw her subscribe, and he and the other witnesses attested. He says nothing about the delivery. The paper itself does not contain any thing on the subject of delivery.

Then the provisions of the instrument are generally of a testamentary character. It is not usual for persons to give their wearing apparel while yet alive. Besides, the idea that a right to the property is to pass presently is expressly negated on the face of the paper. Again; does not the number of attesting witnesses countenance the idea that the paper was regarded as a will? These are not all the difficulties of the plaintiffs. What is given by this instrument is not the negroes, but the bond with the collateral security of the mortgage: a debt on Livingston who was then alive.

The most that can be made of the paper is, that it is an assignment of the bond. Mrs. Conner subsequently collected the debt; and if the plaintiffs have any claims, it is against her personal representative for money received to their use; and perhaps to have the slaves declared liable as collateral security for the amount. The personal representative is not before the Court, and it is not necessary to say what right might be established against him; but I doubt whether Mrs. Conner's estate could be made liable for the debt collected by her, to parties who claim as mere volunteers.

It is ordered that the bill be dismissed.

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*The complainants appealed, on the following grounds:

1. Because the instrument of writing was a deed and not a will.

2. Because O. P. Wheeler, a subscribing witness, proved that it had been executed in his presence; that he afterwards, at the instance of Edward B. Wheeler, the trustee, who had it in his possession, recorded the same in the Register's Office of Marion, which was evidence of delivery.

3. Because the loss of the instrument was proved by O. P. Wheeler, who searched with his father, Edward B. Wheeler, amongst his papers, and testified that it could not be found; and because the contents were fully proved by the said O. P. Wheeler.

4. Because the aforesaid instrument having conveyed a bond and mortgage, which was paid in part by the purchase of the negroes sued for in this case, the negroes stand in

the place of the bond, especially as they were mortgaged to secure its payment, and may be followed in this Court as the property of the complainants, to which they have a legal title, having been purchased with their funds and under the mortgage conveyed to them. Their title is legal, not equitable merely, because their estate in the aforesaid bond and mortgage is a vested remainder after the life estate of Mrs. Sarah Conner the donor, which life estate had terminated before this suit was commenced.

5. Because their title being legal, the complainants had a right to sue the holder of the negroes alone for them, without making the person, from whom or under whom he holds, a party; and because there was no objection made by the pleadings to want of proper parties.

6. Because the circuit Chancellor having indicated that the remedy of the complainants is at law, against the personal representative of Mrs. Sarah Conner, for money had and received to their use, in case the aforesaid instrument be a deed, it is necessary, in order to entitle the complainants to proceed at law, that the decree of the circuit

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Chancellor should be reversed as *to the testamentary character of the said instrument; otherwise such decree would be a bar at law, as res judicata.

Miller, for complainants.

Phillips, contra.

JOHNSTON, Ch., announced the judgment of the Court.

I must acknowledge that I am, in some degree, shaken in my impressions as to the testamentary character of this instrument: but not sufficiently, to enable me to declare the decree, upon that point, erroneous.

But the other grounds upon which the decree is put are sufficient to show its correctness.

The gift is of the bond, as a debt, and of the mortgage,—as an incident,—to enforce its collection.

If, as is argued, the negroes were purchased by Mrs. Connor with the bond, (which is not the case,) it may be true that a trust resulted to the plaintiffs, to have the negroes declared to stand as a substitute of the capital employed; or to have the capital, itself, at their election: but such a decree could not be made, unless upon bill directly for that purpose against the party who converted the capital, or her legal representative.

The ground that the loss of the instrument was not established, so as to let in secondary proof of the instrument, is, also, quite satisfactory to me. The doctrine is not novel or doubtful. All our decisions are one way on the subject, from *Sims v. Sims*, (2 Mill, 225,) to *Wardlaw v. Gray*, (Dud. Eq. 85,) and even down to the last term of this Court,

as may be seen in the case of *Gibson v. McCully*, not yet reported.

The loss in this case depends exclusively upon the assertion of E. B. Wheeler, one of the plaintiffs in the cause; and unless the fact of loss, unlike all other facts, is to be made out by mere statements, there was no foundation laid for letting in secondary evidence. The frauds that may be accomplished by withholding original papers, and resorting to secondary proof, need not be suggested. The hardships complained of, of shutting out parol evidence, unless upon regular proof

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of loss of written instruments, would soon be transferred to the shoulders of the opposite party, if proof of the loss were dispensed with.

I am of opinion that the decree should be affirmed, and the appeal dismissed; and such being the opinion of the majority of the Court, (though upon grounds somewhat differing,) it is so ordered.

WARDLAW, Ch. I concur in the judgment of the Court in this case, on the ground, that the instrument executed by Sarah Connor was revocable, and in fact revoked.

It is settled in this State, by the decision of the Court of last resort, that personal estate may be conveyed by deed, even without the intervention of trustees, after a life estate reserved by the grantor, if, upon construction of the whole instrument, the intention be manifested to transfer the title presently and irrevocably, and to postpone nothing but the enjoyment. In the question whether a particular instrument is a deed or a testament, the postponement of the enjoyment of the estate by the donee until the death of the donor, is a fact no longer conclusive, but still leading to the conclusion, that the instrument is testamentary. The force of this fact by itself, may be now overcome by the context and general frame of the instrument.

The instrument has the frame of a testament, rather than of a deed. It is divided into separate clauses, by the first four of which, distinct articles of property are given to different donees, and by the fifth and last, trustees are appointed for its execution. It has the number of witnesses indispensable in a testament, but unnecessary and unusual in a deed. It contains no internal evidence of delivery; a fact necessary to the existence of a deed, not of a testament. It describes some of the subjects of gift in such general terms, as might serve to pass one of the class in a testament, but not to give present title to specific articles, as 'one feather bed,' &c.; several of the class being owned by the donor. Above all, the instrument expressly declares the intention of the donor, "that the above property does not vest in any of the parties until my death." The terms property

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and 'vest, refer more directly to title than to enjoyment, and in their connexion here, imply strongly, that the donor did not mean to part with any right beyond recall; and the implication acquires increased vigor from the use of the present tense, 'does not vest,' which would not be naturally employed in reference to the future event of enjoyment.

The subjects of disposition in all the clauses of this instrument, except the first, are more appropriately and more commonly given by testament than by deed. One might give by deed a remainder in "wearing apparel," after a use for life, and then the donee would be required to distinguish the specific articles given, from others of the same kind subsequently acquired by the tenant for life; but it is much more reasonable to conclude, that the donor in such case intends to pass all property of this description, with all its changes and accumulations, as it may exist at his death; and this can be effected by a testament, which speaks at the death of the donor.

Against all these circumstances nothing is opposed, except the equivocal fact, that the donor denominates the instrument a deed. She may have done this ignorantly, or because it was her act, or because it had a seal; and seals are commonly, yet unnecessarily, used in testaments.

If it be decided that this instrument is testamentary, the bill must be dismissed. It is only on the concession that it is a deed, that the question of delivery can arise, or the questions as to loss, and as to the operation of the terms of gift, become important.

Considering the instrument a deed, I conclude there was sufficient evidence of delivery. From the possession of the instrument by the person to whom the delivery should be made, and the custody committed, delivery should be presumed, in the absence of any countervailing evidence.

I think there was *prima facie* proof of loss. Our cases determine, contrary to the practice of some of the States, that the witnesses to prove loss, as preliminary to secondary evidence of the contents of an instrument, must be disinterested; and the

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*declaration of E. B. Wheeler, a plaintiff, that he had lost this paper, was manifestly incompetent. But search in the place where a missing paper ought to be kept, although this place may be among the papers of a party, is not the declaration of the party. It is a substantive and material fact. Such search, if made with diligence and in good faith and without success, is sufficient ground for the presumption of loss. (*Drake v. Ramey, Rhodes & Co.*, 3 Rich. 39; 1 Greenl. Ev. § 558; 1 Stark. Ev. 349.) From the nature of the fact it can seldom be proved positively, or otherwise than by circumstantial evidence. Where the search has been

slight or collusive, or where there is reason to suspect the suppression of the original, to gain some advantage from the resort to secondary evidence of contents, the presumption of loss should not be made. Nothing of this sort is imputed here. Moreover, conclusive proof of the existence and contents of the paper is offered; and the party who seeks to establish the loss, has no interest in the property in controversy. More ample proof of loss than was given in this case, is not practicable, except in rare instances, where witnesses of the destruction of the instrument can be produced.

I express no fixed opinion as to the effect of the terms of donation, under which this claim is set up. "All my interest in the estate of" a living person, may include all my claims, by lien or otherwise, on his property; and a gift of a "bond, secured by a mortgage of nine negroes," may not only transfer the debt, but assign the mortgage. The mortgagee at law, after condition broken, is the owner of the chattels mortgaged. *Wolf v. O'Farrel*, (1 Tread. 151.) Even before condition broken, he may maintain trover against any person except the mortgagor. *Spriggs v. Camp*, (2 Speers, 181.) In this court, as between mortgagor and mortgagee, the mortgage is regarded merely as security for the debt. *Bryan v. Robert*, (1 Strob. Eq. 334.) But as between mortgagee and his assignee, if the former take the chattels in satisfaction of the debt, and retain possession of them by his agent, as in this case, I am not clear that the assignee may not elect to proceed for

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the chattels themselves. *In such proceeding, the mortgagee or his representative ought to be a party, as materially interested in the object of the suit; but here no objection was made by the pleadings to the want of proper parties.

DUNKIN, Ch., concurred.

DARGAN, Ch. In this case I concur in the affirmation of the decree, and feel disposed to express the grounds of my concurrence.

I think the evidence to prove the loss of the deed, was insufficient for that purpose. Oliver P. Wheeler, (the son of the complainant, Edward B. Wheeler,) proves that he was called upon by his father to assist him in a search for the instrument among his papers. He complied with the request, and the search was made. The instrument was not found, and E. B. Wheeler said it was lost. This was only a day or two before the trial, and was evidently a preliminary formula for the introduction of the secondary testimony. The first thing that strikes the mind as unsatisfactory in this testimony, particularly in the instance of a person having so many papers and documents in his possession as this complainant, is the probability that the paper was misplaced and not lost. And that

is not the kind of loss, I apprehend, which renders proof of the contents admissible.

But it is obvious, that the whole proof of the loss rests entirely upon Edward B. Wheeler's declaration to that effect. How did the witness, (O. B. Wheeler,) know, but that, at the very time of his making the search, the other did not have the paper in his pocket, or in some other secret place of deposit, to which his attention was not invited? I make this suggestion, not suspecting in the slightest degree, that such was the fact in this case; but merely for the purpose of illustrating a general principle. Such chicanery might be resorted to in any case, in which the party was unwilling, or deemed it unsafe, to exhibit the original. To admit such testimony, would be the merest evasion of the rule, which prohibits a party from being a witness in his own cause. It would be better far, to admit his declara-

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*tion by affidavit, or his examination in Court, with the right of cross examination, than to admit his statement out of Court to a third party, unsupported by oath and unsifted by cross examination.

I admit the great difficulty of proving the loss of a paper in many cases; and that the argument for relaxing the stringency of the proof in such cases is very strong. But to this argument it may be replied, that the stringency of the proof in such cases is greatly relaxed, and that very slight evidence of the loss, after satisfactory proof of the existence of an instrument, is sufficient. But that is not the point here. The question is simply, whether the declarations of the party to a third person, accompanied by a search which may be a mere sham, shall be admissible. There may be evils and inconveniences growing out of the rule as I understand it to have been settled by the practice of the Courts. But on the other hand, the mischiefs which would result from allowing a party to manufacture his own evidence, and to promulge it to the Court, through a witness examined on the stand, and to be used as his mouth-piece, are infinitely greater. After all, when a party fails, for the want of the very slight proof necessary to establish the loss of a paper, he but falls into a category with the numerous class of innocent and unfortunate persons, who have just rights, but lack the necessary proof to sustain them in Court.

On the fourth ground of appeal, I concur with the Chancellor in the views which he has expressed in his circuit decree. If the instrument upon which the complainants rest their claim, were to be construed as having the operation of a deed, it could only be considered as an assignment, (after a life estate in the donor,) of the debt due to the donor by Joseph Livingston; or rather of the fund secured by the bond and mortgage

executed to her by Livingston. She could not have intended to debar herself from the collection and use of the money in her life time. The mortgage was only an incident of the debt, auxiliary but not necessary to its enforcement. The property of Joseph Livingston was afterwards sold, under a decree

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of the Court of *Equity, with the view of marshalling the assets. The negroes mortgaged to Mrs. Connor were sold at this sale, but not under a decree of foreclosure; and Mrs. Connor became the purchaser. In marshalling the assets, the proceeds of the sale of the mortgaged negroes were allowed her on account of her prior and special lien. Mrs. Connor is dead, and the negroes have passed into the possession of third persons, against whom the complainants have instituted this suit. I agree with the Chancellor, that if the complainants have any claim, it is against the personal representatives of Mrs. Connor, (who are not parties,) for so much money as was due on the bond of Livingston at the time of its supposed assignment.

The most difficult part of this case, is the construction of the instrument of the 7th October, 1843. Is it a testament or a deed? And first, was it delivered? E. B. Wheeler, who was one of the trustees nominated by the instrument, was in possession of it, and had it recorded. This I think, according to the decisions, amounted to *prima facie* evidence of its delivery. But is it a testament or a deed? When by the terms of an instrument, duly executed and delivered, it appears that the party who executes it, intends to transfer a present irrevocable right in a chattel to be vested in possession at a future time, (a present right to a future enjoyment,) our Courts will give legal efficacy to such intention. This principle is now too solemnly adjudged to be brought into question. But the question here is, whether the instrument executed by Mrs. Connor comes within the foregoing definition. This is a point which, in my judgment, is not of easy solution. The instrument is Janus-faced. It has two aspects. When I look at it in one aspect, it seems to be a deed. When I regard it in another point of view, it looks like a will. And it cannot be both.

6 When an instrument is propounded as a will, there are three modes or kinds of proof, by which its testamentary character may be tested. One of these is to look to the declared intention of the party executing it, as expressed upon the face of the paper. By another mode or test, we may hear the parol

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declarations of the supposed testator, whether it was his purpose to make a will. The parol declarations must be a part of the *res gestæ*, and of course must be satisfactorily proved. Under this class, there may, and have been, cases, in which an instrument, in

the form of a penal bond, or a simple promissory note, executed according to the forms prescribed by law, have been propounded and established as testamentary papers. And again, we may look to the nature of the dispositions of the property, which the instrument affects to make, to ascertain whether the party executing it, intended to convey irrevocably a present right or estate. In this case, there are no parol declarations or attendant circumstances, to throw any light upon the question. When we look at the language of the paper, we discover that Mrs. Connor herself calls it a deed. It professes upon its face to be a deed. This is a strong point in favor of the appellants. It is the strongest, and in fact the only strong point in their favor. It is difficult to get over it. When looked at in this aspect, the paper appears to be a deed. But upon a further analysis, there are cogent reasons for doubting whether Mrs. Connor did not use the term "deed" in a loose sense, and without regard to its precise and technical signification. She has no where expressly or impliedly declared a purpose to convey a present right or estate, except so far as such purpose may be implied from her calling the instrument a "deed." On the contrary, she declares it to be the full understanding, that the property was not to vest in the donees until after her death. If we look to the subject matter of one of the donations, the doubt is increased. She gives to one of her daughters her wearing apparel. This looks as if she was making a will. These were articles consumable in their use. Did she intend to lay aside the wearing apparel which she then had on hand, to await the remainder which she had created therein, after the termination of the life estate which she had reserved to herself? Or did she intend to use them, and wear them out, if need be, and leave to her daughter such of her wearing apparel as she had on hand at her death, whether they were of the old

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stock, or subsequently acquired? Subsequently acquired apparel would have passed under a will, but could not have passed under a deed.

Such are the various and conflicting aspects which this paper wears. I have been myself unable to arrive at any conclusion, satisfactory to my own judgment, as to the true construction of this most equivocal instrument. My mind as to this question is in a state of equipoise. The appeal, so far as my individual judgment is concerned, may be decided by my concurrence in the decree on the other grounds, as already indicated. If forced to decide this question of construction, I should resolve my doubts, by adjudging against the complainants as actors in the case, and in that character bound to establish the affirmative proposition on which their alleged rights depend.

Appeal dismissed.

3 Rich. Eq. 465

CHARLES T. BROWN and Wife v. W. S. SMITH, PETER CUTTINO and Others.

BENJAMIN F. HUNT, Assignee, v. W. S. SMITH, PETER CUTTINO and Others.

SAME v. HENRY CUTTINO and Others.

W. C. SMITH and Others v. BENJAMIN F. HUNT and Others.

BENJAMIN F. HUNT v. JAMES SMITH and Others.

(Columbia, May Term, 1851.)

[Injunction \hookrightarrow 163.]

Under peculiar circumstances, and after a lapse of sixteen years, an injunction, to stay proceedings at law, dissolved, irrespective of any consideration of the merits of the questions at issue between the parties.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 368; Dec. Dig. \hookrightarrow 163.]

[Equity \hookrightarrow 67, 75.]

A claim may be too stale for investigation in a Court of Equity, even where it may not be subject to the bar of the statute of limitations, or to those presumptions which arise from the lapse of twenty years; but a claim will not grow stale, under the action of the Court, and while it is the subject of hot litigation.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 191, 227; Dec. Dig. \hookrightarrow 67, 75.]

[Assignments \hookrightarrow 104; Partnership \hookrightarrow 183.]

An assignee of one copartner's share in the property and assets of the firm is liable, even without notice, to all the equities of his assignor growing out of the copartnership; but a decree against the assignee on account of

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such equities, is a decree *in rem*,—it operates upon the property assigned, and a *fi. fa.* cannot be issued upon it against the assignee.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 183; Dec. Dig. \hookrightarrow 104; Partnership, Cent. Dig. § 323; Dec. Dig. \hookrightarrow 183.]

[Interest \hookrightarrow 22.]

Upon demands bearing interest at law, the Court of Equity is, it seems, bound to allow interest; but where the demand does not bear interest at law, interest will or will not be allowed according to the equity of the case.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 48; Dec. Dig. \hookrightarrow 22.]

[Interest \hookrightarrow 26.]

Where there was great delay in prosecuting a claim not bearing interest at law, the Court refused to allow interest.

[Ed. Note.—Cited in Pettus v. Clawson, 4 Rich. Eq. 104.]

For other cases, see Interest, Cent. Dig. § 9; Dec. Dig. \hookrightarrow 26.]

[Appeal and Error \hookrightarrow 832.]

There are but two grounds upon which a petition for a re-hearing will be entertained, (1st.) for error of law apparent on the face of the decree: and any part of the record may be resorted to for the purpose of making such error manifest: (2) for newly discovered testimony; and this testimony must be important, and must materially vary the case made; it must not be cumulative as to the evidence which was before the court upon the trial; and it must be such as the party petitioning for a re-hearing was not aware of before the trial, and

could not by proper diligence and enquiry have discovered.

[Ed. Note.—Cited in Hill v. Watson, 10 S. C. 276; Durant v. Philpot, 16 S. C. 125; Ex parte Dunovant, Id., 302; Yates v. Gridley, Id., 501; Ex parte Carolina National Bank, 56 S. C. 19, 33 S. E. 781.]

For other cases, see Appeal and Error, Cent. Dig. § 3215; Dec. Dig. \hookrightarrow 832.]

[Appeal and Error \hookrightarrow 832.]

For alleged error of judgment, on the part of the Court, in deciding upon an issue of fact, a petition for a re-hearing will not lie.

[Ed. Note.—Cited in Ex parte Dunovant, 16 S. C. 302.]

For other cases, see Appeal and Error, Cent. Dig. § 3215; Dec. Dig. \hookrightarrow 832.]

[This case is also cited in Ex parte Knox, 17 S. C. 212, as an illustration of the jurisdiction of Court of Equity Appeals on petition for reopening judgment.]

The original proceeding out of which the above causes grew, was a bill filed in Georgetown, February, 1822, by C. F. Brown and wife, in right of the latter, sole heir and distributee of George Smith, surviving partner of George and Savage Smith against W. S. Smith and Peter Cuttino, administrators of George Smith, and W. C. Smith and others, heirs and distributees of the other partner, Savage Smith, claiming an account of the partnership estate from the administrators of George Smith, the surviving partner—of the demands of the joint estate, and of the partners one against the other; and particularly setting up a demand on a debt, alleged to be due for advances made by Josiah Smith, said to have been intended by him as so much advanced for his daughter, the wife of George Smith, and mother of Mrs. Brown. For this, it was stated, a bond was to have been given by the partners, but that it was never executed.—This bill also charged, that certain endorsements of G. Smith were on account of the firm; and alleged the joint estate to consist of two plantations on Pee Dee; a tan-yard in Georgetown; from three to four hundred negroes; two plantations on Goose Creek; a tract of land on Cat Island, and other estates of less value, besides the debts due the concern, &c. To which bill the administrators put in their answer, plea and

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demurrer—in*sisting that all claim on account of the debt due Josiah Smith, was examinable at law—that they had no possession or interest in the premises, making them answerable for the tan-yard; and answered, admitting the partnership; declaring that they were ready to account, but that there were large debts due by the concern; one of which, a debt due Bird, Savage & Bird, they had compromised very advantageously, and would acquiesce in a decision, if they could be relieved from their responsibility to creditors. They further denied, that the liability of George Smith, as endorser, was obligatory on the joint estate, and submitted to the order of the court.

In February, 1825, a consent decree was made in the premises by Chancellor DeSaussure, ascertaining the rights of the parties as far as its provisions extended, in the following terms.

DeSaussure, Ch. "On hearing the report of the commissioner:—It is ordered and decreed that the plantations on Pee Dee, the land on Cat Island, and the lands on Goose Creek, and the negroes on the plantations on Pee Dee, and also the negroes now hired to Charles T. Brown, be adjudged the copartnership property of George and Savage Smith, and liable to the payment of the debts of the concern, to be distributed and partitioned, the one moiety to the heirs at law of Savage Smith, and the other moiety to the child of George Smith, who has married with Charles T. Brown. As the administrators of the estate are not entitled to the real estates of the deceased co-partners, it is but right that the same should be forthwith partitioned, except so much as may be necessary to pay the debts; and as the negroes now on the Pee Dee plantations, are necessary to their cultivation—it is ordered that the said plantations and negroes be partitioned and divided between the complainants, and the heirs and distributees of Savage Smith, and they are respectively decreed to take each one moiety of the said plantations, together with the negroes, crop and stock, the same to be equally divided, so as to give to each, one entire plantation, including highland and marsh; and the negroes to be divided as nearly as possible into two gangs, and distributed in families. The plantations

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*and negroes to be allotted by lot, one to the complainants, and one to the heirs of Savage Smith; the part or share of each to remain liable to the payment of any aliquot proportion of the debts, and to the final decree, upon the mutual demands of the complainants and defendants. It is further ordered, that the administrators do apply all the monies they have now on hand, toward the payment of the amount that may be agreed upon as a compromise for the claim of Bird, Savage & Bird; and to insure the payment of that claim, it is ordered and decreed that the commissioner shall apply to that purpose, the first monies that may be made from the debts due the estate, and the sales of property hereinafter appropriated to the payment of the debts of the estate. In relation to the remaining debts of the estate, the same shall be equally divided, as near as may be, between the complainants and the heirs of Savage Smith, and the property hereby ordered to be delivered to each, shall stand as a security for the payment of an equal portion of the debts. And to enable the respective parties to pay the same—it is ordered and decreed, that the commissioner shall sell the lands on Cat Island, for such proportion of cash, not exceeding one-third, as

he may judge most conducive to the interest of the estate, and the remainder, upon such credit, not exceeding five years, as he in like manner may think prudent. Also, the lands of the estate on Goose Creek, and the remaining negroes of the estate. He shall also proceed to collect, without delay, all the debts due to the estate, and to this end shall use all legal process, for enforcing the payment thereof; and after first paying the compromise with Bird, Savage & Bird, as aforesaid, shall apply the funds so raised, in the liquidation in equal proportions of the debts adjudged to be paid by the complainants and the defendants, the heirs of Savage Smith. The surplus shall be retained, subject to the final order of the Court, in relation to the mutual claims of the parties. It is further ordered, that the commissioner do examine and report on the several accounts of the complainants and defendants with the estate. It is ordered and

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decreed, that *any personal liabilities assumed by the administrators be discharged by the distributees.

"I have consented to this decretal order for the division of the estate before the payment of debts, and directing that each division shall bear its aliquot part of the debts, on the ground, that the estate is very large, and the property reserved for the payment of debts is very considerable, and greatly more than sufficient to pay the debts."

In conformity with this decree, commissioners were appointed to divide and allot the plantations and negroes on Pee Dee, between the distributees of the two partners. The commissioners made their division and allotment; by which the plantation called Cripps, with negroes, &c. fell to the heirs of Savage Smith; and that called Richfield, with negroes, &c. fell to the heir of George Smith. They submitted their report accordingly, by which it further appeared, that there was an excess of value in the portion assigned to the heir of George Smith, amounting to twenty-five or twenty-six hundred dollars, which was to be adjusted, to render the portion of each equal. This return and report was confirmed by a decretal order, in February, 1828, by which it was directed that the portion allotted to the parties, be held by them, respectively, in severalty, "subject, nevertheless, to the specific liens contained in the former decretal order"—and that the report and documents, &c. be enrolled as part of the decree.

About this time, Brown and wife, by lease and release, dated 10th and 11th February, 1825, conveyed and assigned to Benjamin F. Hunt, all their interest in the plantation allotted to them; also all their claim and interest in the joint estate of George and Savage Smith, and their interest in the demand of Josiah Smith against the said firm; subject, however, to "the debts due and owing by the

said firm, and to the accounts between the parties interested therein, and the final adjustment of the co-partnership and accounts." The deed refers to and recites the decree of 1825, as part of the title, and provides "that he, the said Benjamin F. Hunt, shall hence-

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forth stand and be in the place and *stead of the said Charles T. Brown and Sarah E. his wife, in the adjustment and settlement of said co-partnership estate and effects, real and personal, the said Charles T. Brown and wife reserving to themselves the separate individual estate of the said George Smith;" and further, that the "said Benjamin F. Hunt, henceforth standing and being in the place of the said Charles T. Brown and Sarah E. his wife, and of each of them, in the settlement and adjustment of the said co-partnership estate and effects; he, the said Benjamin F. Hunt, in the said settlement and adjustment of the said co-partnership estate and effects, real and personal, and in relation to the said assignment of the said Josiah Smith, being entitled to all the rights, privileges, demands and claims, and subject to all the duties, obligations and responsibilities of the said Charles T. Brown and Sarah E. his wife, and each of them, in the final settlement, adjustment and division of the said co-partnership estates and effects, real and personal."

After this, the assignee of Brown, by the order of the commissioner, received from W. S. Smith the balance admitted to be in his hands as administrator, belonging to the partnership estate, (\$5,476.79); also from the sheriff of Charleston, another sum belonging to the said estate (\$403.56); and from Ravenel & Stevens, another sum (\$344.21) then in their hands; and it was alleged that he received other sums due the said estate from other quarters. On the 26th February, 1826, at a sale made by the commissioner, of the negroes belonging to the joint estate, ordered to be sold by the Chancellor, the assignee, B. F. Hunt, purchased to the amount of \$13,553, giving his receipt as assignee of Brown and wife for one moiety (9,500) of the whole net amount sales, and his bond to the commissioner, secured by mortgage, for the balance of his purchase (4,053). This bond the commissioner assigned to the representatives of Savage Smith's estate, as cash, for so much of their share of the proceeds of the sale.

By a decretal order, April Term, 1826, the commissioner was directed to divide the oth-

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er debts due by the partnership, be*tween the distributees of each partner; and to provide for the compromise debt of Bird, Savage & Bird, by loan or otherwise, assigning the said debt and judgment as collateral security; and it was ordered that such judgment, when paid, should become the property of the joint concern, and be held for the use of the joint estate. On the 20th April, 1826, accordingly,

the commissioner reported a division of the other debts as ordered, and the report was confirmed by the Chancellor.

By a decretal order of the 6th February, 1828, it was ordered that the commissioner take the accounts of the administrators, with the joint estate, and the estate of the survivor—that W. S. Smith have leave to pass his accounts before the Master in Charleston, and further, "that the account and claims of the representatives of George Smith and of Savage Smith, respectively, on each other, be, and hereby are, referred to the said commissioner, to examine and report thereon." The debt of Bird, Savage & Bird remaining still unpaid, and execution being threatened on the same, a loan was effected (the bond of the assignee, Hunt, being assigned as collateral security,) and the balance of that debt paid off by the representatives and distributees of Savage Smith's estate. This loan was afterwards paid, and the bond returned to them. By a decretal order, dated February, 1832, entitled, Hunt, assignee of Brown v. Administrators of George and Savage Smith and the heirs of Savage Smith, it was ordered, that no claim not previously rendered against the estate be deemed valid, as the time allowed had long since expired—that the sheriff pay over the surplus in his hands, from the sale of the Goose Creek lands, to the commissioner, to be applied according to the former orders of the Court, and that "creditors be compelled to make any demands they may have, in this Court."

In February, 1833, the assignee of C. T. Brown and wife, filed his bill of supplement and revivor, and purporting to be in substitution of that which had been filed by Brown and wife, in 1822. This bill recited the previous bill filed by Brown and wife, against the surviving partner, George, and the dis-

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tributees *and heirs of the deceased partner, Savage Smith—and the charges in said bill—the partnership of George and Savage Smith—that large advances had been made to the firm through George by Josiah Smith, intended for the benefit of his daughter, the wife of George—that it had been purposed to give a bond of the firm, but that this had never been executed—that on the death of his said daughter, leaving an only child, Sarah, married to Brown, the said Josiah Smith had assigned the said demand to the said Sarah, his grand-daughter; and Brown and wife had assigned it to the present complainant—the partnership and residence of George and Savage—and their property—that endorsements had been made by George in his own name, for the benefit of the firm. That complainants had prayed a full settlement of the affairs of the concern, and particularly of their demand in right of Josiah Smith. This bill further recited the defence made by the administrators as before stated, resisting the claim of Josiah Smith denying all interest

and control in the tan-yard admitting the partnership, but denying that the partnership property was liable for the individual endorsement of George Smith, and declaring themselves ready to account, &c.

This supplemental bill further charged, that the plea and demurrer of the administrators were never decided, but that a decree was made in the case by consent, (as above set forth,) and the lands and negroes on Pee Dee divided by commissioners accordingly, an account directed between the parties, and a sale of the residue of the partnership estate; that by the allotment, the plantation called Cripps, with the negroes, was set apart to the distributees of Savage Smith; and Richfield, with the negroes, to C. T. Brown and wife, who entered upon the said plantation, and were seized of it in severalty; and refers to the records, reports and proceedings of the Court.

The bill further charges, by way of supplement, that in this situation, Brown and wife conveyed and assigned to the complainant, (B. F. Hunt,) not only the said plantation and negroes, but all their interest and claims

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on the co-partnership estate, as *well in their own right, as what they had by assignment; and claimed that the said assignee was "substituted completely in the place and stead of the said complainants in the said bill of complaint." The bill further sets forth, the sale by the commissioner of the partnership negroes, the purchase by the complainant, his receipt given for one half of the purchase money and bond for the residue; that his object in doing so, was merely to enable the commissioner to close his sales, in the confidence that what was due to him, as assignee of Josiah Smith, and of the share of Brown in the estate, would be a good discount to the said bond. That he had filed a statement of his demand with the commissioner, and endeavored to procure a report on that claim and the accounts generally, but had not succeeded. The bill again states the assignment of Josiah Smith's claim to the complainant; that a balance will be found due on a settlement of accounts, for advances made by the partnership to support the family of Savage Smith; and claims the benefit of the amount due on Josiah Smith's claim, as a set off to his bond; bill further charges, that this bond has been sued at law, by Peter Cuttino, administrator of Savage Smith. That complainant has complied with the decretal order of the Chancellor, by assuming a moiety of the partnership debts; claims the benefit of the decree of 1825, "by which the shares of complainants and defendants, were declared to be mutually liable for the balance that may be found due on a general account of the partnership estate."

Prays a revival of the original suit:—That the administrators, Cuttino and Smith, and the distributees of Smith, may answer

and come to an account of the partnership estate, including a house and lot, and tan-yard, in Georgetown. That the balance found due complainant may be paid him, and that Cuttino may be enjoined from proceeding at law in the meantime.

After this bill was filed, and before any answer was put in, Peter Cuttino died, leaving Henry Cuttino his executor; and in January, 1834, the assignee, B. F. Hunt, filed a bill against Henry Cuttino, as administrator of Peter, and the Bank of the

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*United States, to whom the bond given to the commissioner had been transferred, by Peter Cuttino, as collateral security for a loan to pay off the compromise debt. This bill referred to the previous proceedings and claims of complainant—stated that Peter Cuttino had been enjoined from putting the bond in suit—but that he was dead, and it was now put in suit by the United States Bank. Prayed a revival of the preceding causes against Henry Cuttino, to make the estate of his intestate liable to the accounts which had been prayed against him in his lifetime; an account against his intestate, and an injunction to restrain the Bank from suing on the bond of complainant.

On the death of Peter Cuttino, former administrator of Savage Smith, Wm. C. Smith had administered on his, Savage Smith's, estate.

In September, W. S. Smith, surviving administrator of George Smith, and the distributees of Savage Smith, put in their answer to the bill of the assignee Hunt. The former admitted the first bill of Brown and wife, as stated in the assignee's bill; the defence and proceeding under it as there stated—a sale by Brown and wife to complainant, of all their interest in the partnership estate, subject to the debts, &c.; the division of the property on Pee Dee; refers to the decree of 1825; states that he had effected an advantageous compromise of the debt of Bird, Savage and Bird; and insists that, by the decree of 1825, the affairs of the estate were wholly taken out of the hands of the administrators, and placed under the direction and control of the Court; relies on the clause, ordering the distributees to discharge any personal responsibilities assumed by the administrators. States that ever since the commissioner has acted as receiver, and no part of the estate has been received by the defendant. That the balance which remained in defendant's hands, (\$5,476.79) was, on 26th November, 1825, paid to the complainant, by order of the commissioner; that defendant then exhibited his account with the estate, to complainant, and has never since intermeddled with the affairs of the estate; and files a copy of his last act, and receipt of the balance appear-

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ing thereby from complainant, with his an-

swer. Further states, that since their assignment by Brown and wife to complainant, the latter has had the chief management and control of the estate of the partnership, defendant never intermeddling therewith, but considering himself discharged from all further liability as administrator; that since the original bill, his co-administrator, Peter, has departed this life, &c.

The other defendants, children and distributees of Savage Smith, admit the partnership and the death of their uncle and father, without division or settlement; that they have heard of the pretended assignment made by Josiah Smith to his granddaughter, wife of C. T. Brown; but deny that said Josiah had any claim against the joint estate of George and Savage Smith, and deny the benefit pretended to be drawn from said assignment; that on the contrary, George expended considerable sums belonging to the partnership estate, in supporting the establishment of Josiah Smith; insist that if Josiah Smith did advance any sums to George, it constituted a personal demand against himself, and not against the partnership, and deny all liability of the partnership to Josiah Smith or his assignee, the complainant; and for themselves and their infant co defendants, rely upon the statute of limitations as if pleaded. Admit the assignment of Brown and wife to complainant, of their claims and interests in the partnership estate, but subject to the debts and mutual demands of the parties, &c., "meaning the final settlement between the representatives of the said George, and the representatives of the said Savage Smith." That thereby, the complainant was put precisely in the place of the said C. T. Brown and wife, and bound to make good all claims, which those representing the estate of Savage Smith might have against those representing the estate of George Smith, by reason of the partnership property, &c. That from the time of the assignment, complainant has had the chief management of the affairs of the estate, &c. Admit the division of the estate in 1825, under the decree, providing that each share shall remain liable to the debts, and final decree upon mutual

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demands; and insist *that they would not have consented to a division upon any other terms, as Brown and wife had previously received large sums of money from the partnership estate, for which he was bound to account on a final division, and for which complainant, as his assignee, is bound to account; that said sums were so charged, in the administrator's account submitted to complainant.

Admit the sale by the commissioner, of the reserved negroes, &c., but state that the proceeds, instead of being applied to the debt of Bird, Savage & Bird, went in great part into the hands of the complainant.

State that while it was supposed the compromised debt would be paid, the remaining debts were apportioned, and believe the same have since been paid or arranged. Further state, that on account of the delay in paying the compromised debt of Bird, Savage & Bird, their agents and attorney threatened to issue execution for the whole amount; and defendants were obliged to borrow money to pay off this debt, which they did in 1826, to the amount of \$13,820.26; and state in addition, that the compromise debt was on an individual debt of George Smith, being on a bond which only bound him, and his separate share of the estate; defendants further charge liability on the complainant, assignee of Brown, for large sums of money received by him, complainant, belonging to the partnership estate—particularly an amount due the partnership, by R. F. Withers; also for a tract of land called Michau's Point, which complainant agreed to take at \$10,000; a tract of land on Cat Island purchased by him; for some negroes belonging to the partnership reserved for sale, retained by complainant, for which he is bound to pay; the sum of \$5,476.79, received by complainant, from W. S. Smith, administrator; the sum of \$1,142 in the hands of the factors, Ravenel & Stevens, belonging to the estate, which, as these defendants believe, complainant also received. Defendants refer to accounts filed with their answer, for a statement of the amounts received by Brown and wife, and by complainant as assignee, for which he, and the share of the partnership in his hands, is liable.

Defendants further allege, that on a final

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settlement between *the representatives, respectively, of George and Savage Smith, the complainant, as representing the former, will be largely indebted to the defendants in right of the latter.

Further state, that the bond secured by mortgage, given by complainant for his purchase at commissioner's sale, was assigned by commissioner to the estate of Savage Smith, as part of their moiety arising from said sale; that said bond was pledged to the U. S. Bank to raise money to pay the compromise debt, and this loan having since been paid the Bank, the bond was returned to Wm. C. Smith, representing the estate of Savage Smith; defendants insist that complainant is bound to pay this bond, and as it was taken for cash, defendants ought not to be compelled to await a final settlement. They insist, that on such settlement, a large balance will be found due to them—that they have always been anxious for such settlement. Two of the defendants, Thomas P. S. and David H. S., say they are infants, and submit their rights to the protection of the Court.

In January, '35, Henry Cuttino filed his answer to the bill above set forth, of the

assignee, B. F. Hunt. He admitted the administration of his testator, and the former proceedings under the decree, &c., but relied on the decree of 1825, as discharging his testator from all further accountability,—stating that since that time, he had never interfered with any portion of the estate, except what was assigned to the distributees of Savage Smith, acting as their agent, and was only accountable to them,—stating that the assignee had the chief control of the estate, &c.

After this, some references were held in Georgetown before the commissioner, whether under the previous orders already noticed, or a subsequent one, did not appear. At these references, or some of them, the solicitor of the distributees of Savage Smith, and the assignee in person, attended—demands were specified—vouchers offered and witnesses examined, but it did not appear that the references were ever closed—and no report was ever made by the Georgetown commissioner.

In August, 1838, W. S. Smith died, leaving the estate of G. Smith unrepresented—and his own estate also unrepresented.

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*In November, '38, W. C. Smith, and the other children of Savage, his distributees, defendants in the former cause, filed their cross bill against B. F. Hunt, assignee, complainant in the former bill. In this bill, admitting and setting forth the previous proceedings, they relied upon the charges set up in their answer to the former bill, and called for an execution of the decree of 1825, claiming an account from the assignee, for all the sums which Brown would have been accountable for under that decree, and all that the assignee had become accountable for since that decree, on account of his dealings with the partnership property, and debts of the partnership estate paid by complainants. They relied for the most part on the claims before specified in their answer, and some additional items in the same right, &c. They persisted in their former denials, and called for a direct account (without regard to the administration accounts,) as being each directly and adversely interested under the decree in the share received by the assignee.

To this bill, the defendant, B. F. Hunt, put in his answer, relying on his former claims, in right of Josiah Smith and C. T. Brown and wife, as a discount to all claims against him—reiterating those claims—denying all privity with complainants, and that he had ever pleaded them as to the personal estate; insisting on his uninterrupted possession of the property, and the statutes of limitations, to all the claims urged against him, and setting up claims against the administrators for professional services, as giving him a right to retain some of the property in his possession—urging various other claims and objections. He also objected to the whole bill as not showing any right to

implead him in this Court, and prayed the same benefit as if he had demurred.

Up to this time, all the proceedings had been in Georgetown, but on 28th June, 1840, it was ordered, that all the causes, pleadings and proceedings should be transferred to Charleston, with the provision, that the transfer was not to affect any of the questions made by the parties. On the 11th July, 1840, an order was taken out by the solicitor of

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William C. Smith, and others *his co-distributees, that the case, together with the original bill and cross bill of the defendants, be referred to the commissioner, to take and report the accounts between the parties. Under this order, references were held before Mr. Gray, one of the Masters, twenty-one or more in number, commencing on the 14th Oct., 1840, and ending on the 7th June, 1843. To all of these, the assignee, Benjamin F. Hunt, was summoned, and at most of them attended in person, sometimes objecting to the proceedings, and sometimes objecting to the vouchers offered, and offering in discount, the claim as assignee of Josiah Smith and George Smith's individual estate as unaccounted for.

On the 28th of June, 1843, the Master filed his report. In this, he reported that it had been satisfactorily proved before him, by vouchers and witnesses, that the sums received by Brown, from the administrator of the estate of George and Savage Smith, sums paid by said administrator on account of the individual estate of George Smith, and monies and property received by Mr. Hunt, belonging to the partnership estate, amounted in the whole, to \$122,993.00, for the one-half of which, the assignee of Brown would have to account, if the case stopped there, but that it was insisted on the part of Benjamin F. Hunt, that no account could be adjusted between the parties until the administrator's accounts of George and Savage Smith had been fully audited and established, and it was ascertained that Brown and wife, &c. had received more than their share. The Master further reported, that the estates of George Smith and of William S. Smith were not represented. That no accounts of the administration of George and Savage Smith had been rendered to him, and that he could not make up a correct account without such accounts, and filed the testimony. The causes were called on the docket at February Term, 1844, for hearing, and objections were made to their being heard, on the ground, that the two first had abated by the death of W. S. Smith, and the third could not be heard on the report. The question was argued before his Honor, Chancellor Johnston, who made a decree, recalling the order of reference of July, 1840, and staying proceedings until

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*other parties were made to the cross bill.

The conclusion of his Honor's decree is as follows:

"It is ordered, that this cross suit be stayed until the plaintiffs make parties of Brown, or his representative; of Cuttino's representative; of the representative of Wm. S. Smith; of the representatives of Josiah Smith, and of the representatives, de bonis non, of George Smith and Savage Smith, respectively; and that the order of reference of the 11th of July, 1840, be recalled.

"A proper order of reference, extending to the whole of the accounts, can only be made when the pleadings are completed. I would suggest such an amendment of the pleadings, as should distinctly call for an account and settlement of the respective estates of George Smith and Savage Smith, so as to close forever this tedious litigation."

From this decree an appeal was taken, which, at March Term, 1845, was dismissed.

After the appeal was dismissed, the proper parties were brought before the Court; and at March sittings, 1846, it was ordered, that the references be resumed without prejudice to any of the parties, and reserving all the equities, &c.

At the same sittings, (March, 1846,) his Honor, Chancellor Johnson, on behalf of Col. Hunt, made the following order:

"Order that an injunction do issue to restrain the defendant, W. C. Smith, and others, from pursuing their judgment at law, and levying execution at law, in the case of Coachman, commissioner in Equity, against B. F. Hunt, upon the complainant, B. F. Hunt, entering into bond with security to be approved by the Master, for the payment of the amount due upon the said judgment, with legal interest thereon from its date, whenever the said injunction shall be dissolved, or until the further order of the Court."

During the summer sittings of 1846 and 1847, applications were made to dissolve the injunction issued under the above order. The applications were refused, and the motion was taken to the Appeal Court, where, in February Term, 1848, the following opinion was delivered by

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*Dargan, Ch. There is much complexity in the facts of this case. The rights of the parties have been further complicated, by a course of litigation protracted far beyond the usual period, by the involved state of the pleadings, the numerous parties thereto, and the various orders which have been heretofore made. As the Court will express, and has, in fact, formed no opinion as to the merits of the questions between the parties, I will here advert only to such of the facts as constitute the basis on which the decree of the Court on this application will be rendered.

On the 26th of March, 1846, Chancellor Johnson made the following order in this case: "Ordered that an injunction do issue

to restrain the defendant, W. C. Smith, and others, from pursuing their judgment at law, and levying execution at law, in the case of Coachman, commissioner in Equity, v. B. F. Hunt, upon the complainant, B. F. Hunt, entering into bond with security, to be approved by the Master, for the payment of the amount due upon the said judgment, with legal interest thereon from its date, whenever the said injunction shall be dissolved, or until the further order of the Court."

At the succeeding term of the Court of Equity for Charleston, it was moved before the presiding Chancellor, that the injunction be dissolved, when the following order was made:—"This case comes up on a motion of the solicitors for the administrator and heirs of Savage Smith, to dissolve the injunction granted by Chancellor Johnson. The Court is of opinion that, in this stage of the proceedings, there is nothing which can warrant its interference with the order of the Chancellor. The same equities subsist upon the allegations of the parties, and the report has not yet ascertained how the account stands. An interlocutory order dissolving the injunction would manifestly then be a re-hearing of the same case already considered by the Chancellor who granted the injunction. It is, therefore ordered that the motion to dissolve the injunction be dismissed."

The motion to dissolve the injunction was again renewed at the Summer sittings for Charleston, and was again refused. And the application is now made by way of ap-

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peal (on the *grounds stated in the brief) from the decision of the two Chancellors, who rejected the motion to dissolve the injunction as aforesaid.

The answer of the defendants has been put in, in which all the equities of the complainant's bill have been positively denied. And on the 8th of June last, the report of the Master was filed, stating the accounts between the parties, and in which a large balance has been struck against the complainant. In addition to these facts, it may be remarked, that the proceedings in this case at law, were first arrested by an order of this Court, in the case of B. F. Hunt v. The representatives and heirs at law of Savage Smith, made by Chancellor De Saussure, in the year 1832. This bill having abated by the death of some of the defendants; on the revival of the same, an application was made to Chancellor Johnson, that a writ of injunction formerly granted, would be re-signed and directed to the present representatives of Savage Smith; and an order was made to that effect. It was then moved that the order should be so amended as to require security, which was refused. On appeal, it was held that a complainant applying to the Court of Equity for a writ of

injunction to restrain proceedings upon a judgment at law, was bound to give security(a). On a subsequent application before Chancellor Johnson, the order first recited in this statement was granted. It thus appears that the proceedings in this action at law have been suspended by the interposition of this Court for sixteen years. The simple question now submitted is, whether, under these circumstances, the injunction should be dissolved, irrespectively of any consideration of the merits of the questions at issue between the parties. It is certainly true that an application for an injunction to stay proceedings at law is one addressed to the sound discretion of this Court. It is also true, that after the answer has been put in, the continuance or dissolution of the injunction is equally within the discretion of the Court. While the equities sworn to in the bill are undenied, there is reason that the injunction should continue in force.

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*The same reason applies, when the answer admits the complainant's equities. But when the answer positively denies all the complainant's equities set forth in his bill, if the latter be not corroborated by other proofs, the presumption, on which the interposition of the Court was originally based, in a great measure ceases to exist. At this stage of the case, if the complainant has further proofs by which he may support the allegation of his bill, he should present them in the form of affidavits. If he has none such, it is obvious that the further intervention of Equity, in arresting the proceedings at law, is unnecessary, and may be mischievous, as on a trial upon bill and answer, the dismissal of the bill must follow as a necessary consequence.

By the 5th section of the Act of 1721, it is provided, "that no injunction shall continue of force longer than the next term after the defendant has put in his answer, unless the Court shall see fit to extend it." The plain meaning of this provision is conceived to be, that after the answer is put in, the Court may extend or dissolve the injunction, in the exercise of its own sound discretion. There is no impediment, therefore, in entertaining the motion, notwithstanding the order that has already been made. Indeed, it seems to be but a provisional order, and by its own terms, to contemplate a possible further modification before the hearing of the cause.

Since that order was made, another important stage in this protracted litigation has been attained, and another aspect given to the case, which did not then exist, and which has a strong bearing on the question now submitted to the Court. The Master has filed his report on the accounts between the parties, and has found a large balance

against the complainant. The judgment at law (the subject matter of the injunction) is not included in that balance. It is true, that many exceptions are taken to this report, and it may be, when the exceptions are heard, the report may be set aside in the whole or part. Doubtless, the merits of the controversies between the parties are, in a great degree, involved in that report, and

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the exceptions thereto. But *this application is decided (as has been already stated) without any reference to those questions.

The Master's report thus finding a large balance against the complainant, and thus making a case of *prima facie* indebtedness by him instead of the defendant, when superadded to the denial of the complainant's equities by the answers, constitutes an insuperable objection to the further interference by this Court with the progress of the suit at law.

This Court has now stayed the proceedings of a Court of law, on a purely legal demand, for sixteen years. And it has been twenty-six years since this litigation commenced in the Court of Equity. Doubtless, the progress of the cause has been obstructed by many unavoidable accidents and delays. It is difficult to avoid the conclusion, that there has been laches. This Court has no means of knowing by whose default this extraordinary delay has occurred. The rules of Chancery practice, on the subject of injunctions, require that the complainant should use a high degree of diligence, and in any uncertainty as to whose default has occasioned the delay, he, as the actor, must share a large proportion of the responsibility, or, at all events, make a showing that he has used a reasonable degree of diligence in preparing his case for trial.

Against the dissolution of the injunction, it is urged, that it might occasion the complainant irreparable mischief; that the heirs of Savage Smith are utterly insolvent; that their share of the joint estate which was allotted to them in the division, has passed by sale into other hands; and that, if the complainant should establish his claims against the estate of Savage Smith, he would have no means of enforcing his demands, while the defendants possessing the security of the injunction bond can suffer no other inconvenience than delay. This argument might address itself strongly to the consideration of the Court, if it were not clear that the complainant possesses the most ample security for any amount that he may recover from the defendants. In the final adjustment of the accounts. The decree for partition of 1825 affords this protection. It expressly provides, "that each

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*share shall remain subject to the final decree, which shall be made upon the mutual demands of the parties, plaintiffs and de-

(a) Hunt v. Smith, 1 Rich. Eq. 277.

fendants." And the share of the heirs of Savage Smith purchased pendente lite, and, therefore, with notice, cannot by such sale be divested of the lien which that decree thus imposes upon it.

For the foregoing reasons, it is the opinion of the Court, that the injunction should be dissolved, and it is accordingly so decreed.

JOHNSTON, DUNKIN and CALDWELL, CC., concurred.

Under the order of reference of March, 1846, the Master, (Mr. Gray), on the 9th June, 1847, filed his report as follows.

"To the Honorable the Chancellors of the said State:

"Since my report, filed 28th June, 1843, with the testimony to which it referred, Chancellor Johnston, on the 13th March, 1846, made the following order.—"New parties having been made, in pursuance of the Appeal Decree; it is ordered that the references be resumed in these causes, without prejudice to any of the parties, and reserving all the equities in the same manner for the hearing as though the present order had not been entered. It is further ordered, that evidence be taken by any party to the cause or any matter involved in the pleadings, to be used in the causes as may be required; this order made with consent of the solicitor of B. F. Hunt." I respectfully report, that in pursuance of the said order, many references have been had before me by the solicitors of the parties, up to the 25th May last, inclusive, the day fixed by me for closing all references in litigated causes, by a notice published in my office on the 1st day of the last April. I beg leave to file herewith my notes of these references, and all the testimony submitted to me from time to time by the several parties. The representatives of the several estates of George and Savage Smith, have each filed their claims, and I proceed to state the results at which I have arrived, after considering the testimony submitted to me:

"First, as to the claim of B. F. Hunt, the

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assignee of C. *T. Brown and wife, or the representatives of the estate of George Smith, viz: that

"First, an account of the co-partnership of George and Savage Smith, under its various names, should be taken, and the share of each brother ascertained. The testimony shows, that with the exception of a few house servants, and some other property of inconsiderable value, owned by George and Savage Smith in their individual rights, all the rest of their lands, negroes and assets were owned and employed by them jointly, in the various uses to which they were applied; so that after deducting whatever was strictly applicable to their joint liabilities,

the remainder was to be equally divided between the brothers.

"2nd. That Josiah Smith made considerable advances to the firm of George and Savage Smith, on account of his daughter, the wife of George, which ought to be credited to the estate of George, and allowed Mr. Hunt, who is the assignee of the claim. I do not find any testimony in support of this claim, but that of Mr. Josiah Smith, the alleged creditor himself, supported by entries in the book called his Petty Ledger in evidence; but there is no proof that Savage Smith ever recognized the claim, and it seems from the testimony of Henry Cuttino, that George Smith himself stated to him, that he was not aware how Mr. Josiah Smith had made such advances.

3d. The excess of the private expenditures of Savage over George, from 1783 to 1817, which it is alleged would leave \$45,000 to equalize the partnership expenses; it is in evidence, that George Smith during that time resided in the family of Josiah Smith, and that his private expenses were small, having only a wife and one child; while Savage Smith had a large family of children, and lived in Georgetown handsomely at an expense of from \$2,000 to \$2,500 per annum. But it is also in evidence, that during this long series of years, the brothers never came to an account with each other, or had any settlements of transactions, but appeared to treat their interests as identical, and to use their estates as if it were the property of

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each, and employed *for their mutual advantage; so that it would be impossible to adjust their accounts after such a lapse of time. This answer applies also to all the other incidental claims under this head, such as the title to "Crips" Plantation, having been taken in the name of George Smith, while that of "Richfield" was taken in the name of George and Savage. The payments made by George Smith for negroes, as per bills of sale, &c.

"4th. The next claim is, that the administrators should account for the estate. I find that the accounts of W. S. Smith, one of the administrators, from 1818 to 1825, have been vouched before me, and the balance appearing in his last account paid to the order of Mr. Heriot, commissioner in Equity for Georgetown district. Mr. Hunt has submitted his objections to these accounts, and filed a statement, which I have marked X., which he claims as a proper account, shewing a balance of \$10,799.12 in his hands in 1825, instead of \$5,576.79, the balance paid by him. In this connexion, Mr. Mitchell, for the representatives of Savage Smith, has submitted a statement, marked Z, by which it appears, that comparing the sums received and disbursed by Messrs. Ravenel & Stevens, the factors of the estate, with those actually received and disbursed by the said administra-

for, there results a sum of \$1,637.69, overcharged for commissions, which added to the balance stated by Mr. Smith, would amount to \$7,114.48, the correct balance due in 1825; and it appears to me that this is the correct view of the matter.

"5th. The next is a claim of the estate as per the inventory.

"It appears to me, that the property contained in the partition, and allotted in 1825, together with the sales made by commissioner Heriot, satisfactorily account for the property.

"6th. The debts due the firm in 1818, when George Smith died: which ought to have been collected, unless the insolvency of the debtors can be shown.

"The responsibility for these debts seems to be shared between the administrators, and commissioner Heriot, viz: from 1818 to 1825 by the administrators, and afterwards by the commissioner in Equity, who was then

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authorized to collect them, and then *received for collection from Mr. Cuttino, the administrator, such as had not been realized under the decree.

"The testimony of Mr. Huggins specifies such of them as he thought might, from the circumstances of the debtors, have been collected; and he adds, that many of them were solvent in 1825, and it appears to me, that there must have been a want of proper diligence in making the collections; but the representatives of both estates have suffered equally from the acts of their agents, and ought to share the losses, if any have occurred; this embraces the cases of W. R. Theus and of Richard F. Withers, the debtors referred to, the particulars of which are detailed in the testimony of Mr. J. N. Davis and Mr. Huggins.

"7th. The next claim is, that the lot in Hampstead is part of the joint estate. And I find that it is so, as appears by the tax returns of W. S. Smith, the administrator, as late as 1816; and this, therefore, ought to be brought into division between the parties.

"8th. That the land on which the tan-yard was in Georgetown, and the other real estate in that town, was joint estate. I find that the tan-yard lot was a part of the joint estate, and was sold by Henry Cuttino in 1835, for \$110; that after the death of Savage Smith, George Smith transferred his interest in it to his nephew, George S. Smith. And I find that the house and lot of Savage Smith, where he resided, was not the property of the estate, but of Mrs. Savage Smith, derived from her father, Wm. Cuttino.

"9th. Is a claim for a negro, Isaac, and others attached to the tan-yard. I find from the testimony of Mr. Henry Cuttino, that Isaac was the property of Savage Smith: that at the death of Savage Smith, the busi-

ness of the tan-yard was very inconsiderable; that of the 16 negroes then attached to it, all died except five, which were sold in 1835, and brought \$397.56 altogether.

"10th. Claims that the accounts of Peter Cuttino should be vouched; I find that these accounts were vouched before the ordinary; but the vouchers have not been submitted to me; and that for all the items of said ac-

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counts, except for monies *admitted to have been received by either of the representatives of the two estates, the parties are entitled to have a decree against the said administrator.

"I proceed now to the claims of the representatives of Savage Smith, submitted by Mr. Mitchell, which are to be reimbursed by Mr. Hunt, the assignee of C. T. Brown and wife, in conformity to the decree of 1825, for all sums received by him, or expended for him, out of the joint estates, over his equal share.

"1st. Is contained in Schedule A, filed with said claim, which contains the items of portions of the joint estate applied to the private debts of George Smith greater than were applied to the private debts of Savage Smith. I find the items of this claim to be correctly established by the testimony, with the exception of the sum of \$13,820.26, paid on the compromise debt of Bird, Savage & Bird, which I consider to be a good charge on the joint estate. The debt originally seems to have been one of George Smith, sen'r. (the father of George and Savage Smith,) and of Josiah Smith, and the judgments upon it in the Federal Circuit Court are entered against Josiah Smith individually, George Smith as executor of George Smith, and Josiah Smith as executor of George Smith: the particulars of which judgments are stated in my notes of the references of the 9th of February last. The name of Savage Smith does not appear in the proceedings; but that of his brother, George, appears only as executor of his father, and as they held and enjoyed jointly their father's estate, there is every reason to infer that this was regarded as a joint debt by George and Savage Smith. Besides, the debt was compromised at the instance of the representatives of both estates, and the decree directed it to be paid out of the funds of the joint estate, and the above payment was accordingly so made. The result of this Schedule shews, after striking out this item, that the amount paid for the estate of George Smith, exceeds that paid for the estate of Savage Smith, after allowing interest to the present time, by \$21,686.32, which ought to be paid by the assignee of C. T. Brown and wife.

2d. This claim, contained in Schedule B,

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Nos. 1 and 2, is for *the excess of payments made out of the joint estate to C. T. Brown and wife, over those made to the distributees of Savage Smith. Exception was taken to the character of many of the receipts given

by Mr. Brown to W. S. Smith, as indicating receipts of money from Mr. Smith individually, and not as administrator, from which it was inferred, that they related to private transactions not connected with the estates; but the testimony of Thomas Lehre convinces me that the money came from the joint estates. And I find that there is due by the assignee of C. T. Brown and wife, to the distributees of Savage Smith, on this account, \$11,521.56, including interest to the present time.

"3d. Schedule C contains the claim for the amount due from C. T. Brown, for the hire of the negroes of the estate, from January, 1820, to January, 1825. I find this claim to be established by the letter of C. T. Brown to the administrator, of the 1st August, 1819, and also by the examination of C. T. Brown before me, annexed to my former report, and I find that there is due by the assignee on this account, \$13,542.50, including interest to the present time.

"4th. Schedule D is the claim of the amount due to the heirs of Savage Smith, for equality of partition on the division of the estate in 1825. This claim is established by the return of the commissioners in partition in 1825, and the report of commissioner Heriot, February 3, 1827, and I find the amount due by Mr. Hunt to be \$3,262, including interest to the present time.

"5th. Schedule E is a claim for the amount paid by the administrator and heirs of Savage Smith, in full of the balance due on the compromise debt of Bird, Savage and Bird. This claim is fully established by the testimony, especially that given by Mitchell King, Esq., and I find the amount due by Mr. Hunt to the heirs of Savage Smith, to be \$14,768.16, including interest to the present time.

"6th. Schedule F is a claim for certain funds and property, alleged to have been received by Mr. Hunt, after the decree of 1825, for which the heirs of Savage Smith did not receive an equivalent, or which were not ap-

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plied to the partnership debts; *of the items of this claim, I find that the item of \$344.20, received from Ravenel & Stevens, and the item of \$403.56, received from sheriff Steedman, were accounted for by Mr. Hunt to commissioner Heriot, whose agent he was in the receipt of them. And they are disallowed. Another item in this Schedule, viz: the amount due for the purchase by Mr. Hunt of Michau's or Clegg's Point, \$10,000, appears to me not to be sustained by the testimony. The property was bid off by Mr. Hunt, at \$8,000, and he paid \$776.50 of the purchase money; but he never received titles for the property, and it was afterwards sold under the decree obtained by S. Pedrieau and wife, (reported in Riley's Chancery Cases, page 88,) and was lost to Mr. Hunt, the former pur-

chaser. This item is therefore disallowed. And I find the amount due by Mr. Hunt to the heirs of Savage Smith, on the remaining items of this Schedule, to be \$1,468.00, including interest to the present time.

"In addition to the foregoing claims, there is one for the bond given by Mr. Hunt to commissioner Heriot, for \$4,053.00, with interest, for the purchase of negroes of the joint estate, on which a judgment has been obtained at law, but which has been enjoined by this Court, to abide the decree in this case.

"The Schedule G annexed, will exhibit a summary of the several balances found as above to be due by Mr. Hunt to the representatives of Savage Smith."

The cases were heard, on exceptions to the above report, at February sittings, 1848, before his Honor, Chancellor Johnston, who pronounced the following decree:

Johnston, Ch. I had, at the close of the argument, pretty satisfactory impressions of the general principles upon which this litigation must turn; and though they have been in some decree obscured, they have not been materially altered by the immense and heterogeneous mass of documents, which I have been required to read and examine.

In deciding the case, I will introduce what I have to say, by remarking, that the principal litigation has palpably arisen in consequence of Mr. Hunt's having substituted

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his bond, in place *of the money, for part of his purchases from Mr. Commissioner Heriot. By the report of the 3d February, 1827, it appears that the commissioner has sold, of property belonging to the copartnership estate, and of property mortgaged to it, to the amount of \$21,598, (of which there was purchased by Col. Hunt to the value of \$13,553.) Part of this sum, to wit: \$19,069.42, was divided between the distributees of the respective parties, in the proportion of \$9,500.00 to Col. Hunt, and \$9,569.42 to the distributees of Savage Smith; and upon the principles of that report, it is pretty clear, that if Col. Hunt had paid the whole amount of his purchases, instead of giving his bond for \$4,053, a part of them, an equal division would have been made of the whole of this fund, (the \$21,598.) That is, the amount covered by Hunt's bond, (\$4,053,) if it had been paid in, and had existed in cash, in the commissioner's hands, would have been apportioned by allotting to Hunt \$2,061.21, and to the distributees of Savage Smith \$1,991.79, of that portion of the fund, which would have equalized the difference of \$69.42 between the drafts upon the whole \$21,598.

The early contest was in relation to this fund, and has been enlarged, by the one party looking up claims to sustain him in the right to retain it, and the other seeking for counter claims to meet these and compel him to give it up; and I am persuaded, from the

facts to which I have alluded, coupled with the preceding and succeeding laches of the parties in relation to these extrinsic claims; that they are more plausible than real, and that the marrow of this litigation is the bond of Hunt. Nothing beyond this was claimed by him, until his bill in 1833, nor by the other parties, until their cross bill in 1838, for although they did fish up some few things in their answer to his bill, they never earnestly proceeded to urge any claim beyond the bond, until they filed their cross bill, as I have stated.

My persuasion is, therefore, that (with the exception of matters in the report not excepted to, which must of course stand, if there be any such,) the decree must be confined to the sum for which Hunt's bond was given, with

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interest, and that it should be divided as I have stated; the judgment obtained on it to stand as a security for the amount to be decreed, and to be enjoined for all beyond that amount. My opinion is, also, that all the other claims are too stale or obscure to be made the subject of a decree.

If we were to go beyond the point I have intimated, and enter into the consideration of the other claims set up by the different parties, we must be governed, throughout the investigation of them, by one leading principle. There is no privity between these parties, but through the decree of 1825. No claim can be recognized that does not come within the purview of that decree. Every claim anterior to it, and not embraced in it, is lost. Every claim that falls within it, must be governed by its provisions. And every claim arising under it must be regarded with special reference to the rights of the parties, as established by the decree itself.

This decree of 1825 must be construed with reference to the pleadings. Besides the two matters of Josiah Smith's claim, and the endorsement for Waring, which are specially mentioned in the pleadings, there is no other claim set up, but the demand of a general account of the partnership. The latter would necessarily be subject to reciprocal claims, incidentally arising from the account. By the phrases in the decree, "mutual demands of the complainants and defendants," "mutual claims of the parties," and "the several accounts of the complainants and defendants with the estate," the Court must be intended to allude to the "demands," "claims" and "accounts" embraced by the record; and these are such as I have stated.

Let us assume, therefore, that these are embraced in the decree of 1825. No other claims are embraced in it.

That decree, according to the view I have taken, entitled the parties to an inquiry into Josiah Smith's claim, and into the indorsement for Waring. Besides this, the plaintiff, Brown, was entitled to a general account

of the partnership from the administrators, under which all matters proper to be urged

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by the different parties, as incidental to the accounting, might be brought up and considered.

Now, from the date of that decree, until very recently, the parties have not availed themselves of the rights thus given them, nor attempted to take the account; and at this late day, they come forward, not only with the demands which they might long ago have urged under this decree, but with others entirely foreign to it, all stamped with obscurity, and ask the Court to redress the consequences of their own neglect.

If it were proper to inquire into Josiah Smith's claim, I entirely concur in the conclusion of the commissioner in relation to it. It is in no view sustainable. The bond was never executed. The demand remains a simple contract, and was barred before the bill was filed. For the monies advanced by Josiah Smith, he still remained the creditor; as much after his assignment as before; for certainly the assignment of a blank carries nothing. He was not before the Court in 1822. Again, whose creditor was he? Did he advance the money to George Smith or to the firm? If to George, then he was his creditor; and George, by contributing the money to the firm, was the real creditor of the firm. But he, according to Cuttino, made no such claim. But waive all these objections, and assume that Josiah Smith advanced directly to the firm, that the bond was executed, and the demand not barred; still Mrs. Brown took nothing by the assignment, which vested the whole interest in her mother, who was neither a claimant nor represented in the suit.

The endorsement for Waring stands upon testimony entirely too obscure to ground any decree upon it.

We come now to the general account. But before we enter upon it, it may be useful to examine the general features of the decree. The decree looked to a speedy settlement. The impediments to the partition sought by Brown, (and possibly by the distributees of Savage Smith,) were the existence of outstanding partnership debts, (among which the demand of Bird, Savage & Bird was the largest and most pressing,) and the express engagements made by the administrators with

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the creditors. *The administrators said, "Free us from the liabilities existing against us, in virtue of assets in our hands, enhanced in some instances, by our personal and positive contract with the creditors, and take the estate into your own hands; but we cannot part from it until we are indemnified." The decree meets these difficulties, (1) by requiring the distributees of the partners to discharge the liabilities assumed by the administrators; (2,) by providing a fund

for the payment of the partnership debts; and, (3,) by limiting the property to be partitioned to a certain portion only, and in allotting this to the distributees, imposing a condition, that "the share of each remain liable to the payment of an aliquot proportion of debts," as well as "to the final decree upon the mutual demands of the complainants and defendants."

The fund provided for the payment of debts was three-fold; (1) the monies in the hands of the administrators; (2,) the partnership choses, which the commissioner, (taking the place of the administrators,) was forthwith to collect by legal process; and, (3,) the proceeds of Cat Island and other property, which the commissioner was directed to sell.

The administrators were directed to apply the monies in their hands to the demand of Bird, Savage & Bird; and the commissioner was ordered to complete the payment of that debt out of his first collections. The remaining debts were thrown into two classes, corresponding to the two sets of distributees; and the commissioner was to discharge these classes, *pari passu*, out of the residue of his collections, and retain whatever surplus might remain in his hands, "subject to the final order of the Court in relation to the mutual claims of the parties."

Then "the several accounts of the complainants and defendants, with the estate," were referred to the commissioner,—which I have interpreted to mean, the general account, (which is the only one spoken of in the record,) and those incidentally connected with it.

There is no doubt about the meaning of the general account. What claims are incidental

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to it? When a general account is *decreed, I suppose the proceedings must be so far reciprocal, that the accounting party may shew payments or advances made to the party calling for the account, or set off debts due by him to the fund or to the trustee. Whether in relation to debts of the latter character, or where he insists upon a balance in his favor, the trustee must not support himself by pleading, it is not necessary, in the view I shall take, to consider. Again, I suppose, that when the account is, as in this case, of a partnership—where the object is to ascertain the dry balance to which the respective partners are entitled—it is strictly incidental to the proceedings, to enquire not only what debts are outstanding against the concern, whether held by strangers or by one of themselves—but what choses, constituting assets, are due to the firm, either by third persons, or by the individual partners. Whether in relation to debts due to or owing by the partners, pleading is necessary, or whether, if pleading is required, there is no distinction as to the necessity of it, between the accounting party and the party demand-

ing the account, are questions in my view of no importance here.

I think the right of the general account has been waived or lost by laches; or that the account has been informally given to and accepted by the parties entitled to it by the decree. And as to the incidental claims, even if they did not fall with the general account, but stood upon independent ground, I am of opinion, that every one of them upon both sides has been forfeited by negligence; and that many of them are not, in themselves, entitled to consideration.

Let us look to the general account. Has there been no laches here? The decree shews that the administrators were to be speedily exonerated. The only condition of this exonerated was, that they pay out the monies in their hands; deliver over the choses; and come to the account; the performance of two of which conditions depended on themselves, the third depended upon the other party, unless in so far as the administrators might have counter claims to set up, as for

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instance if they desired to *make reclamations for excessive advancements to the distributees, &c.

Now, did the administrators pay out all the monies in their hands to Bird, Savage & Bird? If this was not done, or what was equivalent and equally satisfactory, why did not the distributees—pressed as they were on all hands by that debt—take the account, at least so far as to shew the amount of money in the administrators's hands, and by rule or attachment compel the performance of that part of the decree?

Then the choses were to be delivered to the commissioner.—This officer was made the agent of the distributees. He was not the agent of the administrators, though he was interposed for their protection, and required to apply the assets to the demands for which they were responsible. The distributees took them with the tangible property, out of the hands of these trustees at their own risk; and all that the administrators were bound for, so far as the heirs were concerned, was the delivery of them to the commissioner. Did they do it? If not, why did the distributees delay to compel them?

Then, it is said, the complaint is not so much that they were not delivered, as that, when delivered, they were comparatively worthless;—rendered so by the laches of the administrators;—and they should account for that. The commissioner, in his report, expresses an opinion that there was negligence somewhere; either in the administrators or in the commissioner, Heriot. Well, if it was in the administrators, was not that fact known when the assets were delivered?—and was it not more capable of being investigated by proof and counter proof then than now?—and why did not some one of these distributees, importuned from day to day by the co-

partnership creditors, demand the account, and establish the fact? The list of copartnership securities, now used for establishing the default of the administrators, was parcel of the record in Brown's case, and was accessible to any party for the purpose of shewing whether there was a full delivery,

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or whether the negligence *now imputed to the administrators really existed. What impediment, then, hindered the investigation?

Except the money and these securities, which have been disposed of, what remained to be accounted for but the income which the administrators may have received while in the custody of the estate? Whatever of this remained as money in their hands has been already considered. As to whatever portion of it was paid out in the course of administration, or to distributees, if there was any dissatisfaction as to the disposition of it, why did not the discontented distributees or other party call for the account?

I see no reason for the delay from 1825 to 1833. So far as the administrators are concerned, this account could have been as well taken in 1825 as at any time after, and far better. I have said nothing of the laches since 1833; of the demanding an account and not making proper parties; or, (if all necessary parties were before the Court) not proceeding; nor of the procrastinations by which evidence that might have been produced, or explanations that might have been given, may have been lost; nor of the evidence actually existing on the commissioner's notes, and in the record of transactions purporting to be an execution of the decree.

The same laches exists as to the incidental claims. The inequality in the partition; the inequality in the payment of debts; the reclamations and counter charges set up for hire of negroes and for monies paid to Brown; why were these so long neglected? The subsistence account between the brothers from 1783 to 1817; is it not apparent from the circumstances referred to by the commissioner that these brothers never intended to raise such an account? They knew their business, and may have supposed that the superintendence of the large plantations in his neighborhood entitled Savage to a greater provision from the joint property, if, in fact, he drew his provision from that property. But if it was otherwise; still, why was not the demand pressed? The attempt to shew that the debt to Bird, Savage & Bird was properly chargeable to one of the partners instead of

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the *firm, was in the teeth of the decree of 1825, and badly supported by evidence.

On the whole, I can attribute the protracted silence of these parties on all sides, and their long abstinence from taking effectual steps, to nothing but a consciousness that the claims were doubtful, or satisfied; and that substantial justice did not require them to

proceed; unless I adopt the supposition that, suffering under injustice, they neglected to proceed.

It is dangerous, when claims have become stale, and the evidences of them obliterated or obscured by time, to take judicial cognizance of them; and it is better they should remain where the negligence of the claimants has placed them, than to meddle with them at the risk of perpetrating error and injustice in their adjudication.

It is ordered that the report be re-committed, to be reformed agreeably to the foregoing opinion; and that he report the sum for which the decree should go, including interest. Counsel will then propose a decree. Hunt to pay the costs.

A motion was made, that the bond and other securities taken by the commissioner, on issuing the injunction against the suit or judgment on Col. Hunt's bond, be delivered out to be sued on by the plaintiff in that action. It is ordered that they be delivered accordingly.

Wm. C. Smith and others, heirs distributees and representatives of the estate of Savage Smith, deceased, appealed from so much of the above Decree as dismissed their claims against Benjamin F. Hunt, reported by the Master, and so much as enjoined the judgment at law and abridged their rights acquired under the same, on the following grounds:

1. Because his Honor has erred in deciding that the said claims are too stale and obscure to receive the aid of this Court, whereas it is submitted that they come fairly within the purview of the Decree of 1825, and the pleadings and proceedings had in these cases before and since that time; were fully supported by evidence in the Master's office, and ought to have been enforced by a Decree of this Court.

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*2. Because his Honor has erred in deciding that these appellants had forfeited their right to enforce the said claims by laches, whereas it is submitted that there has been no such laches as would forfeit the right, and that the delays have been owing either to unavoidable causes, growing out of the course of proceedings in this Court, or the obstacles thrown in the way of a speedy adjustment by the Assignee.

3. Because his Honor has erred in deciding that the claims of these appellants were barred, by lapse of time, although some of them were infants at the time of the Decree in 1825, and continued so for a long time afterwards; and it is submitted that this would prevent their rights being prejudiced by the lapse of time.

4. Because his Honor has erred in deciding that these appellants were not entitled to be reimbursed for the amount paid out of their funds or estate, or by their agents, in satisfaction of the debt of Bird, Savage & Bird;

whereas it is submitted that by the Decree of 1825, the compromise became a specific charge or lien on the whole joint estate, and they were entitled to be reimbursed for any amount beyond one moiety paid by them or out of their funds, in discharge of said debt; and that by the proceedings of the cause and the acts of the parties, any persons advancing this money, or paying the debt, were entitled to the benefit of this lien, and to have it enforced in this Court.

5. Because his Honor has erred in deciding that these appellants should be enjoined from recovering more than one half of the judgment on bond; whereas it is submitted, that according to the very principles of the Decree, they were entitled to the whole of it, as the bond on which it was recovered was given for a part of the moiety to which they were entitled and which was assigned to them.

6. Because his Honor has erred in reinstating an injunction which had already been dissolved by the Decree of the Appeal Court.

7. Because his Honor's Decree is in other respects erroneous and contrary to law and equity.

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*At January Term, 1850, the appeal was heard and the following opinion thereon delivered by

DARGAN, Ch. All these cases are substantially between the same parties, and relate to the same subject matter, and are but the different phases in the way of pleading which the controversy has assumed in the progress of the protracted litigation.—In a case like this, so complex and multiform in its points of controversy, it will be a most fortunate result if the judgment of the Court shall attain any near approximation to perfect justice between the parties; clouded and obscured as are the facts, by lapse of time, and by the death of the witnesses and the persons who were the actors in the transactions which are the subject of investigation. No earthly tribunal, guided solely by human sagacity and skill, can claim for itself infallibility of judgment, or entire exemption from error. And I will not undertake to say that the Court may not, at any stage of this case, have evinced something of the infirmity of all human institutions.—But I think it very obvious, that a large proportion of the difficulties now to be encountered, and the consequent shortcoming of the Court in its present attempt to administer justice, are the result of the unnecessary delays and defaults of the parties themselves, and of the persons by whom they have been represented. The original bill was filed in 1822. And now, 28 years afterwards, the case is for the first time brought before this Appeal Court, for a hearing upon its merits; nor yet for a final hearing upon all the matters involved. For this extraordinary delay, unexampled, I hope, in the judicial annals of South Carolina, the

parties on both sides are more or less responsible. And if, in consequence of these causes, the Court should fall short of the truth and the right, in the judgment which it is about to render, the reproach must in a large measure be shared by the parties themselves, and those who acted as their solicitors. It is difficult to conceive of impediments in this country, which with proper diligence, could have baffled justice for so long a period. And when it is remembered that some of the matters of controversy were old at the commencement of the litigation, now

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28 years ago, the nature of the difficulties which have been experienced by the Court may be appreciated.

There is a clear admitted misapprehension, on the part of the Chancellor who tried the cause, on one branch of the case. This mistake is carried into the decree, and is so apparent, that it was not seriously controverted from any quarter. I refer to the bond of Benjamin F. Hunt, to the commissioner in Equity, for \$4,053. The Court, by its decree at February Term, 1825, had ordered the sale of certain lands and negroes, for the payment of the debts of the joint estate. The debts, (except that of Bird, Savage & Bird,) so far as then known, had been divided between the parties representing the two estates in equal shares. The decree contemplated that the proceeds of the sale ordered, should be applied to the payment of the debts thus assumed by each of the parties. And I think the decree, by a fair construction, also contemplated that the commissioner should pay over the nett proceeds of the sales ordered, in equal moieties to the two parties, to be by them applied to their share of the debts which they had respectively assumed. But whether the decree would bear that construction or not, the parties had undertaken to give it that interpretation, and with the consent of the commissioner, effected their object. By his report of the 3d February, 1829, he states, that out of the proceeds of the sale he had made, in pursuance of the previous order of the Court, he had paid the sum of \$9500 to B. F. Hunt, and the sum of \$9569 to Peter Cuttino, the agent of the defendants. But Col. Hunt had been, through his own bids and those of Charles T. Brown, the principal purchaser at the sale. The sale amounted in gross to \$19,356, and he was the purchaser to the amount of \$13,553. For the excess of his aggregate purchases over his moiety, he gave his bond to the commissioner with a mortgage of 16 negroes. And this bond was paid over to the agent of the heirs of Savage Smith, as so much cash, in part of their moiety, for which the commissioner took their receipt in full, having paid them the balance in cash. They are, and have been since Feb. 1827, the assignees of this bond.

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They received it as so much *cash, on their

share of the proceeds of those sales, while Col. Hunt then received, and has ever since had the enjoyment of his share. This bond has been the subject of various orders of injunction issuing out of chancery in this case. At February Term, 1848, on an appeal heard by this Court, it was ordered, that the injunction be dissolved, and that the assignees of the bond have leave to proceed at law upon it. An action was brought at law upon the bond, and judgment has been recovered thereon. But in the circuit decree, which is now the subject of appeal, it was ordered, that this judgment "stand as security for the amount that shall be decreed, and to be enjoined for all beyond that amount," the Chancellor deciding, from a misapprehension of the facts as before stated, that in no event were the defendants entitled to more than half of the amount purporting to be due upon the bond.

Whatever heretofore may have been the grounds upon which the assignees have at various times been enjoined from proceeding at law upon this bond, now when the mists that enveloped and obscured the complicated facts of this case have been dissipated, by a searching investigation, it appears to be a plain legal demand, against which it does seem that there is at present no subsisting or outstanding equity. To say the least, there is no longer any ground for this Court further to interfere in the prosecution of their legal rights by the assignees, upon the judgment which they have recovered. It is therefore ordered, that the injunction ordered by the presiding Chancellor in his decree, be dissolved, and that the assignees of the bond, (who are plaintiffs in the judgment at law,) have leave to prosecute their legal rights under the same. It is also ordered, that the master of this Court, whose duty it was to take the injunction bond, do deliver over the injunction bond to the plaintiff in said judgment at law, together with all other securities he may have taken as collateral to said injunction bond, or in lieu thereof; to be used by the said plaintiff in the suit at law, in the manner they deem most expedient: provided, however, that the said parties shall not be obliged to receive from the master any securities collateral to

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or *in lieu of the injunction bond, unless they think proper so to do.

I come now to consider other branches of this case. And here I will observe, that there is nothing in the general reasoning of the circuit decree which is exceptionable. The general principles of equity jurisprudence, which the Chancellor asserts, are forcibly discussed and clearly expressed. They command my unqualified assent. This Court has adjudged the case on those principles, so far as they apply. If parties having dealings and transactions together, and intending to charge each other, will fail to keep accounts

in the proper form, together with the necessary documents and evidence, by which these accounts are to be authenticated and supported; if having rights, they will slumber over them, until time has thrown around them an impenetrable veil of obscurity and uncertainty; if they will not bring their claims to the judicial cognizance of Courts until some of the witnesses are dead, and the memory of the surviving has become dim and faded, it is clear that they have no right to embarrass those who administer justice, with their stale, obscure and antiquated claims. In the adjudication of such claims, every step that is taken is one of doubt, and there can be no assurance, that any judgment that is rendered may not be founded in error, and fraught with injustice. The Court is not obliged to descend into the catacombs and charnel houses, and amidst the bones of the forgotten dead, and by the dim phosphorescent light which they emit, to adjudge matters of right, appertaining to this living and breathing world.

The doctrine that a claim may be too stale for investigation in this Court, even where it may not be subject to the bar of the statute, or to those presumptions which arise after the lapse of 20 years, is not disputed. And it will be applied in this case with rigour in those branches of the controversy to which it is applicable. But I will here remark, that in the opinion of the Court, a claim will not grow stale under the action of the Court, and while it is the subject of hot litigation.

I will now proceed to make some other

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preliminary observations. The Chancellor in his decree observes, "that no claim can be recognized, that does not come within the perview of the decree of 1825. Every claim anterior to it, and not embraced within it, is lost. Every claim that falls within it, must be governed by its provisions." "This decree of 1825," he says, "must be construed with reference to the pleadings." The Chancellor, in his construction of the decree, includes nothing within it but the claim set up on account of the endorsement for Morton Waring, the Josiah Smith claim, and a general account of the partnership. Construing the decree by its own terms, and that too in reference to the pleadings, it does not forbid or exclude from investigation any branch of the case which has been the subject of discussion before this Court. In reference to the property ordered to be divided, it expressly declares, that "the part or share of each is to remain liable to the payment of an aliquot portion of the debts, and to the final decree upon the mutual claims of the parties." The mutual claims of the complainant and defendant, I apprehend, would be a moiety of the joint estate to each, after every just and existing claim upon it was satisfied, due either to the estates of the deceased copartners themselves, or to any third persons.

After satisfying the individual claims of the partners, against the joint estate, and those of the creditors, the balance would be the joint estate to be divided, a moiety to each. And this and the other equities which arose between the parties, after the death of the partners, were "the mutual claims" of the parties, complainant and defendants. Still, notwithstanding the decree does not close the door against the investigation of any of the claims which have been discussed, that will not prevent some of them from being obnoxious to the objection of being too old and stale to be recognized by the Court as valid and subsisting claims; as will be hereafter more particularly explained.

A great deal has been said about Col. Hunt's position in this case, and his relationship, as the assignee of Charles T. Brown, to the heirs of Savage Smith. And the deed of Brown and wife to him, has been the sub-

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ject of much comment and discussion. I am of the opinion, that the deed warrants the construction which has been contended for on the part of the defendants, and that by the terms of the deed, Col. Hunt was to occupy the same position in relation to the parties interested in the joint estate, which Brown and wife had done. And I further think, that by his bill of supplement and revivor, filed by him in Feb., 1833, he did actually place himself as a party before the Court, in the relation to the defendants, which his stipulations with Brown required him to do. And that must have been the understanding of all the parties at that time, which some of them may have forgotten since.

But all this is entirely immaterial. If his deed from Brown contained no such stipulations—if he had filed no such bill as has been alluded to—still, as the simple assignee of Brown and wife, his position would be precisely the same as the stipulations of the deed obliged him to occupy, and which by his bill he proceeded to assume. His rights under a simple assignment would be the same with those of Brown, neither more or less. Brown could not convey more than he himself possessed. And his assignee would be subject to all the equities in relation to the interest assigned, that Brown himself would, even though there had been no notice of those equities. For it is a case where the assignee, at his own peril, is bound to take notice of the equities. Col. Hunt must be considered as occupying Brown's position as to the joint estate, so far as the transactions of the latter extended, at the time of the assignment. There is but one conceivable difference which does not exist under the circumstances of this case. If Brown had received more than his share, I do not say that Hunt would be liable to the defendants for the excess, whatever his liability might be to Brown under the terms of their

contract. The equities against Brown would attach only against the remainder of the share in the hands of his assignee; and if his assignee himself has received in excess, he is liable to refund, and that is a personal liability.

Having thus discussed and laid down the

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principles upon which the decree of the Court will be based, I will proceed to apply them to the different matters which are the subjects of investigation. In regard to the claims set up in behalf of the estate of Josiah Smith for moneys advanced by him to George and Savage Smith; in regard to the claim set up by the heirs of Savage Smith against the joint estate, on account of the indorsement of George Smith for Morton Waring; and in regard to the claim for the excess of expenditures by Savage over George Smith, from 1783 to the dissolution of the partnership, by the death of Savage in 1817, the Court is of the opinion, that these various claims are too stale, obscure, and insufficiently proved. Some of the transactions attempted to be brought into review relate to the last century. And some of them, though of a much later date, are too antiquated and shadowy for this Court to form any satisfactory judgment about them. We are content with the disposition which the circuit decree has made of them, and this is the judgment of this Court. The Chancellor was also correct in the decree which he made in reference to the administration accounts of W. S. Smith and Peter Cuttino. The administration was taken from them in February, 1825, by an order of this Court. They had accounted regularly before the Ordinary, as by law required, and their accounts vouched. W. S. Smith had a settlement with Col. Hunt in 1825, as the agent of the Commissioner, and was directed to receive the assets from him. The Commissioner, Gray, does report a balance against Peter Cuttino, but it is on the ground, that his accounts were not vouched before him. But Peter Cuttino's house was burned, and his papers all consumed. He also reports a small balance on the account of W. S. Smith, in consequence of some supposed overcharge of commissions. I incline to think that the administrator was entitled to the commissions, the charge for which was overruled. The Court is of the opinion, that after this lapse of time the accounts of both administrators must be presumed to be correct, and that there has been no malversation or devastavit committed by them. They have both long since paid the great debt of nature; but if they were now living, and

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*parties before the Court, they would, after this lapse of time, be protected from liability to account. It is also the opinion of this Court, that the assets mentioned in the inventory must be presumed to have been properly disposed of. More than thirty years

have elapsed since the inventory was taken. And it is too late now to go into a minute and strict investigation.

I approach now what I consider much the most important part of the case. I mean the question, whether the debt of Bird, Savage & Bird is a debt of the joint estate and chargeable thereon; who has paid the balance due on the debt; and whether the party who has paid said balance has a right to charge the share of the other party, in the way of contribution. In the first place, are these questions open for discussion? are they concluded by the decree of 1825, or any decree heretofore made between the parties, or are they barred by the presumptions arising from the lapse of time? While the Chancellor has decided that they are not concluded by this decree, he has held that the claim is too old and stale to be considered, and has placed it in the same category with those which I have just disposed of.

I am of the opinion that this claim is especially recognized and adjudged as a partnership debt of George and Savage Smith, by the decrees of 1825 and 1826. As to whether it is a partnership debt, the parties are concluded by those decrees. It is, as to them, *res judicata*. The decrees made special provision for it as a partnership debt. It is so treated by the parties in the pleadings, and admitted in substance by Col. Hunt in his letter of 18th July, 1826. It seems to me, that if it was possible to go behind the decrees before referred to, on the question whether the claim of Bird, Savage & Bird was a joint debt of George and Savage Smith, there is sufficient evidence before the Court to justify the conclusion that it was. In 1826 this claim amounted to the enormous figure of \$70,000. It was agreed to be compromised for \$20,000, provided payment should be made within a given period. It became an object of great moment that this condition should be complied with. Hence the decretal orders of Chancellor DeSaussure, looking to

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its immediate *payment, and making provision for that object. The answer of the defendants to the original bill had stated this as an outstanding claim against the joint estate, and that it was proposed to be compromised by the payment of \$20,000 within a specified time. And by the decree of 1825, *inter alia*, "It is ordered, that the administrators do apply all the moneys they have in hand, towards the payment of the amount which has or may be agreed on, as a compromise of the claim of Bird, Savage & Bird; and to insure the payment of that claim, it is ordered and directed, that the Commissioner shall apply to that purpose the first moneys that may be made from the debts due the estate, and the sales of property hereinafter appropriated to the payment of debts of the estate." In a subsequent part of the same decree, making an appropriation of funds

contemplated to be raised by sales of property, the decree provides as follows: "After first paying the amount of the compromise with Bird, Savage & Bird, as aforesaid," the Commissioner "shall apply the funds so raised in liquidation in equal portions of the debts adjudged to be paid by the complainants and the defendants."

The decree of 1826, in reference to this claim, provides as follows: "Whereas, cash sufficient to pay the amount of the two compromises of the debt due to Bird, Savage and Bird, has not been received, and it is highly important to all parties, that the same shall be closed, it is therefore ordered and decreed, that the Commissioner may raise the money necessary to pay what remains due upon that compromise from any Bank or other source. And as the said judgment will, upon the payment of the said compromise, become the property of the joint estate of George and Savage Smith, the Commissioner shall take an assignment of it, to hold the same for the use of the said estate; and to secure more perfectly any loan made for the purpose of paying said compromise, the Commissioner may, by way of collateral security, assign said judgment to the lender; and to provide for the sum so borrowed, shall moreover apply the first moneys received by him from debts due the estate of George and Savage Smith as heretofore ordered. And

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any mode devised by the *parties respectively to raise the sum necessary, may be adopted, and the said judgment be assigned, and the repayment be secured by allowing the lender the benefit of the decretal order, made in this case to secure the creditors." It seems to me that sophistry itself cannot distort these decretal provisions into any other construction than a judicial recognition of the claim of Bird, Savage & Bird as a joint debt of George and Savage Smith. But it was asked, if such was the judgment of the Court, whence the provision that after its payment an assignment of it should be taken by the Commissioner for the benefit of the estate; an assignment, it was contended, that would be ineffectual, because the payment of the judgment would extinguish it. Such, it is conceded, would be the effect at law, but not necessarily in equity. And the answer is obvious and two-fold. One of the means contemplated by the decree to raise the money necessary to pay the balance due on the debt of Bird, Savage & Bird, was to assign the judgment to any person who might advance his money to pay that balance, and to subrogate the lender to the lien of the plaintiff (in the judgment) upon the property of the estate. It was certainly within the competency of the Court to give such lien upon the property then under its control and management.

Another object which the Court may have

contemplated by taking an assignment of the judgment, does not appear upon the face of the decree; but it is rendered quite probable from the facts that are in evidence. The debt of Bird, Savage & Bird, was originally a debt of Smith, Darrell & DeSausure, of Charleston. To this firm belonged Josiah Smith, and George Smith, the father of George and Savage. After the death of George Smith, the elder, George Smith, the younger, his executor, gave his bond to Bird, Savage & Bird for the amount of the debt then due. The estate of George Smith, the elder, was divided among the heirs and distributed by private arrangement among themselves, and funds were doubtless provided for the payment of all outstanding liabilities. As early as 1807, we find George and Savage Smith recognizing the claim as a joint obligation upon themselves by payments to T. Parker, Esq.,

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the attorney *of Bird, Savage & Bird. Contemporaneously with the execution of the bond of George Smith, the executor of George Smith, the elder, Josiah Smith, one of the firm of Smiths, DeSausure & Darrell, executed his bond to Bird, Savage & Bird, for the same debt. He was then also liable, and if the other obligor paid the debt, Josiah Smith was prima facie liable for contribution.—And as it was known that he set up large claims against the joint estate of George and Savage Smith for moneys advanced to that firm, the assignment ordered by the Court to be taken for the joint estate may have contemplated a prosecution of a claim for contribution against Josiah Smith, or a set off against the demand which was set up on his account. But whether the one or the other of these explanations be sufficient to account for the meaning of the Court, in ordering an assignment of the judgment for the benefit of the joint estate after it should have been paid by the funds of the same, there is one thing too clear for doubt, and that is, that the Court has adjudged the claim of Bird, Savage & Bird to be a joint obligation of George and Savage Smith, and chargeable upon their joint estate. If it should appear that this debt has been paid by any of the parties out of their own funds, can there be any doubt of their equitable right to a contribution from the other party? Though more than twenty years have elapsed since the payment, the party who has paid is not precluded from setting up his claim for contribution. The matter has been sub judice ever since. And as I have before said, a claim cannot grow stale while under the action of the Court.

The question of fact now arises, who has paid this debt? Col. Hunt paid a portion of it. But the payments made by him were of funds confessedly derived from a common source, namely, assets belonging to the joint estate. The balance remaining due

(after the payment from the joint funds) was, on the 16th day of December, 1826, twelve thousand one hundred and forty-four dollars, fifty cents. The Master so reports. He also reports, that this balance was paid by funds borrowed from the Bank of the United States, on the notes of Charles T. Brown and the distributees of

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the estate of Savage Smith, and *that the notes in Bank were finally taken up by funds belonging to the estate of Savage Smith. Upon a careful examination of the evidence on this subject, the Court is entirely satisfied with the Master's report in this respect. It therefore follows, that the defendants, the distributees of Savage Smith, are entitled to a contribution from Col. Hunt for one-half of the amount thus paid, with interest thereon, from the day of payment. So much of the Chancellor's decree as disallows this claim is reversed, and the Master's report, in relation to the same, is confirmed, and made the judgment of this Court. But there is another matter to be considered in connexion with this subject. The decree of 1825, which ordered a partition of certain lands and negroes, provided, expressly, that the part or share of each should remain liable to the payment of an aliquot portion of the debts, and to the final decree upon the mutual claims of the complainants and defendants. And the decree of 1826, before quoted, ordered the judgment of Bird, Savage and Bird, to be assigned to any person who might advance the funds to pay the balance due thereon, as collateral security, and to secure more perfectly any loan made for the purpose of paying the amount due on the compromise. And contemplating a failure to obtain the funds from any other source, and that the parties themselves (on account of the magnitude of their interests involved in the immediate payment of the amount due on the compromise) might be induced to raise the money for that important object, the decree proceeds to provide especially for their security in such an event. It declares that "any mode devised by the parties, respectively, to raise the sum necessary, may be adopted, and the said judgment assigned, and the repayment secured, by allowing the lender the benefit of the decretal order, made in this case to secure the creditors." On the force and effect of these orders, it is the opinion of this Court that the sum hereby adjudged to be due to the heirs of Savage Smith for the sum paid by them on the balance of the debt of Bird, Savage & Bird, as aforesaid, with interest on the same as aforesaid, is a charge, and has a lien, upon the share of

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the joint estate, real *and personal, of George and Savage Smith, assigned and allotted in the partition thereof to the said Benjamin F. Hunt, and the share of the said Benjamin F. Hunt is especially liable

to satisfy the debt hereby adjudged to be due to the heirs and distributees of Savage Smith, as the subrogated creditors of George and Savage Smith.

Schedule A. of the commissioner's report, contains a statement of the private debts of George and Savage Smith, paid out of the funds of the joint estate. This Court is of the opinion, that such an enquiry is not improper, nor concluded by any decree heretofore made, nor by presumptions, or any other impediment that would close the door against investigation. Though the property and interests of the brothers were blended to an almost unprecedented degree, yet it could scarcely be otherwise, than that they should owe some individual debts; and those contracted after the death of Savage by George, and the funeral expenses and physician's bill, &c. of each, were necessarily several and individual. These must be charged of course as individual debts, and accounted for accordingly. In reference to the debts due by either, previous to the dissolution of the co-partnership by the death of Savage, and purporting to be individual, this Court will lay down one rule applicable to them all. From the great degree of intimacy and confidence between the brothers, and the perfect amalgamation of their property and interests, the *prima facie* presumption must be, that every debt contracted by either of them, whether in their joint or individual names, should be regarded as a joint debt, until the contrary be satisfactorily shewn; the burden of proof to rest upon the party who affirms the debt to be individual and personal. The establishment of this rule, by which the future investigations on this subject are to be directed, is as far as the Court will go at present on this part of the case. As this branch of the litigation has not been examined by the Circuit Court, (the Chancellor considering himself precluded from the investigation by the lapse of time, and the staleness of the claim,) it is deemed advisable that

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the transactions embraced in *schedule A. of the commissioner's report, be remanded back to the Circuit Court, for a hearing there upon the merits under the principle hereinbefore expressed. After the death of George and Savage Smith, Charles T. Brown, whose wife was the sole distributee of George Smith, had some of the negroes of the joint estate on hire. The commissioner, in his report, has charged this amount on the share of the estate which has been assigned by Brown to B. F. Hunt. The administrators also paid to Charles T. Brown, before the assignment, various sums on account of the estate, as they also did to the heirs of Savage Smith. The commissioner, in schedule B. (No. 1 and 2 of his report) has set forth these various matters in a particular manner. This Court is of the opinion (as has before been expressed) that the assignee of Brown, as to the

property assigned, is subject to the same equities that would attach upon Brown's share, if he was still the owner, and a party before the Court. And no reason is perceived why this account should not become the subject of investigation. But from the views which the presiding Chancellor took, this branch of the case has never been adjudged upon its merits by the Circuit Court: for this reason it is remanded to that Court for a hearing.

For the same reason, so much of the controversy as relates to the negroes which have been sold by Col. Hunt, and so much thereof as relates to the account of Col. Hunt for professional services, and likewise so much thereof as relates to the purchase by B. F. Hunt of Clegg's Point, and his accountability for the same, are remanded to the Circuit Court for a hearing. And it is ordered that B. F. Hunt have leave to go before the Master and offer evidence in regard to his account for professional services. The question as to costs is reserved.

It is ordered and decreed that the decree of the Circuit Court be reformed in the particulars hereinbefore stated, so that it is made conformable to this appeal decree. In all other respects, it is ordered and decreed that the Circuit decree be affirmed, and the appeals be dismissed.

DUNKIN and CALDWELL, CC. concurred.

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*At June sittings of the Circuit Court for Charleston, the cases were heard, on the matters referred back to the Court, by his Honor Chancellor Dunkin, who made the following decree:

Dunkin, Ch. These causes were heard under the decree of the Appeal Court, pronounced in February last. It is important that the decree then made should be first read, presenting, as it does, not only a succinct history of the case, but the principles of adjudication, as well as the particular subjects thereby adjudicated and settled.

Preliminary to the consideration of the matters referred back to the Circuit Court, it is proper to state that the defendant proposed to open the inquiry in relation to the debt of Bird, Savage & Bird. I was of opinion that this was one of the points on which the judgment of the Appeal Court was clear, final and conclusive. But as it was strenuously and repeatedly urged, it is due, as well to the counsel as the Court, to advert to so much of the judgment of the appeal tribunal as seemed to me to consider and determine this question. At page 7 of the decree, the Chancellor, after premising that he "considered this as much the most important part of the case," adjudicated it to be a partnership debt of George and Savage Smith. Then at page 9, "If it should appear that this debt has been paid by any of the parties out of their own funds, can there be any doubt

of their equitable right to a contribution from the other party?" Thus far the principle had been announced. The Chancellor then proceeds: "The question of fact now arises, who has paid this debt?" He adverts to the Master's report as making the balance, (after deducting certain payments from the joint funds,) on the 16th December, 1826, twelve thousand one hundred and forty-four 50-100 dollars, (\$12,144.50 cents.) "The Master reports," says the decree, "that this balance was paid by funds borrowed from the Bank of the United States, on the notes of Charles T. Brown and the distributees of the estate of Savage Smith; and that the notes in Bank were finally taken up by funds belonging to the estate of Savage Smith. Upon a careful examination of the evidence upon this subject, the Court is entirely satisfied

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with the *Master's report in this respect. It therefore follows that the defendants, the distributees of Savage Smith, are entitled to a contribution from Col. Hunt for one half of the amount thus paid, with interest thereon from the day of payment. So much of the Chancellor's decree as disallows this claim is reversed, and the Master's report in relation to the same is confirmed, and made the judgment of this Court." The question is then considered whether this sum constituted a lien, and after discussing the subject, the Chancellor announces, "as the opinion of the Court, (p. 11,) that the sum hereby adjudged to be due to the heirs of Savage Smith, for the sum paid by them on the balance of the debt of Bird, Savage & Bird, as aforesaid, with interest on the same as aforesaid, is a charge, and has a lien, upon the share of the joint estate, &c., assigned and allotted to the said Benjamin F. Hunt," &c.

It is not too much to say, that no point of the case was so thoroughly investigated, so maturely considered, and none could be, as I thought, more distinctly and conclusively adjudicated.

It seemed to be conceived that some subsequent orders of the Chancellor on the Circuit might bring into question the conclusiveness of this judgment of the Appeal Court. I can perceive no ground for such impression, if it exists. Several other matters were remanded to the Circuit Court for consideration. That Court was held immediately after the adjournment of the Court of Appeals, and the cause was not ripe for hearing. It might be that, in the investigation of the matters reserved, Col. Hunt would obtain a decree; and the Chancellor, in the exercise of his discretion, thought proper to suspend proceedings under the fi. fa. of the distributees of Savage Smith, although he gave them leave to lodge it to bind. That such was the understanding of the Chancellor seems clear enough, from his remark in refusing an order previously proposed by Mr. Mitchell. "It is refused," says he, "on the ground that it would be im-

proper to grant it until the final accounting is had upon the matters of controversy reserved by the Appeal Decree."

The first matter in controversy reserved

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by the Appeal Decree "is Schedule A of the Master's report." This relates to the individual debts of the partners, said to have been paid by the administrators out of the joint estate. Savage Smith died in April, 1817. George Smith survived until September, 1818. On this subject, the Court of Appeals say, "It could scarcely be otherwise than that they should owe some individual debts; and those contracted after the death of Savage, by George, and the funeral expenses and physician's bill, &c., of each, were necessarily several and individual. These must be charged, of course, as individual debts and accounted for accordingly." In reference to those due previous to the death of Savage, and purporting to be individual, the Court declare that, from the peculiar manner in which their property was held, and their business conducted, "the prima facie presumption must be, that every debt contracted by either of them, whether in their joint or individual names, should be regarded as a joint debt, until the contrary be satisfactorily shown: the burthen of proof to rest upon the party who affirms the debt to be individual and personal."

George Smith lived in Charleston and transacted all the business of the firm with the Banks here. The evidence left the impression on my mind that the notes of George Smith, paid by the administrators, December, 1818, were not original transactions, but renewal of debts contracted during the existence of the copartnership. The decree of Ann Pursell, the judgment of Susannah Forster, and the acknowledgment to T. Smith, jun., for the State Bank Shares, (dated 1802,) all fall within the rule prescribed by the Court; so far as can be perceived, the cause of action or contract existed during the copartnership, and prima facie was a joint debt. On the other hand, the subscriptions to the Dorchester Church, and bond to the Free School, were evidently individual; so of the note of James C. Hourin, (called H. Hourin in the printed report.) On reference to the administrator's accounts, this appears to have been a note of James C. Hourin, dated 1818, and endorsed by George Smith, which the administrators were obliged to pay, together with costs of protest. The whole amount of the debts properly payable

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by George *Smith, amount to five hundred and sixty-one dollars; those payable by the representatives of Savage Smith, to one hundred and seventy-eight dollars and seventy-five cents.

The next matter ordered by the Appeal Court to be considered was so much of the

Master's Report, and the exceptions thereto, as relates to the sums advanced by the administrators to C. T. Brown and wife, and to the heirs of Savage Smith, previous to the assignment, and also to the account of negro hire after the death of George Smith. These matters are embraced in the schedule (B) No. 1 and 2, and in schedule (C) of the Master's Report.

On these subjects the language of the Appeal Court is, "this Court is of the opinion (as has been before expressed) that the assignee of Brown, as to the property assigned, is subject to the same equity that would attach upon Brown's share, if he was still the owner and a party before the Court." Some objection was made as to the form of some of the loose receipts given by C. T. Brown to the administrators, J. and S. Smith. The various payments made to C. T. Brown run through a series of years from 1818 to 1825 inclusive; these sums were regularly charged in the accounts kept by the administrator, and annually passed by the Ordinary. These accounts, down to October, 1823, were filed as an Exhibit in W. S. Smith's answer to the bills of Brown and wife, filed in 1822. The administration account was closed in 1825, and the administrator, William S. Smith, has been many years dead. It is not doubted that the money was paid to Brown, and it is quite too late now to suggest that the payments may have been made on account of other transactions; some sixty-seven negroes, belonging to the joint estate, went into the possession of Charles T. Brown some time after the death of his father-in-law, George Smith, for which he agreed to allow an annual hire of two thousand dollars. This agreement with the administrator is established by his letter making the proposal, as well as by his testimony at p. 111 of the Master's report. He kept the negroes 1820, 21, 22, 23 and 1824; they were then sent from his place to be sold by the Commissioner, in February, 1825;

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*they are referred to particularly in the order of that date as "the negroes now hired to C. T. Brown."

The matters embraced in schedules, A, B and C, were mutual claims existing between the complainants, C. T. Brown and wife, and the defendants, heirs and distributees of Savage Smith, in reference to which the decree of "1825 ordered, in relation to the mutual claims of the parties, the Commissioner do examine and report upon the several accounts of the complainants and defendants with the estate;" and the share allotted to each was declared "to remain liable to the final decree upon the mutual claims of the complainants and the defendants." When this decretal order was made, the greater number of Savage Smith's heirs were minors. The Court of Appeals have settled the con-

struction of the decree as far as was practicable. Admitting that only then existing mutual claims were to be included, the Court say "the mutual claims of the complainants and defendants would be a moiety of the joint estate to each, after every claim due to the estates of the deceased partners, or to third persons, was satisfied; after satisfying creditors, and the individual claims of the partners against the joint estate, the balance would be the joint estate to be divided, a moiety to each; and this, and the other equities, which arose between the parties after the death of the partners, were the mutual claims of the parties, complainants and defendants." What were the "other equities" subsisting in 1825, and which had arisen between the parties after the death of the partners, which ought properly to have been adjusted before partition, and for the security of which this provision was made? Brown had received payments from the administrators on account of his interest or share every year since the death of George Smith, the surviving partner. He had also hired sixty-seven negroes for five years of that period at a fixed rate. In the same manner, the heirs of Savage Smith had received sums from the administrators during the same time, on account of their share. These should have been settled before a partition was made. This being waived in consequence of the anxiety to have immediate partition, an order of reference was made, and a spe-

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*cific lien was declared in order to secure the satisfaction of the final decree on the Commissioner's report. This was the only mode left of securing to each a moiety of the joint estate after payment of debts. Regularly each party should have accounted for what he had received, and taken only the balance of his moiety. It was thought well enough to let each take a moiety and be accountable for any surplus by a specific lien on the shares received. But an inquiry still remains, whether, in accounting for the sums thus received by them respectively, the parties are liable for interest. I considered the negro hire on the same footing as any other payment made to Brown. It was not understood that he was to pay the hire to the administrators, but was to account for it as so much received by him. Their omission to make any annual requisition, or even to take a note, evince the understanding of the parties. In matters of accounting, the allowance of interest is governed by no fixed or established rules—no rules can be made which should be applied arbitrarily in all cases.

Thus, on the bond given to Robert Heriot, in February, 1826, he was probably chargeable with interest by the concession of all parties. So in regard to the compromised debt of Bird, Savage & Bird, for which both

were liable, but which was paid by the heirs of Savage Smith by a loan made from the United States Bank; in making the decree for contribution, the Court ordered the payment of interest on acknowledged principles of the Court. But the sums received by Brown and wife, and by the representatives of Savage Smith, from the administrators, were received by the parties as their own, and they were entitled to receive them. They were not expected to refund; they were in no default for not refunding. Even where a legatee has been erroneously paid, in recalling that payment the general rule is not to charge interest; *Gittins v. Steele*, 1 Swant. 199. But these were not erroneous payments. The parties were mutually entitled to an account of what had been paid. But in the allowance or disallowance of interest, all the circumstances are properly taken into consideration, and the character of the

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claims, *as well as the vigilance or laches of the party insisting on the payment of interest, are always prominent features in directing the judgment of the Court. It is not proposed to attempt a narration of this litigation. It is not inappropriate, however, to remark, that one of the Chancellors, who heard the cause at the Circuit, refused any investigation of these matters in consequence of the staleness of the claims and the laches of the parties in prosecuting them. It is not to be denied, that great and almost unprecedented delay took place in prosecuting the litigation. In no inconsiderable measure this was attributable to the parties; although the claims have been preserved, the demand of interest upon them seems obnoxious to many of the principles which influence the Court. After a careful consideration of all the circumstances, I think no interest should be charged on the sums thus received by the parties respectively; nor do I think it should be charged on the balance which may be found due in schedule (A.)

Schedule (F.,) page 109, and Mr. Hunt's account for professional services, (p. 163,) may be considered together. The Report on this subject is at p. 96; the principal of the sums charged by the Master to the defendant, amounted to twelve hundred and seventy dollars. These were for the value of a negro retained by the defendant in February, 1825, and for sums received from the auctioneers, who sold two other negroes of the estate, and for an amount collected on Theus's bond. These charges seem well sustained by the proof. Mr. Hunt's account against the estate amounts to fourteen hundred and forty-nine 50-100 dollars. This was referred back by the Appeal Court in order that an opportunity might be afforded for vouching and investigating the same. Mr. Hunt was jointly interested with the heirs of Savage Smith; and after the decree of 1825, any suit against the joint estate was defended by him. This

is apparent, from the records produced, as well as from the oral testimony taken by the Master. The accounts filed is from 1825 to 1828, inclusive; all the items, except those for professional services, strictly appear to have been sustained by proper vouchers. In

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reference *to those for professional services, the records were adduced, which showed the character of the cases. In the litigation which appears under various titles of Hugh Fraser, executors Josiah Smith, and executors Clegg, very important services were certainly rendered, and the joint estate was protected from the payment of a large demand, which was pressed through the several tribunals, with a reasonable prospect of success, but which was ultimately dismissed. At this distance of time, it is not to be expected that very positive testimony should be adduced as to the value of services rendered in each particular case. The accounts seem to me sufficiently well sustained; and that Col. Hunt is entitled to credit for that amount. Deducting the twelve hundred and seventy dollars with which he is chargeable, a balance remains of one hundred and eighty dollars, for one-half of which, the representatives of Savage Smith would be liable to him.

The demand in relation to Clegg's Point, (strictly speaking, "Michau's," for it is below the point, though originally part of the same tract,) alone remains to be considered. Every fact concerning this matter is either of record or undisputed. The proceedings in *Perdriau and wife v. B. F. Hunt et al.* (Riley's Eq. Cases, 88,) were put in evidence. Among the debts due to the copartnership estate of George and Savage Smith, was a demand against Paul Michau, deceased. Clegg's Point was the inheritance of Lydia Clegg, who had married Paul Michau, and had died, leaving her husband and five children surviving, one of whom afterwards died. In 1795, Michau mortgaged Clegg's Point to George Butler, and in 1801, he mortgaged the same to George and Savage Smith. In 1820, a bill was filed by the creditors of Paul Michau, to foreclose these mortgages. In addition to his own share, Michau had purchased the interests of two of his children. A decree of foreclosure was made, and the land ordered to be sold, and by a decree of the Appeal Court in 1822, ten-fifteenths of the proceeds of sale were ordered to be paid to the creditors of Michau, three-fifteenths to Buford and wife, and two-fifteenths to Perdriau and wife. Un-

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der the decree, *Clegg's Point was sold by the Commissioner in Equity, in 1822, to Robert Francis Withers, for twenty-two thousand dollars. R. F. Withers paid off the debt of George Butler, which was the eldest lien on Michau's share, and he bought up, and thereby extinguished the right of Buford and wife. He also made several other payments on account of his purchase to the Commis-

sloner in Equity, who paid over the several amounts to those representing the claim of George and Savage Smith. But in April, 1827, R. F. Withers, having failed to comply with the terms of sale, Clegg's Point was sold under an order of Court, at the risk of the former purchaser, and was bid off by B. F. Hunt, for the sum of eight thousand and ten dollars. The report of sales was made to the Court by the Commissioner, at the Winter Sittings, 1828, in which the order of sale is recited, prescribing, among other things, that the "purchase money" (not paid in cash,) "should be secured by bonds so divided, as to be paid over to the parties in the proportions to which they are entitled, with good personal security if required, and a mortgage of the premises."

The title deed was not to be delivered, until all the instalments were fully paid. It is stated in the case in Riley, that B. F. Hunt paid \$776 in cash, and gave his bond for the balance with interest on the whole amount, payable annually, and a mortgage of the property. Mr. Heriot, the Commissioner, in his report of 1828, just mentioned, states, among other things, that Samuel Perdrieau had made a "claim on the fund, on account of the payments made by the former purchaser—that this was resisted, and he had been ordered to proceed by Bill and Answer." He stated also, "that Benj. F. Hunt, the purchaser, claimed, as the assignee of a moiety of the estate of George and Savage Smith, an interest in one-half of eleven-fifteenths of the amount of sales."

Perdrieau and wife did proceed by Bill and Answer. The amount due to them was fixed and established, "and this Bill," say the Court, (at p. 91 Riley,) was filed by "the complainants, (Perdrieau and wife,) to enforce

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the payment of Mr. Hunt's bond, *or the foreclosure of the mortgage, and to obtain that share of the proceeds to which they are entitled. The Chancellor has decreed accordingly."

The amount which had been found due Perdrieau and wife, including interest, was (\$3,594.87,) three thousand five hundred and ninety-four 87-100 dollars.

The decree of the Chancellor was affirmed, and it was ordered, that unless the amount reported to be due Perdrieau and wife was paid on the first Monday in April next, (1837,) the land should be sold in pursuance of the decree, by which, after paying Perdrieau and wife, the proceeds were to be held subject to the further order of the Court. The defendant had taken possession of Clegg's Point under his purchase in April, 1827, and had held and cultivated the same. Failing to comply with the decree in the case of Perdrieau and wife, the land was sold by the Commissioner, and purchased by a third person.

It is difficult to perceive upon what ground

the defendant should be excused, or released, from the payment of this purchase. When the facts are understood, he is just as plainly responsible as for the bond given to the commissioner for \$4,053, on the purchase of negroes, in 1825, which has already been the subject of adjudication. It is said as a reason, that "he did not receive titles for the property, and it was afterwards sold under the decree of Perdrieau and wife, and was lost to Mr. Hunt, the former purchaser." By the terms of sale the title deed was not to be delivered until the purchase money was fully paid. As to the rest, it is precisely as if one had purchased at the commissioner's sale on a credit of ten years or more, and given bond and mortgage to secure the payment. He holds for ten years, pays a trifle or nothing on the debt, and at the expiration of the credit, the premises are sold for less than the amount due. The purchaser is to be exempted from the payment of the balance because the land was sold under a decree of foreclosure, and "lost to the former purchaser." That is this case. The defendant, as a purchaser, had nothing to do with the claim of Perdrieau and wife. He should have com-

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plied *with the terms of sale. Suppose a third person had bid off the land, in April, 1827, under the terms of the sale prescribed, had paid \$776 of the purchase money, and taken possession, what concern had he with the claim of Perdrieau and wife? As Mr. Heriot states in his report of 1828, the claim of Perdrieau was "on the proceeds" of the sale. It could be nothing else: and is so set forth in the proceedings afterwards instituted by him. His claim on the land was only under the lien created by the terms of sale, according to which the defendant purchased.

Why then should the third person so purchasing, be excused from paying his bid? And in what manner does the defendant's situation constitute a difference? The defendant insists, too, as will be shewn in the sequel, that the purchase was on account of himself alone, as his individual transaction, and for his own benefit. Although, as a purchaser, the defendant was not authorized to inquire about the claim of Perdrieau and wife, yet, as a litigant, as a person, in the language of Mr. Heriot's report, claiming a moiety of so much of the proceeds as belonged to the estate of George and Savage Smith, he might contest the amount due Perdrieau and wife out of the proceeds of sales; whatever was not due to Perdrieau and wife, belonged to the estate of George and Savage Smith, and for a moiety of that he was entitled to an equitable discount on his bond to the commissioner. The other moiety belonged to the heirs of Savage Smith. The defendant contested the amount claimed by Perdrieau and wife. He alone filed an answer to the bill. The issue was against him.

In April, 1827, when Clegg's Point was purchased by the defendant, the amount due Perdrieau was less than three thousand dollars, (the exact amount is easily to be ascertained from the record in the case which was put in evidence). If a third person had purchased and paid the \$8010 on that day, the amount due to Perdrieau and wife being deducted, the surplus would have been divided between the defendant and the heirs of Savage Smith. And on the same principle it should now be adjusted. The defendant is responsible for his purchase, \$8010, but he is equitably entitled to a credit for the sum due

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*Perdrieau and wife at the time of the sale, and for the sum of \$775.50 cts. paid to the commissioner. For one moiety of the balance, with interest from the 16th April, 1827, he is indebted to the complainants. But this is, I think, a personal debt and does not fall within the purview of the decree of 1825. The complainants, however, insist that, as between them and the defendant, he should be charged with the purchase of Clegg's Point at ten thousand dollars, instead of eight thousand and ten dollars. It will be remembered, that five years previously, this plantation had been sold to Robert F. Withers, for twenty-two thousand dollars. The allegation is something of this kind, that when the defendant bid off Clegg's Point at \$8,010, it was understood between the defendant and Peter Cuttino, who represented the complainant's interest, that the land should be re-sold for the benefit of the copartnership estate; that immediately after the sale to the defendant, an unexceptionable purchaser was found, at ten thousand dollars—and that "it was finally agreed that the complainant, as between himself and the defendants, should hold the plantations on his own account, at ten thousand dollars." The evidence on this subject is derived from the coterminous correspondence between the defendant and Peter Cuttino.

It will be observed, that the object is to set up a new and distinct contract from that made between the defendant and the commissioner.

The defendant relies on that—insists that he purchased for his individual benefit, and that there was no privity or understanding between himself and any other person. A serious obstacle to the consideration of this claim, is the late period at which it was brought forward. The defendant purchased from the commissioner, on the 16th April, 1827. It constituted, therefore, no part of the matters originally referred for investigation. In accounting for the assets of George and Savage Smith, the debt due by Paul Michau would be properly a subject of inquiry, and the proceedings in relation to it. But this alleged agreement is, for the first

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time, brought to the notice of the *Court in an answer filed by the representatives of Savage Smith, on the 25th September, 1834, more than seven years after the purchase, and their cross bill was not preferred until November, 1838, nearly eleven years after the purchase from the commissioner, and the alleged new agreement between the parties; neither in the answer of 1834, nor in the cross bill of 1838, is it alleged that there existed any written agreement between the parties; and the correspondence on which the complainants now rely, was not in any manner exhibited or put in evidence until the meeting before the Master, in August, 1842, (see page 116). I think the sequel of that correspondence was well calculated to put Mr. Cuttino on his guard, and to advise him that he and the defendant did not place the same understanding on what had passed between them. The inactivity of Mr. Cuttino for the several ensuing years, may, in some measure, be accounted for, in the relations which the defendant professionally occupied towards the joint estate. But when parties having a supposed right to establish a trust of this character, and thereby to vary the terms of a judicial sale, lie by for fifteen years with the evidence of the trust in their possession, they can have no cause to complain, if the Court regards them as having waived such a right, and restricts them to the benefit of the public sale, about which there exists neither doubt nor controversy. I am not at all satisfied that, in this matter, full justice has been done to the complainants; but in the language of the Court of Appeals, "if, in consequence of these extraordinary delays, the Court should fall short of the truth and the right in the judgment which it renders, the reproach must, in a large measure, be shared by the parties themselves, and those who acted for them." I am of opinion that the measure of the defendant's liability, is the price at which he bid off the land at the commissioner's sales.

The report of the Master, and the account submitted therewith, must be reformed according to the principles of this decree. But it is manifest that, "upon the matters reserved by the appeal decree," the defendant is

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largely indebted to the com*plainants, and, as the proceedings under the fieri facias were only suspended with a view to that inquiry, and "until the further order of the Court," the complainants now have leave to enforce the execution issued under the appeal decree, and which they had leave to lodge to bind under the order of March last.

Wm. C. Smith et al. heirs and distributees of Savage Smith, deceased, appealed from so much of the above decree as decided that interest is not to be charged on the amounts received by Brown and wife, and debts due by

them, in taking the accounts against the assignee, to ascertain what said complainants are entitled to receive from the assigned estate in his hands, as erroneous; and submitted that they are well entitled to have the interest so charged, either from the time of the receipts, respectively, or from the division under the decree in 1825, on the balance which was then due to them.

Benjamin F. Hunt also appealed from the above decree, on the grounds,

First. The decree of the Court of Appeals establishes, that the defendant, Hunt, as assignee of Brown, is liable for one-half the joint note of C. T. Brown and Elizabeth Smith, discounted at the United States Bank, December 16, 1826, for \$12,500, wherewith the debt to Bird, Savage & Bird was discharged, to the amount of \$12,144.50, and that the representatives of Savage Smith are liable for the other half. And this being a final adjudication of a principle by the highest Court, is conclusive upon the parties, and no attempt or pretence is set up to re-open the same. But the circuit decree adjudicated a matter of account, (and is warranted somewhat, it is conceded, by the words of the appeal decree,) and thereupon awards and adjudges that the distributees of Savage Smith have paid the whole amount of said sum of \$12,144.50, and are entitled to be repaid one-half thereof, with interest, at the rate of seven per cent., from the 16th December, 1826, and directs the payment to be levied and enforced out of the property of Col. Hunt, by execution of fieri facias—and there is error in this as follows.

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*1. Because there is no evidence whatever to show, or raise the presumption, that the heirs of Savage Smith ever did pay said joint note, more than the following sums in part payment thereof, to wit:—March 15, 1834, \$3206. June 5, 1834, \$5033. Bill of costs to Mr. Grimke, \$88.91 cents. In all, \$8,327.91; which sum, at that date, the interest being correctly calculated at six per cent. is less than one-half of said note, and, therefore, less than the share to be paid by the estate of Savage Smith; and this averment the appellant is ready to prove and maintain, and it will appear manifest upon inspection of the Master's report, and the evidence therewith referred to by the appeal decree, and to all the other evidence in the cause and before the Court.

2. Because there is manifest error in charging the appellant with interest, at the rate of seven per cent., from December 16th 1826, to June, 1834, the heirs of Savage Smith never having made any payment till the last date, and prior thereto, interest was charged at six per cent.

3. Because the execution allowed to be enforced by the circuit Court, is a general lien, and against all the property of Col. Hunt,

whereas, the appeal decree establishes the claim only against the specific property assigned by Brown and wife to Hunt, which was a part of the joint estate of George and Savage Smith.

Second. Because the decree is also erroneous, in charging against the share of George Smith, the claims mentioned in schedule A.

Third. Because there can be no decree to refund the amounts paid by the administrator of George and Savage Smith, to Charles T. Brown the distributee, inasmuch as there was no proof of an original deficiency of assets, and until such proof, a legatee or distributee cannot be called upon to refund, and a large portion of the same may, from the character of the receipts and proof, be properly referred to and chargeable in the large and continuous private account between Brown and Wm. S. Smith.

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*Fourth. Because the decree is erroneous, in charging against Col. Hunt the amount due by Charles T. Brown, for negro hire, inasmuch as this claim must be regarded, either as a voluntary payment to Brown, and, therefore, subject to the same rule as is set forth in the last ground, or it must be regarded as included in and belonging to the private account between Brown and William S. Smith, and also subject to the objection made on the score of defective proof, and the presumption of payment from the lapse of time between the date of the hiring and the first evidence of claim.

Fifth. Because the claim for Clegg's Point should have been dismissed, inasmuch as it is for a subject matter entirely distinct from those for which the defendant is impleaded, and not properly embraced in the pleadings; and, furthermore, because it is neither sufficiently proved, nor taken out of the presumptions arising from delay of claim.

[For subsequent opinion, see 11 Rich. Eq. 269.]

Mr. Mitchell, Mr. Yeadon, for W. C. Smith, and others.

Mr. Memminger, Mr. Hunt, for Col. Hunt.

DARGAN, Ch. delivered the opinion of the Court.

It falls to my lot, for the third time, to announce the judgment of this Court upon questions growing out of the cases above stated. My present duties are greatly abridged by the labors and adjudications of this Court and of the circuit Court, at preceding stages of the cause.

It is supererogative to travel over ground that has been already extensively and thoroughly explored, or to remark upon questions that have been already discussed and adjudged by the Court.

In reference to the claim of Bird, Savage & Bird, which is a branch of the cause which seems to have called forth the most serious

efforts at the recent hearing on the part of the appellant, (Col. Hunt), it may not be inappropriate, although it may be unnecessary, to offer some comments. Alluding to this branch of the controversy, and the judgment of the Court of Appeals thereon, the Chancellor who presided at the last circuit trial,

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*uses the following language. "It is not too much to say, that no part of the case was more thoroughly investigated, so maturely considered, and none could be, as I thought, more conclusively and distinctly settled." This is strong language; and to it I may add, that there was no part of the case, in reference to which the Court of appeals arrived at a conclusion more unanimously adopted, or more entirely satisfactory to itself.

I will not now pause to consider the question, whether the claim of Bird, Savage & Bird was a debt due by the partnership estate of George and Savage Smith. That is made sufficiently manifest by the decree of 1825, in which provision was made for its payment out of the effects of the partnership estate; by the letter of Col. Hunt, of the 18th July, 1826, in which he explicitly admits the liability of the partnership estate for the debts,—and by other circumstances, not necessary to be particularly noticed.

That the balance of this debt, charged in schedule E, of the Master's report, as having been paid by the heirs of Savage Smith, was so paid by them, or from funds belonging to them, is equally clear. The fact is susceptible of demonstration beyond any rational doubt. The circumstances on which this conclusion rests, are manifold, all tending to the same result.

The debt has been paid; and must be supposed to have been paid by some of the parties interested in its extinction. Col. Hunt does not profess to have paid it. Nor is it pretended that Charles T. Brown paid it, except in the way of hypothetical suggestion. It is contended that Brown may have paid it, but there is not a tittle of proof that he did pay it, or any part of it. In fact, it does not appear that Brown had any direct interest in the payment of this debt after his assignment of his share of the estate to Col. Hunt, by his indenture of the 11th February, 1825. Brown and wife, by this instrument, assigned their moiety of the estate to Col. Hunt, "subject to the debts of the said firm, and the account between the parties interested in the same." Again; it was recited that Col. Hunt was to have all the rights, privileges and claims of the said Brown and

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wife in *the partnership estate, and to be "subject to all the duties, obligations and responsibilities of the said Charles T. Brown and Sarah E. his wife, or either of them, in the final settlement and adjustment and division of the said copartnership estate, real and personal." And after this and other re-

citals, Charles T. Brown and wife proceed by the indenture to assign to Col. Hunt, all their lands, negroes, &c. in the partnership estate, (which had, about the date of the indenture, been assigned to them by proceedings in partition); also, all the interest of Brown and wife, in a claim set up by Josiah Smith against the partnership estate, and which had previously been assigned to Brown and wife; also, all the share of Brown and wife in the surplus of the undivided estate, if any there should be, after the payment of debts; "subject, nevertheless," as the deed goes on to declare, "to the payment and discharge of the judgments, executions, debts, claims and demands, now due, owing and payable by the aforesaid late firm of George and Savage Smith; and to the accounts between the parties interested in the said copartnership estates." The claim of Bird, Savage & Bird was then an acknowledged liability of the copartnership estate, for the payment of which, then in judgment, a provision had been made by a previous decree of the Court. Can any one doubt that, by the obligations arising out of the deed of assignment of the 11th February, 1825, and as between Hunt and Brown, it was the duty of the former, and not of the latter, to pay the one-half of this debt? Brown had no interest in the extinguishment of the debt; for if the execution in favor of Bird, Savage & Bird had been pressed, and a portion of the estate assigned by Brown and wife had been sold to satisfy it, I cannot perceive that, under the conditions of the assignment, Brown would have been in any way responsible to Hunt on that account. And this seems to have been Col. Hunt's own views when he wrote his letter to Peter Cuttino of the date 18th July, 1826. Peter Cuttino represented the heirs of Savage Smith, and the letter was written with the view of urging upon him the necessity of immediately raising a sufficient sum of mon-

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ey to pay off the balance of the *debt due to Bird, Savage & Bird. Brown, it must be remembered, was then in affluent circumstances and good credit. Yet Col. Hunt did not then say, that Brown was under any obligation to step forward for his relief in the payment of any part of the debt. But he proposes to unite with Mrs. Smith, the widow of Savage Smith, in borrowing the necessary amount; or, says he, "I will borrow one-half, if she will the other." He again says:—"I think it very likely, that the money can be procured, and without some such measure, the most disastrous consequences will follow. The amount of each share would be five or six thousand dollars. This would close the estate, as to its debts:—all then would be, to settle the accounts and adjust a final decree. Should we not be able to get the amount through the Bank, we may, perhaps, by giving a premium, get it from some individual. I do not like to do so, but it would

be much better than to have a debt of \$70,000 hanging over us." It seems to me, that this would have been a very proper occasion to have laid claim to Brown's assistance, if Brown had been interested in the extinction of the debt. But no allusion of that kind is made.

The proposal of Col. Hunt, in the letter above cited, seems not to have been adopted. And by the assistance of Mr. King, a negotiation was effected with the United States Bank for the requisite amount, (\$12,500) on the joint and several note of Mrs. Smith, the administratrix of Savage Smith, and Charles T. Brown, with a deposit, (as collateral security) of specialties to the amount of \$19,667.98. The money thus raised, beyond all controversy, was applied to the satisfaction of the balance then due on the debt of Bird, Savage & Bird. Which of the parties paid this debt thus contracted with the United States Bank? Two witnesses were examined as to this point, namely:—Mr. M. King and Mr. Henry Cuttino. There is some confusion in the notes of this testimony. Mr. King is represented as having said, in reference to certain notes and securities there mentioned, that "he paid the balance due on the notes, from the funds of Savage Smith, and then such of

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the collateral securities, *which had been assigned to the Bank, as were uncollected, together with the letter now produced in evidence, were returned to the witness, and witness delivered them up to the estate of Savage Smith." The collateral securities lodged with the Bank to assure the payment of the note, were the assets of the estate of Savage Smith. Upwards of two thousand dollars were collected by the Bank on these securities, and applied as payments on the note of Mrs. Smith and Charles T. Brown. Again, this witness says,—"the balance which witness paid the Bank, was for the note, or renewals, on which the loan for \$12,500 had been made."

The debt had been reduced by payments to \$7,700; and Mrs. Smith having died, the note in Bank was renewed by a note of Charles T. Brown and George S. Smith, payable to, and endorsed by, Peter Cuttino, and this renewal note was confessedly satisfied by funds of the estate of Savage Smith.—When Mr. King speaks of having paid the balance of the note, or renewals, he was understood by the Master, before whom his testimony was taken, to have meant the balance of the note after the application of the money collected by the Bank upon the collateral securities. Mr. King further says, that he was the friend and counsel and confidential adviser of the heirs of Savage Smith, and was intimately acquainted with the transaction. And that, although he did not attend to putting the renewals in Bank, he was constantly con-

sulted about them as they progressed. He was also the professional adviser of Charles T. Brown, after the sale to Col. Hunt, and was repeatedly consulted by him. And it is worthy of remark, that in the evidence of this witness, so cognizant, as he was, of the loan from the Bank, from its beginning to its extinction, there is not the slightest intimation that Charles T. Brown had made any payments. If Brown had made payments, is it not probable that he would have sought reclamation from Col. Hunt? Henry Cuttino testified, in so many words, that the debt contracted with the Bank was paid by the heirs of Savage Smith. In his cross-examination, he says, "from his per-

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sonal knowledge, he does not know *that Charles T. Brown and some of the family of Savage Smith did, or did not, raise money, but, from papers he has seen, he has reason to believe that they did: the papers he has reference to, are an account current of Mr. Mitchell King and a note for money borrowed from the Bank in Georgetown, by Charles T. Brown and Elizabeth Smith: the money so borrowed, was applied to the payment of the debt of Bird, Savage & Bird," &c. Whether this witness intended, in his cross-examination, to qualify his statement to the effect, that he had derived the whole of his information on the subject from the papers that he had seen, does not very clearly appear. He may not have personally known of the negotiation with the Bank, and the application of the money to the debt of Bird, Savage & Bird, and yet, being the brother of the administrator of the widow of Savage Smith, he may have personally known that the debt due to the Bank, (which was but a substitute for the balance of that which had been due to Bird, Savage & Bird), had been paid by the assets of the estate of Savage Smith.

The Master has found, and so states distinctly in his report, that the whole amount of the debt contracted with the Bank has been paid by the heirs of Savage Smith. This report bears date 8th January, 1846. The decision of the Master on this point, was then promulged, together with the evidence on which it was based. He refers expressly to Mr. King's evidence as supporting his judgment. If the Master had so widely misinterpreted Mr. King's evidence, in the interval which has elapsed from January, 1846, to the trial of the cause, why were not steps taken for the re-examination of Mr. King? Col. Hunt knowing that the Master had reported the debt with the Bank to have been paid by the heirs of Savage Smith, in his exceptions to that report did not controvert the fact. He does not deny, (in his exceptions,) that the heirs of Savage Smith did pay the whole of the Bank debt, as found by the Master. He does not as-

sert that Charles T. Brown paid any part thereof.

For the foregoing reasons, this Court, at the former hearing, (Charleston, January Term, 1850,) was satisfied that the report

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*of the Master was right in this particular. And the appeal decree confirmed the report (as to this matter) in language unmistakably clear and distinct. If the question were now *res integra*, this Court would come to the same conclusion. And indeed, it is difficult to perceive how such a conclusion could be avoided upon the evidence before us.

I have, in deference to the zealous and apparently sincere argument offered in behalf of the appellant, travelled over the grounds which have led the Court to its judgment in reference to this branch of the case. And it is satisfactory, upon a re-examination of the facts, to perceive that there has been no error committed, as was broadly asserted at the bar. But the question is not open. It is conclusively and finally adjudged by the appeal decree. And though an error of judgment, as to the facts, had been made manifest, the Court could not have corrected it. As to facts, a bill of review, or a petition for a rehearing, would not lie, except upon evidence, not cumulative, discovered subsequent to the trial.

In reference to the other questions, raised and discussed on behalf of Col. Hunt, it is deemed unnecessary to add anything to that which has been stated in the Circuit Decree. This Court concurs with the Chancellor who heard the cause, except as to one matter which will be hereinafter considered.

The question, as to interest, made in the appeal which has been taken on behalf of the heirs of Savage Smith, is interesting from its not having been heretofore much discussed. Upon demands bearing interest at law, this Court, I conceive, would be bound to allow interest. But, as to non-bearing interest demands, the claim of interest will be allowed or disallowed in this Court, according to the equity of the case. It is a matter of discretion. It is rarely disallowed in the adjustment of accounts, for it is rarely otherwise than an equitable claim. Where parties from laches, or from other similar causes, fail for a long time to prosecute their claims to a final settlement, and suffer them to lie still until the interest account has swelled to an enormous magnitude, (as in this case,) the claim for

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interest does not present itself, in this Court, in a favorable light. It would be a premium for delay. This Court concurs with the Chancellor on this point also.

This disposes of all the questions raised in the appeals which have been taken from

the circuit decree of June Term, 1850.—But there are other matters yet to be considered.

On the seventh of March, 1850, the Solicitor of the heirs of Savage Smith sued out before the Register in Equity a *fieri facias* on the decree of the Court of Appeals, which had been rendered in the cause at the preceding term of the Court. A motion was submitted by Mr. Campbell, acting for Col. Hunt, that the execution be recalled. This motion was refused. Mr. Campbell, acting on the behalf of Col. Hunt, submitted a motion, that proceedings, under the execution, be suspended until the further order of the Court; and that the complainants have leave to lodge the execution to bind.

The issuing of a *fi. fa.* could only be upon the ground that the decree had an operation in personam against Col. Hunt and upon his estate generally. The appeal decree of 1850 is a decree in rem. It operates only on the property of the partnership estate of George and Savage Smith, which was allotted in the division to Charles T. Brown and wife, and which has come into the possession of Col. Hunt by assignment from them. The appeal decree of 1850 creates no personal liability against Col. Hunt. It is expressly so declared. And so, the circuit decree of June Term, 1850, creates no personal liability against Col. Hunt, except as to the amount decreed against him on account of the purchase of Clegg's Point. A writ of *fieri facias*, to operate on the property of Col. Hunt generally, would be improper. The *fi. fa.*, which has been issued, must be recalled, and so much of the circuit decree of June Term, 1850, as allows the complainants to proceed on said *fi. fa.*, (which had been suspended by a previous order of the Court,) must be reversed.—The complainants will, of course, have a right to proceed to enforce the payment of the debt decreed to be due on ac-

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count of *the purchase of Clegg's Point, by any process which the practice of this Court allows.

It is ordered and decreed, that the *fieri facias* issued in this cause on the 7th day of March, 1850, be recalled and set aside, and so much of the circuit decree of June Term, 1850, as allows the complainants to proceed under the said *fieri facias*, be reversed. In all other respects, the decree of this Court is, that the said circuit decree be affirmed, and the appeals therefrom be dismissed.

At the February Term of the Circuit Court, the Solicitors of the heirs of Savage Smith moved the Court to grant an order nisi for the sale of so much of the estate of George and Savage Smith as had been allotted in partition to Charles T. Brown and wife, and by them assigned to Col. Hunt, as should be necessary to satisfy the debt to which the said property was declared to be liable by the appeal decree of January Term, 1850. This order was refused by the presid-

ing Chancellor, on the ground that it would be improper to grant it until the final accounting was had upon the matters of controversy reserved by the appeal decree. From this decision of the Circuit Court an appeal has also been taken.

It is not perceived, that there was any error in the decision under the circumstances that then existed. And the appeal is dismissed. The matters of controversy reserved by the appeal decree have since all been adjudged. And it is now proper that the complainants should have an order for the enforcement of the lien which has been declared by the decree of the Court.

It is therefore ordered and decreed, that unless the said Benjamin F. Hunt shall on or before the first day of November next pay to the heirs of Savage Smith, or their legal representatives, the sum adjudged and decreed against him by the appeal decree of February Term, 1850, being the sum of six thousand and seventy-two dollars and twenty-five cents, with interest thereon from the 16th day of December, 1826, to the time of payment, James W. Gray, one of the Masters of the Court of Equity in Charleston, shall, after two weeks's notice in one of the

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news-papers published in Charleston, and one of the newspapers published in Georgetown, proceed to sell for cash, before the Court House door in Georgetown, first the negroes, and then, if necessary, the lands, which, in the partition of the partnership estate of George and Savage Smith, were assigned to Chas. T. Brown and wife, and by them assigned to Benj. F. Hunt, for the purpose of satisfying the aforesaid sum of \$6,072.25, and interest thereon, together with the costs and commissions on the sale.—And it is also ordered that the said Master do pay over the said monies, so collected and raised, to the parties entitled to receive the same.

It is also ordered that, in the event the said B. F. Hunt shall fail to pay the said sum on or before the first day of November next, as herein before ordered and directed, the said B. F. Hunt do deliver into the hands of the said James W. Gray the said property, or so much as may be necessary to raise the said sum of money, whenever, after the first day of November next, he shall be required to do so by the said James W. Gray.

DUNKIN and WARDLAW, CC. concurred.

JOHNSTON, Ch. I am of opinion that the questions in relation to the demand of Bird, Savage & Bird, are concluded by the appeal decree of 1850: (and I am, now, pretty well satisfied, upon pretty clear evidence actual and presumptive).

I agree with the Court upon the subject of interest.

I am not dissatisfied with its judgment in relation to Clegg's Point.

In relation to the advances to Brown and the negro hire, though these were ruled by the Court of Appeals to fall within the purview of the decree of 1825, yet I think the evidence on the subject is too obscure, and the transactions too antiquated, to allow of a satisfactory adjudication: and that after the administrators have been discharged, the heirs of Savage Smith, who had no direct right of reclamation, should not be allowed to reclaim through the administrators,—at least without clear proof that the adminis-

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trators could reclaim. The only ground *is the subsequent depreciation of assets, in the hands of the administrators, or of the Court: and neither administrators, or other heirs, have a right of reclamation from such a circumstance.

After the hearing in these causes at this Term, and before the above decision was pronounced, Benjamin F. Hunt presented a petition for a re-hearing, upon grounds which sufficiently appear in the following opinion of the Court, delivered by

DARGAN, Ch. This is a petition for a re-hearing. The first ground assumes that the petitioner, B. F. Hunt, has by the decree of this Court, been held jointly and personally liable for the debt of Bird, Savage & Bird. This is an erroneous inference. The decree of the Appeal Court of January Term, 1850, declares no personal liability against the petitioner, but establishes a lien upon the property, which, in the partition of the partnership of George and Savage Smith, had been allotted to Charles T. Brown and wife, and by them assigned to the petitioner. The decree adjudges that the balance of this debt had been paid by the heirs of Savage Smith, as reported by the Master; and gives a lien for one-half of that amount on the property in the possession of the petitioner, derived from the partnership estate of George and Savage Smith.

The petitioner also states, as a ground for a re-hearing, that the decree of June Term, 1850, allows the complainants, the heirs of Savage Smith, to proceed by a writ of fieri facias for the enforcement of their claim. This has been made a ground of appeal from that decree. It has been considered by the Court, and so much of the said decree, as is complained of in this particular, has been reversed by the decree of this Court, rendered during this Term.

In reference to the error alleged in the petition, as apparent on the face of the decree of the Court of Appeals, in respect to the amount paid by the heirs of Savage Smith, on the debt of Bird, Savage & Bird, it would, perhaps, be sufficient to refer to what has been said in the appeal decree which has been rendered during the present Term.

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*A bill of review and a motion for a re-hearing are entertained on similar grounds. There are but two grounds on which either of those proceedings will lie. First; they will be entertained on account of error of law apparent upon the face of the decree; and any part of the record may be resorted to for the purpose of making such error of law in the decree manifest. This petition sets forth no error of law in the decree, and this Court perceives none.

The other ground upon which a bill of review, or a motion for a re-hearing, will be entertained, is newly discovered testimony; that is to say, testimony discovered since the trial. This testimony must be important and must materially vary the case made; it must not be cumulative as to the evidence which was before the Court upon the trial; and it must be such as the party, petitioning for a re-hearing, was not aware of before the trial, and could not by proper diligence and enquiry have discovered. To which it may be added, that many of the authorities declare that it must be written testimony. As to the grounds upon which a re-hearing will be ordered, see *Hinson v. Pickett*, 2 Hill Eq. 351.

The ground set down in this petition for a

re-hearing, is nothing more than alleged error of judgment on the part of the Court, in deciding upon an issue of fact. This is a very good ground of appeal, if well founded, where an appeal is taken from a lower to a higher tribunal, but I am not aware of any precedent for such cause being considered a ground for a re-hearing after a cause has been finally adjudicated. And more particularly is this assertion true, where the Court has had evidence before it, though that evidence might be doubtful. For it was held in *Johnson v. Lewis*, (1 Rich. Eq. 390,) that a petition will not be allowed for supposed error in the conclusion of the Court drawn from doubtful or equivocal evidence. The rule was, in this case, unrelentingly applied, where the cause was decided by two Chancellors in opposition to the opinion of one of the Court and of the absent Chancellor who presided on the circuit.

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*But, as has been before intimated, the Court perceives no error. It is satisfied with its conclusions as to the matter complained of. The petition is dismissed.

JOHNSTON, DUNKIN and WARDLAW,
CC. concurred.

IN THE COURT OF ERRORS

COLUMBIA—DECEMBER, 1850.

ALL THE JUDGES AND CHANCELLORS PRESENT.

3 Rich. Eq. *543

*S. P. and J. E. M. TEMPLETON v. WM.
and JOHN WALKER.
(Columbia, Dec., 1850.)

[*Deeds* ⇨ 105.]

A father by the same deed made separate gifts of negroes to his three daughters; the gift to P. was to her "and her future heirs of her body;" and the deed further provided, that, "if either of the above named girls should die without any lawful heirs of their body, her property shall go to the surviving children:" P. died leaving issue, two children, and two grand-children, issue of a deceased daughter:—*Held*, (1) that the issue of P. took as purchasers, and (2) that they took per stirpes,—not per capita.

[*Ed. Note*.—Cited in *Nix v. Bay*, 5 Rich. 426; *Collier v. Collier*, 3 Rich. Eq. 557; *Pordrian v. Wells*, 5 Rich. Eq. 28; *Evans v. Godbold*, 6 Rich. Eq. 35; *Barksdale v. Macbeth*, 7 Rich. Eq. 133, 134; *Rembert v. Vetoe*, 89 S. C. 211, 213, 71 S. E. 959.

For other cases, see *Deeds*, Cent. Dig. §§ 278–291, 372–374, 420; Dec. Dig. ⇨ 105.]

[*Wills* ⇨ 525.]

Whenever, by the terms of description, in a devise or grant, resort must be had to the statute of distributions for the purpose of ascertaining the objects of the gift, resort must also be had to the statute to ascertain the proportions in which the donees shall take, unless the instrument making the gift indicates the intention of the donor that a different rule of distribution shall be pursued. (*a*)

[*Ed. Note*.—Cited in *Evans v. Godbold*, 6 Rich. Eq. 39; *Allen v. Allen*, 13 S. C. 531, 36 Am. Rep. 716; *Kerngood v. Davis*, 21 S. C. 207; *Dukes v. Faulk*, 37 S. C. 264, 265, 267, 16 S. E. 122, 34 Am. St. Rep. 745; *Kitchen v. Southern Ry.*, 68 S. C. 561, 48 S. E. 4; *Rembert v. Vetoe*, 89 S. C. 210, 71 S. E. 959; *Gardner v. Horton*, 89 S. E. 638.

For other cases, see *Wills*, Cent. Dig. § 1133; Dec. Dig. ⇨ 525.]

Before Dargan, Ch. at Barnwell.

Stephen Phillips, on the 17th December,

(*a*) *Freeman v. Knight*, (2 Iredell's Eq. 72.) If a bequest of personal property be to heirs simply, they take in the proportions prescribed by the statute of distributions; but as the testator directs the property "to be equally divided" among them, the division must be per capita, the children of the deceased daughter taking each an equal share with the children of the testator.

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1815, executed a deed in the following words, to wit.

"Know all men by these presents, that I, Stephen Phillips, of the said State and district, do, of my own free will, and for love to my children, as follows, viz.: my daughter, Polly Phillips, I do give unto her, and her future heirs of her body, two negro girls, Darks and Sealey. I do give unto my

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daughter, Flower *Phillips, one negro boy, named Peter. I do give unto my daughter, Elizabeth Nix, one negro boy, named Jeffree. Also I do give unto my three above mentioned daughters, one negro woman, Abigail, and her future increase; which said negro woman and increase, if any, after the death of my wife and myself, is to be equally divided, among my above mentioned daughters. It is to be understood, that the above mentioned property is to remain in my possession, or my wife's, till after our deaths, then to go as above mentioned—the above property is to my said daughters and the heirs of their body. Now, if either of the above named girls should die without any lawful heirs of their body, her property shall go to the surviving children, and so on."

Polly Phillips intermarried with Alexander Templeton, and upon the death of Stephen Phillips and his wife, the property given by the deed to Polly Phillips, passed into the possession of her husband.

In 1847, Polly departed this life, leaving surviving her, her said husband, and two children, (who are the complainants,) and two grand-children, the issue of a deceased daughter, (who are the defendants).

On the 2d of August, 1849, the negroes given by the deed to Polly, had increased to twenty in number, and on that day, Alexander Templeton, supposing the limitation in the deed to be too remote, and that his marital rights had attached, executed a deed, whereby he released all his interest in the negroes, to the complainants and the defendants, to be divided amongst them in the following proportions, that is to say, one-third

to the complainant, Stephen P. Templeton, one-third to the complainant, John E. M. Templeton, and the remaining third, to be equally divided between the defendants, William and John Walker, who were infants.

The bill was for partition according to the terms of the deed of Alexander Templeton.

The answer stated the infancy of the defendants, and submitted that Alexander Tem-

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pleton had no interest in the negroes *after his wife's death, and that the title to the said negroes should be determined according to the provisions of the deed of Stephen Phillips, under which, (as they were advised) the heirs of the body of Polly Phillips took per capita and not per stirpes.

Dargan, Ch. After holding that, under the deed of Stephen Phillips, the limitation over 'to the surviving children' was good, and that the 'heirs of the body' of Mrs. Templeton took as purchasers, after a life estate in their mother: added: "If this be so, then the deed of Alexander Templeton can have no effect in varying their rights, and the next question occurs, do the issue of Polly Templeton take per stirpes or per capita? On the authority of *Campbell v. Wiggins*, *Lemaks v. Glover*, and *Keitt v. Houser*, I hold that the children and grand-children take per capita, and in equal shares. A case involving this point, (*Collier v. Collier*) has recently been referred by the Court of Equity to the Court of Errors. Of course, the ultimate decision in the case before me, must depend upon the decision in the Court of errors. For the present, I decide in conformity with my own views."

"It is ordered and decreed, that the complainants and defendants are entitled to the estate mentioned in the pleadings, to be divided among them per capita. It is also ordered, that the parties have leave to apply at the foot of this decree for such orders as may be necessary to carry it into effect."

The complainants appealed, on the grounds,

1. That his Honor should have decreed that the limitation over, in the deed of Stephen Phillips, is too remote, and that, therefore, the defendants take the proportions given them by the deed of A. Templeton.

2. That even if the said limitation over be good, nevertheless, his Honor should have decreed, that the estate mentioned in the pleadings, be divided per stirpes and not per capita.

At May Term, 1850, the appeal was heard

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at Columbia, by *the Equity Court of Appeals, and the following opinion thereon pronounced.

PER CURIAM.—This Court is satisfied with the decree that the heirs of the daughters took as purchasers, which is drawn in question by the first ground of appeal: and

it is ordered, that the decree on that point be affirmed, and the appeal dismissed.

It is further ordered, that this cause be sent to the Court of Errors (and docketed) for its judgment upon the question involved in the second ground of appeal; and to be heard in connexion with *Collier v. Collier*.

JOHNSTON, DUNKIN and DARGAN, CC. concurring.

Upon the question involved in the second ground of appeal, the case was now heard in the Court of Errors.

J. T. Aldrich for complainants. The question is, do the heirs of Mrs. Templeton take per capita, or per stirpes? What mode did the grantor intend? Clearly the proportions of the statute, because he describes them as "heirs of the body," without repudiating the proportions of the statute; the description "heirs of the body," compels a resort to the statute to ascertain its meaning. This express adoption of the objects of the statute, unaccompanied by a repudiation of its proportions, amounts to an implied adoption of its proportions. When a person uses language which compels us to go to the statute for its interpretation, the inference is, that such person points to the statute as the exponent of his meaning, except in so far as he expressly repudiates it. The intention of the grantor was, that the heirs of Mrs. Templeton should take in the same way as the issue of an intestate. Why should not this intention prevail? "Because," says Lord Eldon, in *Lady Lincoln v. Pelham*, (10 Vesey, 175,) "it is better to adhere to a settled construction, than to come to a decision, having a tendency to shake that which forms a rule of construction, and which may in practice have been acted upon in many cases." But there is no such "settled construction" in South Carolina. The presence of this case

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in *the Court of Errors, is alone sufficient to show that the question is still unsettled. The true rule is, whenever the persons intended to take under a grant or devise, are so described as to compel a resort to the statute, to ascertain who they are, the statute must also furnish the proportions in which they are to take, unless the grantor or testator introduces into the grant or devise, some expression or expressions expressly repudiating the proportions of the statute. (2 Jarman on Wills, 47.) But the operation of this rule ceases, where the language employed creates no necessity for resorting to the statute for its interpretation. Thus where the gift is to "children," "grand-children," "sons," "daughters," &c., there is no necessity for a resort to the statute, and therefore no reference to the statute is to be implied from their use. The legal construction of these terms accords with their popular signification. But when the objects are described as heirs, heirs

of the body, issue, and the like, a resort to the statute becomes necessary, for these are technical expressions, differing from their popular signification. The following cases are examples of expressions repudiating the proportions of the statute. *Thomas v. Hole*, (Cases Temp. Talbot, 251.) is a leading case. There the words of the will are, "to the relations of Elizabeth Hole, to be divided equally between them." Lord King determined, "that as the testator had directed the £500 to be divided equally amongst them, he could not direct an unequal distribution," (to-wit, the distribution of the statute,) "and he accordingly decreed them to take per capita." The same remarks are applicable to the case of *Leigh v. Norbury*, (13 Ves. 339.)

No persons taking as heirs of the body, can take otherwise than as the statute gives it to heirs of the body, viz: per stirpes, unless the instrument under which they take points out a different mode of distribution; *Rowland v. Gorsuch*, (2 Cox. 187.)

Bellinger & Hutson, contra.

WARDLAW, Ch., delivered the opinion of the Court.

Stephen Phillips, by voluntary deed, gave

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to his daughter, *Polly Phillips, afterwards Polly Templeton, "and her future heirs of her body, two negro girls, Darks and Sealey;" to his daughter Flower Phillips a negro boy named Peter; to his daughter Elizabeth Nix a negro boy named Jeffree, and to his three daughters, above mentioned, a negro woman named Abigail; and, after some provisions not now in question, proceeds to declare "the above property is to my said daughters and the heirs of their body—now if either of the above named girls should die without any lawful heirs of their body, her property shall go to the surviving children, and so on." Polly Templeton, died in 1847, leaving her husband Alexander Templeton, two children, the plaintiffs, and two grand-children, the issue of a deceased daughter, the defendants, who would be the distributees of her estate if she died intestate. The husband, Alexander Templeton, on 2d August, 1849, executed a deed, whereby he released all his interest in the negroes then twenty in number given by the deed of Stephen Phillips to his daughter Polly to the plaintiffs and defendants, in the proportions of one-third to each of the plaintiffs, and of one-third to the defendants to be equally divided between them. The bill prays partition of the negroes, according to the scheme of this last deed.

The Court of Appeals in Equity has decided, on the construction of the deed of Stephen Phillips, that the issue of Polly Templeton took as purchasers, after her life estate; and has referred to this Court the single question, whether the property shall

be divided amongst said issue per stripes or per capita.

It is well said by Lord Eldon, in *Lady Lincoln v. Pelham*, (10 Ves. 175,) a case somewhat analogous to the present, that "it is better to adhere to a settled construction than to come to a decision having a tendency to shake that which forms a rule of construction, and which may, in practice, have been acted upon in many cases." Our first inquiry, then, should be, whether such words as are now in question have received a "settled construction" in this State. In the case of *Campbell v. Wiggins*, (Rice's Eq. 10,) in December, 1838, it was decided by three Chancellors against the opinion of the Chan-

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cellor on the circuit, that, under *a grant by Act of Assembly to the "heirs at law of John Taylor and Blake Wiggins," all who could bring themselves within the terms of the description were entitled to take per capita; and the general doctrine was announced that "when the persons intended to take under a grant or devise are described as a class, without designating the proportions in which they are to take, all are equally entitled who can bring themselves within the description." In *Lemacks v. Glover*, (1 Rich. Eq. 141,) in January, 1845, where the limitation was to the "heirs of the body" of a tenant for life, the question as to the proportions in which the designated persons should take the estate, was referred to the ten Judges in the Court of Errors, but no authoritative decision was attained—five Judges, including one of the majority in *Campbell v. Wiggins*, being of opinion that the distribution should be regulated by our Act of 1791, and five Judges being of opinion that the estate should be equally divided amongst all the objects of the gift. In *Kelt v. Houser*, (M. S. May, 1846,) the Equity Court of Appeals decided according to the case of *Campbell v. Wiggins*, but some stress seems to have been laid upon expressions introduced into the gift indicating equality of participation among the objects of bounty. In *Rochell v. Tompkins*, (1 Strob. Eq. 114,) where an estate was limited, upon the death of a wife, without appointment and without living issue, to her right heirs, it was held, that our statute of distributions should ascertain as well the persons who were to take, as the proportions in which they should take; and there the husband, as statutory heir, took one half of the estate, and the other distributees, who were numerous and in different degrees of relationship, took shares jure representationis; but, in that case, the question seems not to have been argued by counsel nor considered by the Court. In *Seabrook v. Seabrook* (McM. Eq. 201,) the question underwent some discussion, but the case was determined upon principles not affecting the question. After this review of our cases on this subject I think

we may pronounce that, notwithstanding the doctrine of *Campbell v. Wiggins* may have been the law of this State for about six years, it was greatly shaken by the case

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*of *Lemacks v. Glover*, and that we have not any "settled construction" of such terms of description as are employed in the present case, forming a rule of property, and that we are at liberty to adopt any rule on the subject which we may suppose will best subserve the intention of donors and the policy of the State. This conclusion is greatly confirmed by the consideration that our Act of 1791 is, and has long been, extensively known and highly approved by the people of this State; and that this legislative will, as it was called in the argument, has always had more influence in regulating testators and other grantors in the distribution of property than the rule of *Campbell v. Wiggins*, which was little known, except to members of the profession, and could not have been acted upon in practice in many cases.

Whatever may be the doctrine of the English cases on this subject, the state of our law and of public policy justify the rule that whenever we are compelled by the terms of description, in a devise or grant, to resort to our statute of distributions for the purpose of ascertaining the objects of the gift, we must also resort to the statute to ascertain the proportions in which the donees shall take, unless the instrument making the gift indicates the intention of the donor that a different rule of distribution shall be pursued. In England, leaving out of view such exceptions as grow out of estates of gavelkind and coparcenary, &c., the heir is a single individual, designated by the common law, and when the term heirs is employed, it means persons who are to take successively as heir, and not persons who are entitled to an equal, or even a common participation; but our Act of 1791 is an Act of descents as well as distributions, and determines at once who shall be the heirs of the real estate of an intestate and the distributees of his personalty.

The term heirs is inapplicable to the succession to personal estate, and even as to real estate, we have no other heirs except the hæredes facti of our statute of distributions (*Seabrook v. Seabrook*). As remarked by that eminent jurist, Chancellor Harper, in *Lemacks v. Glover*, in an argument that

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has nearly *exhausted the subject: "In England, when the term heirs or heirs of the body is taken to mean a class of persons, these cannot, in any manner or respect, take as heirs or heirs of the body. Whether construed children, issue or descendants, next of kin, &c., they must be always different persons from the heirs: not so with us." In the case under consideration the Court of Appeals in Equity could not have attained the

conclusion that the "heirs of the body" of the tenant for life took as purchasers, within the rules as to the remoteness of limitations, otherwise than by construing these terms to mean the descendants of the tenant for life living at the time of her death, or something equivalent. No one can take as heir of the body of another unless he fulfils the description, and is not only such a person as would take the real estate of that other under our Act of distributions, but likewise a lineal descendant. As we are obliged, then, to ascertain from the statute of distributions who are the heirs of the body, it is a logical consequence that we should look there also to ascertain their shares in the subject of gift. The statute is the exponent of the full meaning of the donor unless he has declared a contrary intent, which is not pretended in the case before us. "And this agrees with what the law supposes to be the rule of affection, by which children are preferred to grandchildren and nearer kindred to the more remote." (Per Harper, Ch. in *Lemacks v. Glover*.) Certainly in all the cases on this point which have hitherto come before the Courts of South Carolina, the intention of the donors would have been more completely fulfilled by following the statute for the shares, and it is believed that such would be the result in a large majority of the instances that will occur in practice. A fertile mind may conceive cases of hardship from the operation of any general rule, but such hardship from the rule we are disposed to establish in this matter, may be avoided always by the careful expression of the whole intention of the testator. In *Lady Lincoln v. Pelham*, where the gift was of "one-fourth to the children of A. and one-fourth to or among the children of B."; and distribution per capita was directed, Lord Eldon said, "I am not sure that my de-

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cision does *not defeat the intention." What was doubtful in that case seems certain whenever there is a necessary reference to the statute to ascertain the donees. Most, if not all, of the English cases which hold that the distribution shall be per capita, where gifts are made to a class of persons, such as to children, grandchildren, to A. and the children of B. to the next of kin of A., &c. (*Northey v. Strange*, 1 P. Wms., 340; *Blackler v. Webb*, 2 P. Wms., 383, are examples,) are not inconsistent with the rule we have adopted, for in them there is no necessary reference to the statute of distributions for any purpose. We do not go to the statute to discover who are children, next of kin, &c.; but we are obliged to look there to find out who are heirs of the body, descendants or relations entitled to take; and in the cases which actually occur we commonly find them, not strictly a class but individuals standing in various degrees of

kindred to the intestate or first taker, and entitled to unequal shares of the estate.

It was strongly insisted in the argument of this case, that wherever several persons take as purchasers under one gift, they must take per capita, and that no case can be found to the contrary. But where is the necessary connection between the ideas of purchase and equality? Surely a testator might provide for unequal distribution among those taking by purchase; as by a gift to A. and the three children of B., so that A. should take one half, or by a gift to C. for life and upon his death to his children then living, the eldest son of C. taking one half, however numerous such children may be. It is useless, however, to suppose cases when examples may be found in the books. In 2 Jarm. 46, it is said: "The statute of distributions not only determines the objects of a gift to 'relations,' but also regulates the proportions in which they take, the gift being held to apply to the next of kin and the persons whom the statute admits by representation, the whole being taken per stirpes, not per capita; that is, the property is distributable proportionably among the stocks, not equally among the several individual objects of every degree."

In *Roach v. Hammond*, (Pre. in Ch. 401,) on a gift by a testator of all his real and personal estate "for the use of his rela-

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tions," it was determined that those who would be entitled to his personal estate under the statute of distributions, and those only, should come in, and that they should take in the proportions prescribed by the statute; and the Lord Chancellor said it had been often ruled accordingly in this Court. See also *Masters v. Hooper*, (4 Bro. C. C. 207;) *Devisme v. Mellish*, (5 Ves. 525.)

In *Stamp v. Cooke*, (1 Cox. 234,) where testator directed the residue of his estate to be parted amongst his "next relations, as sisters, nephews and nieces," Sir Lloyd Kenyon, Master of the Rolls, held that distribution should be according to the statute, per stirpes. He said, "the statute is not to be adverted to, when testator has himself laid down a different rule, but has that been done?"

In *Rowland v. Gorsuch*, (2 Cox, 187,) Sir L. Kenyon applied a similar rule to the words "descendants or representatives," saying that no person, taking as representative, can take otherwise than as the statute gives it to representatives, i. e. per stirpes. See also *Booth v. Vickers*, (1 Coll. 6;) *Cotton v. Cotton*, (2 Bea. 67.)

It is now settled in England, that in a gift, "next of kin" means nearest in kindred in degree, and implies no reference to the statute of distributions. *Brandon v. Brandon*, (3 Swanst. 312;) *Elmesley v. Young*, (2 Myl. & K. 780;) (8 Con. Eng. Ch. R. 227.) But the opinion prevailed there for a long time, that next of kin meant such of the

kindred as would be entitled to shares of an intestate's estate, under the statute; and while that opinion prevailed, the statute was also adverted to for the proportions of the distributees. In the case of *Stamp v. Cooke*, already cited, the Master of the Rolls said: "If the residue had been given to the next of kin, and the testator had stopped there, the statute would have been the rule to go by, and although nephews and nieces are not in fact so near as sisters, yet the fund would have been distributed per stirpes, according to the statute." It is true, that in *Phillips v. Garth*, (3 Bro. C. C. 64,) Mr. Justice Buller, sitting for the Lord Chancellor,

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determined *that, where a testator left his property to be equally divided amongst his next of kin, the subject of the gift should be divided per capita among the surviving brothers, nephews and nieces of the testator. It appears, however, from the remarks of Sir John Leach, M. R., in *Hinchley v. Maclarens*, 1 Myl. & K. 27, (6 Con. Eng. Ch. R. 480,) that when the case of *Phillips v. Garth* came before Lord Thurlow, by way of appeal, his Lordship expressed doubt as to the propriety of the decision, and that the appeal was abandoned upon a compromise among the next of kin, by which the property was divided among them per stirpes, and not per capita—and that Mr. J. Buller's decision was doubted by Lord Eldon, in *Garrick v. Lord Camden*, (14 Ves. 385,) and disapproved by Sir Wm. Grant, in *Smith v. Campbell*, (19 Ves. 403,) and the Master of the Rolls refers these doubts and disapproval to so much of the decision as directs distribution per capita.

In the case of *Hinchley v. Maclarens*, above cited, the testator gave the bulk of his property to his daughter, but directed that if she died before attaining the age of twenty-one, his property should be equally divided amongst his next of kin. The testator left surviving him his daughter, one brother, and two nephews and a niece, the children of two deceased sisters.—The daughter died under twenty-one, intestate and unmarried. Sir John Leach determined that where the words "next of kin" were used simpliciter in a gift over, and without explanatory context, showing a different intention on the part of the testator, they must be taken to mean next of kin, according to the statute of distributions, and that the property must be divided, not per capita, but per stirpes.

Sir John Leach reiterated this opinion, upon a like state of facts, in *Elmesley v. Young*, 2 Myl. & K. 82, (7 Con. Eng. Ch. R. 270,) but his opinion was overruled by Commissioners Shadwell and Bosanquet, upon appeal, on the ground, however, that there was no reference to the statute, for the meaning of the words "next of kin," 2 Myl. & K. 780, (8 Con. Eng. Ch. R. 227.)

It is the opinion of this Court that, by the

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principles of the *common law, by the reasoning of the English cases, and by our own law and policy, we are justified in establishing as a general rule, in cases like the one before us, that the partition shall be per stirpes; and it is so ordered and adjudged in this case.

O'NEALL, EVANS, WARDLAW, FROST, WITHERS and WHITNER, JJ., and DUNKIN, Ch., concurred.

3 Rich. Eq. 555

THOMAS COLLIER and Others v. ELEANOR COLLIER and Others.

(Columbia. Dec., 1850.)

[Wills 531.]

Testator bequeathed to his deceased "son John's children" a negro; to his deceased "son William's children" another negro; to his "daughter Margaret," and to each of his other four children, naming them, certain negroes; and, "tenthly, all the rest of my estate not yet disposed of, I give to be equally divided among my above named heirs;" Held, that, under the tenth clause, the legatees took per stirpes and not per capita; that is to say, that "John's children" took, between them, one share, "William's children," between them, one share, and the five children of testator each one share.

[Ed. Note.—Cited in *Perdriau v. Wells*, 5 Rich. Eq. 28; *Felder v. Felder*, Id. 515; *Barksdale v. Macbeth*, 7 Rich. Eq. 133; *Allen v. Allen*, 13 S. C. 532, 36 Am. Rep. 716; *Kerngood v. Davis*, 21 S. C. 207; *Dukes v. Faulk*, 37 S. C. 266, 16 S. E. 122, 34 Am. St. Rep. 745.

For other cases, see Wills, Cent. Dig. § 1150; Dec. Dig. 531.]

Before Dunkin, Ch., at Orangeburg.

William Collier, who died in January, 1849, by his last will and testament, bearing date the 10th March, 1846, devised and bequeathed as follows:

"First, I give to my son John's children, a negro man named Jack. Secondly, I give to my son William's children, a negro man named Israel. Thirdly, I give to my daughter Margaret, a negro woman named Harriet, and her children. Fourthly, I give to my daughter Sophia, two negroes, Selina and Alfred. Fifthly, I give to my son Thomas, two negroes, Job and Edward. Sixthly, I give to my son George, two negroes, Ned and Sophia Ann. Seventhly, I give to my daughter Nelly, a negro woman named Hager, and her children, and a negro girl named Rosanna; but in the event should my daughter Nelly die, leaving a child or children, in that case, it is my will, that the said negroes go to her child or children; but should she die before her husband David, it is my will that one-

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half the said negroes *go to the said David; but should the said David die before my daughter Nelly, then it is my will that none of the said negroes shall go to any of the

heirs of the said David, but it is my will, that the negroes after the death of my daughter Nelly, come back to my above named heirs. Eighthly, I give to my wife, Eleanor, three negroes, Moriah, Stephen and Caesar, also one horse, named Jim, and a Dearbon wagon, and as much household furniture as she may think necessary for her use, to be only during her life, after death, it is my will, that the property I give my wife be equally divided among all my above named heirs. Ninthly, I give to my grandson Oliver, one bed and furniture. Tenthly, all the rest of my estate not yet disposed of, I give to be equally divided among all my above named heirs."

William Collier left surviving him, his widow, his five children, Margaret, Sophia, Thomas, George and Nelly, named in his will; five grand-children, namely, J. D. W. Collier, Lewis P. Collier, Francis C. Collier, Mary A. Collier and William O. Collier, children of his deceased son, William Collier; and five other grand-children, namely Mary Weathers, Susannah Moorer, S. W. M. Collier, Oliver D. Collier, and Albert G. Collier, children of his deceased son John Collier.

The only question was as to the proportion in which the parties took the property, a tract of land, and about eighteen slaves, which passed under the 10th clause of the will.

Dunkin, Ch. The only question is as to the proportion, in which "the above named heirs" shall take. The context of the will seems to confine the term to the children and grand-children of the testator, and not to include his widow. The principle of the case cannot well be distinguished from that involved in *Campbell v. Wiggins*, (Rice's Eq. 10.) The authority of that case is much shaken by the decision of the Court of Errors, on the same point, in *Lemacks v. Glover*, (1 Rich. Eq. 141.) Under these circumstances, it seems proper, that the doctrine should be reviewed; and I recommend that this case be carried up for that purpose. At

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present, I am bound by the *authority of *Campbell v. Wiggins*, and must decree, that the children of John and the children of William, take per capita, with the children of the testator. It is ordered, that the writ of partition issue to divide the estate accordingly.

The complainants appealed, on the ground,

That his Honor should have decreed that the children of John and the children of William take per stirpes, and not per capita, with the children of the testator.

Munro, for appellants.

Ellis, contra.

WARDLAW, Ch., delivered the opinion of the Court.

It is the opinion of this Court, that this case must be determined on the authority of the case of *Templeton v. Walker*, [3 Rich. Eq. 543, 55 Am. Dec. 646], and we refer to that case for the reasoning and authority by which our general conclusion is attained. The words of gift are here somewhat different, and it has been argued that the testator, by directing that his estate shall 'be equally divided among all his above named heirs,' has manifested his intention, that the distribution of his estate shall be per capita among all who bring themselves within the scope of the term 'heirs'; and that this case is within the exception to the general rule. But it seems to us, that upon the whole will, and particularly by the manner and amount of the several primary gifts to his 'son John's children,' to his 'son William's children,' to his 'daughter Margaret,' his 'daughter Sophia' and to his other children, and by the phrase 'above named heirs,' the testator signifies his purpose, that his 'son John's children' shall be one of his heirs, his 'son William's children'

shall be one of his heirs, and each of his own children one of his heirs; and that the words of equality are satisfied by equal distribution amongst those of the same degree, according to the statute. The testator's 'grand-son, Oliver,' is represented to be a son of John, and will it be urged that testator intended Oliver to take two full, equal shares?

The appeal presents no question as to the
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right of the widow, *Eleanor, to a share of the residue of the estate, and this Court has not considered that matter.

It is ordered and decreed, that a writ of partition issue to divide the residue of the testator, William Collier's estate, among his children and grand-children, per stirpes; and the circuit decree is modified accordingly.

O'NEALL, EVANS, WARDLAW, FROST,
WITHERS and WHITNER, JJ., and DUNKIN, Ch., concurred.

Decree modified.

IN THE COURT OF ERRORS

COLUMBIA—MAY, 1851

ALL THE JUDGES AND CHANCELLORS PRESENT EXCEPT WARDLAW, J.,
WHO WAS ABSENT HOLDING THE CIRCUIT COURT
FOR CHARLESTON.

3 Rich. Eq. *559

*CAREY M'LURE, Adm'r. v. JAMES M.
YOUNG, JUN.

(Columbia, May, 1851.)

[Wills ⇨614.]

Testator devised real property to his "daughter C., for and during the term of her natural life; and at her death, I give, bequeath and devise the same, absolutely and forever, to her lineal descendants; and in case she should die without lineal descendants, (one or more,) living at the time of her death, then," over; *Held*, that C. took a life estate, with remainder to her lineal descendants as purchasers.

[Ed. Note.—Cited in *Hays v. Hays*, 5 Rich. 38; *Danner v. Trescot*, Id., 360; *Addison v. Addison*, 9 Rich. Eq. 61; *Markley v. Singletary*, 11 Rich. Eq. 396; *Anderson v. Rhodus*, 12 Rich. Eq. 111; *Monaghan v. Small*, 6 S. C. 182; *Bannister v. Buil*, 16 S. C. 228; *McIntyre v. McIntyre*, Id., 294, 295, 297; *Fields v. Watson*, 23 S. C. 46, 55; *Smith v. Smith*, 24 S. C. 315; *Archer v. Ellison*, 28 S. C. 241, 5 S. E. 713; *Fuller v. Missroon*, 35 S. C. 330, 14 S. E. 714; *Shaw v. Erwin*, 41 S. C. 214, 19 S. E. 499; *Simms v. Buist*, 52 S. C. 559, 560, 561, 30 S. E. 400; *Duckett v. Butler*, 67 S. C. 135, 45 S. E. 137; *Williams v. Gause*, 83 S. C. 270, 65 S. E. 241; *Adams v. Verner*, 102 S. C. 15, 86 S. E. 214.

For other cases, see Wills, Cent. Dig. § 1402; Dec. Dig. ⇨614.]

[Wills ⇨610.]

Testator bequeathed personal property to his "daughter C., and the issue of her body forever; but in case of my said daughter's death without issue living at the time of her death, then," over; *Held*, that C. took a life estate with remainder to her issue as purchasers.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1380; Dec. Dig. ⇨610.]

[Wills ⇨610.]

Testator bequeathed personal property to his "daughter C.; but in case of my said daughter's death without issue living at the time of her death, then," over; C. died leaving issue; *Held*, that C. took an absolute estate in the property, and that the same vested in her husband, jure mariti.

[Ed. Note.—Cited in *Buist v. Dawes*, 4 Rich. Eq. 424.

For other cases, see Wills, Cent. Dig. § 1384; Dec. Dig. ⇨610.]

[This case is also cited in *Simms v. Buist*, 52 S. C. 554, 30 S. E. 400, and distinguished therefrom.]

Before Johnston, Ch., at Newberry, July, 1849.

Jonathan Davenport, deceased, by his last will and testament, bearing date the 18th May, 1842, devised and bequeathed as follows:

"1st. It is my will and desire, that all my just debts and funeral expenses be first paid out of the cash on hand, and notes and bonds owing to me at the time of my death; and, if that fund be not sufficient, then out of the balance of my estate.

"2d. It is my will, that all the personal

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property which I have *heretofore given to any of my children, and put them in possession of, be vested in my said children respectively, absolutely and forever.

"3d. I give and devise to my daughter, Catherine Davenport, the whole of my real estate, of which I may die seized, containing in all about fourteen hundred acres of land, for and during the term of her natural life; and at her death I give, bequeath, and devise the same absolutely and forever to her lineal descendants; and in case she should die without lineal descendants, (one or more,) living at the time of her death, then it is my will, that the whole of said real estate revert to my estate, and be disposed of as hereinafter directed.

"4th. I give and bequeath to my daughter, Catherine Davenport, and the issue of her body forever, my Merriman clock, and the following twenty-four negro slaves, viz: Andy, Kit, Phillis, Smith, Frances, Milton, Sam, (son of Kit), Caroline, Ritter, Amanda, Melinda, Charles, Lucinda, Griffin, Jerry, Lewis, Peter, Anderson his wife Martha, her children Mary, Nancy and Emily, Sampson and Tener, with their future increase; but in case of my said daughter's death without issue living at the time of her death, then it is my will, that the property herein bequeathed to her, by this or any other clause of my will, be equally divided between my children, James M. Davenport,

John G. Davenport and Aimy Hill; and I give and bequeath and devise the same to my said three children and their heirs forever, share and share alike.

"5th. I give and bequeath to my said daughter, Catherine Davenport, the choice of my wagons, and four choice horses; pork sufficient for one year, and a stock of hogs sufficient to make pork for the next succeeding year; one thousand bushels of corn, and a proportionate quantity of fodder and oats; three choice beds and furniture, all my household and kitchen furniture, and my barouche and harness.

"6th. I give and bequeath to my son, James M. Davenport, and to his heirs forever, the following negro slaves, with their future increase, viz: Ned, Mariah, Iverson, Isaac,

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Claiborne, *Viny, Charlotte, Hannah, Blufford, (son of Easter,) Nelson and old Hannah.

"7th. I give and bequeath to my son John G. Davenport, and to his heirs forever, the following negro slaves, with their future increase, viz: Jim and his wife Sarah, with their four children, Solomon, Elvira, Admiral and Muzilla, also old Sam and his wife Esther.

"8th. I give and bequeath to my daughter Aimy Hill, and to her issue forever, the following negro slaves, with their future increase, viz: Albert, Demps, Ellick, Joyce, Nelson, (son of Albert,) Dorcass with her children, Ann and Peggy and Ephraim; also fifteen hundred dollars in cash; but in case my said daughter should die without leaving issue alive at her death, then it is my will, that the property bequeathed to her in this clause be equally divided between my three children, James M. Davenport, John G. Davenport and Catharine Davenport, and I give and bequeath the same to my said three children, absolutely and forever, share and share alike.

"9th. To my daughter Maria Louisa McLure, and to my daughter Elizabeth G. Rudd, deceased, I have heretofore given and advanced their full portion of my estate, for which reason no provision is made for either of them in this my will.

"10th. It is my will and desire, that all the rest and residue of my estate, not herein specifically devised and bequeathed, be sold by my executors, on such terms, conditions and credits as they shall deem proper, and the proceeds arising therefrom, after the payment of my debts, and the legacies herein bequeathed, be equally divided between my four children, James M. Davenport, John G. Davenport, Aimy Hill and Catharine Davenport, share and share alike, absolutely and forever; and in the event of either of my said four children dying before such division should be made, the issue of such child or children shall take among them, the share to which their respective parents would have been entitled if they had lived. I have heretofore given property to each one of my

children, and have put them in possession of the same; and it is my express intention

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that what *I have so given them, and what I have given them in this my will, shall be their portions of my estate in full, notwithstanding any apparent or seeming inequalities, as I have divided it out among them according to my own intentions and my own notions; and I am, (or at least think I am,) the best judge in the matter."

The bill was filed by the plaintiff, as administrator of James M. Young, deceased, the husband of testator's daughter, Catharine, for a settlement of his estate. Mrs. Young was also dead. The defendant is her only child.

Johnston, Ch. This case is fully stated in the pleadings and exhibits, and was heard upon the facts set forth in the bill. The argument was so limited and incomplete, as to afford scarcely any guide whatever to the proper decision of it. For the purpose of eliciting further argument, and particularly the adduction of authorities bearing on the points raised, I threw out at considerable length, the impressions which the imperfect argument had produced on my mind; but nothing of the kind has been furnished me, and I have been left to grope my way to the conclusions which I am about to announce, most of which have therefore been adopted with much hesitation.

I think it would introduce a principle entirely too perplexing in practice, and so far as I know, without precedent, to allow Mr. McLure to carry back the note given to Stevens, through the intermediate note, to the decree, and give him the lien of that decree, upon proof that the last note remotely arose out of that consideration. He will nevertheless be entitled, in taking an account of his intestate's estate, to rank as a creditor for the money he has been obliged to pay on that note; and may thus be partially, if not wholly, reimbursed.

I am of opinion that, according to the decisions on Bell's will, (a)—from which I cannot distinguish this case—the personalty was well limited to the defendant as purchaser, in remainder, by the fourth clause of his grandfather's will; and, of course, the

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*plaintiff's intestate was chargeable with the profits of it, from the time the remainder took effect. In taking the account, there may be some modification of this liability, in regard to slaves employed in planting, which may depend upon the season of the year when Mrs. Young, the life-tenant, died. The precise time of her death is not stated in the pleadings; and I am therefore compelled to reserve this point until the commissioner's report comes in.

(a) Riley's Eq. 247; Bail, Eq. 535; 2 Hill, 228, and see 2 Sp. 786.

With respect to the real estate, covered by the third clause of the will, I entertain, at present, impressions somewhat differing from those suggested by me at the hearing.

If we consider the words of the direct devise in this clause, apart from those relating to the limitation over, I suppose that the words "lineal descendants"—being testamentary words, and not words of a deed—may be construed equivalent to heirs of the body; and then it follows, according to all the authorities, that the estate created was a fee conditional in Catharine, the first purchaser.^(b)

I shall not stop here to inquire, whether the words of limitation over, or any other words in the context, are sufficient so to confine the words of limitation in the direct gift—by pointing them to the heirs of the body living at Catharine's death—as to confer a remainder on those specific heirs, by purchase.^(c) But assuming, for the present, that there is no such qualifying matter in the context, and that therefore the will vested a fee conditional in Catharine, I shall proceed to state the results, which, in my opinion, must follow in this case upon that assumption.

This kind of estate, says Blackstone, (d) "was called a conditional fee, by reason of the condition expressed or implied in the donation of it: that, if the donee died without such particular heirs, the land should revert to the donor—for this was a condition annexed by law to all grants whatsoever: that,

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on fail*ure of the heirs specified in the grant, the grant should be at an end, and the land revert to its ancient proprietor." This eminent commentator proceeds to state the incidents of fees conditional, and among them one was, that the performance of the condition by the birth of issue "enabled the tenant to aliene the land, and thereby to bar, not only his own issue, but also the donor of his interest in the reversion." "If, however," he proceeds, "the tenant did not in fact aliene the land, the course of descent"—meaning the descent per formam doni—"was not altered by this performance of the condition, for," says he, "if the issue had afterwards died, and then the tenant, or original grantee, had died, without making any alienation, the land, by the terms of the donation, could descend to none but the heirs of his body; and, therefore, in default of them, must have reverted to the donor. For which reason, in order to subject the lands to the ordinary course of descent, the donees of these conditional fee simples took care to aliene as soon as they had performed the condition,

by having issue; and afterwards repurchased the lands, which gave them a fee simple absolute, that would descend to the heirs general, according to the course of the common law."

Another incident of fees conditional was that the husband of a woman actually seized of such an estate, became tenant by the curtesy, upon having issue by her, born alive, and capable of inheriting her estate. "In this case," says this commentator,^(e) "he shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England." And he lays it down upon authority, that by the birth of the issue, the husband became, even during the life of his wife, tenant by the curtesy initiate, so as to be entitled to do homage for her land alone, and not conjointly with her, as he was bound to do before the issue was born; that he also became natural guardian of the issue or heir apparent of the land; thus, for the term of his life, displacing the wardship of the lord of the fee; and that his estate by

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the cur*tesy, once vested, was not determinable by the death or coming of age of the infant heir.

This authority is sufficient to show that, according to the law of England, (which is our law, except so far as it is modified by statute,) if the estate vested in Catharine by the will of her father was a fee conditional, she never having alienated it, nor converted it into a fee simple absolute, it descended per formam doni at her death upon the defendant, her sole issue, subject, however, to the life estate in her husband, as tenant by the curtesy, as contended for in the plaintiff's bill. The consequence of that would be, that the husband's estate would not be accountable for rents accrued between the death of the wife and his own death.

The law of this case must undoubtedly be as I have stated it, unless there is something in the statute of 1791, 5 Stat. 162, to alter or modify it. The question then is, how far does this statute affect estates in fee conditional, or their incidents? It is very clear that the statute does not, in terms, include such estates, but is expressly made to affect fee simple only. And, if we look to the context, we shall see that its intention was only to regulate the descent among heirs general, according to the course of the common law, and to prescribe a more equitable canon than before existed, to be applied to cases in which deceased parties possessed the ability to devise the estate according to their own pleasure, but neglected to do so. This was entirely consonant to fee simples absolute, the species of estates expressly mentioned in the statute; but could not be intended of fees conditional, which were of a quality that ad-

(b) 2 Bl. Com. 115. (and note 10.) 381.

(c) See authorities cited in *Hill v. Hull*, 2 Stroh. Eq. 189, 192.

(d) 2 Bl. Com. 110 and vide 1 Cruise, Tit. 5, ch. 2, § 5, 8, 9, 10, 27, 28; and Tit. 1 and 2 passim, 2 Bl. Com. 111.

(e) 2 Bl. Com. 116, 126.

mitted of transmission by deed only *inter vivos*, and not by will.

I do not suppose it will be insisted that this statute was intended to apply directly to estates of the description we are now considering, or that they were intended to be included in the property over which it was to have direct operation. If that were the case, it is easy to show that it amounts, virtually, to a complete abolition of fees conditional, which would be a very strong interpretation to be put on a statute which makes no men-

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tion of *such estates at all. What would be left of an estate descendible to specific heirs, if it were taken from them and given to heirs general? Taken from the special male or female line, provided for in the contract, and given to males and females promiscuously? Or from the lineal issue, whose advancement formed the consideration of the grant, and given to collaterals? What would be left of the donor's right of reversion, if this Act were made to apply to such estates? Though the contingency should happen upon which, by the terms of his grant, the estate should return to him, to wit: the failure of the special heirs mentioned in it, yet, upon the construction now under consideration, the land should not revert, but go to other persons never within the donor's contemplation.

This would be a startling construction. How many titles and how many settlements would it destroy! It would shake the landed interests of the State to an extent and to an amount in value that would confound the rashest reformer among us, and cause even him to pause. When I consider the number of adjudications which fill our judicial archives and our books of reports, in which fees conditional are recognized and supported as valid and subsisting estates, I cannot hesitate to discard any interpretation of this organic statute regulating descents, which rests for its validity only on a principle that abolishes this established tenure.

But, as I have said, no one contends that the statute of 1791 applies directly, or was intended to apply directly, to fees conditional. No one contends that it regulates directly the distribution of such estates. Does any one pretend that, upon the death of the first purchaser of a fee conditional, it is to be distributed by giving the widow or widower of the party one-third? or that, in case there be no lineal descendants, the distribution is to be extended to collaterals? And if this is not contended for, what is meant by saying that the statute (which is only for distribution) applies to such estates?

But I may be asked, do you contend that

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the statute of 1791 *has no influence (f) what-

ever upon the rule of inheritance in these estates? Certainly I do not. It has an indirect influence. We are told by the authorities that in England "a devise to the heirs of the body comprehends the remotest issue, and takes the oldest son previous to and in preference to the younger." I suppose this rule of primogeniture may be still applicable to the inheritance of fees conditional created before 1791. It is understood to be very different in relation to such estates created since that time; and I believe the uniform practice is to apply a rule of inheritance drawn from the statute of 1791. But this is not because the abolition of the right of primogeniture, contained in that Act, was intended by the statute to be directly applied, or is directly applicable, to fees conditional. I have, upon another occasion, endeavored to show that this provision in the statute was intended to apply solely to estates which had previously descended according to the general law of inheritance, and which it was the object of the statute to render distributable by a different rule; and that the right of primogeniture was abolished for the purpose of introducing the new rule; the object being to clear the ground for the general distribution, by abolishing that which stood in its way. But all this related exclusively to intestates's estates, descendible to heirs general, according to the course of the common law. The influence which this legislation has upon fees conditional is simply this: the statute of 1791 serves to define who are heirs, and we resort to it for the purpose of learning from its provisions what lineal descendants come within the description, and to these persons we adjudge the inheritance to belong, as heirs of the body. The process is just the same as if the inheritance of the special estates were, by the terms of the instrument, made descendible to the sheriffs of the county, and, by a change of the law, that office should be vested in a plurality of persons; we should have to resort to the statute by which the tenure was changed, in order to know what persons were, as sheriffs, entitled

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to the property. And so in relation to the statute of 1791. This statute may be regarded as a table of definitions, to which conveyances of fees conditional, subsequently executed, may be supposed tacitly to refer; and when we find in such conveyances the words heirs of the body, we turn to the Act for the purpose of learning what issue of the body are therein declared to be heirs, and in what proportions; just as, in the case of such conveyances executed before the statute, we should resort to the definitions of the common law, to which the instrument must be supposed to have referred. This is the only function the statute performs as to fees conditional. It furnishes information. But as to fee simples, for the regulation of which it was enacted, it goes further, and commands

(f) Fearnie 167 of Phila. Ed. of 1819; p. 103 of 3d Eng. Ed.; *Martin v. Price*, 2 Rich. Eq. 470, 471.

how they shall be distributed. But the statute of 1791 is not entitled to operate to any greater extent than this. To the incident of inheritance belonging to fees conditional, it has the indirect application which I have stated. But it is not perceived how it applies to any other incident or quality of such estates; whether arising before or after the descent is cast. For instance, can it be supposed that it abolishes or modifies the power of barring the inheritance by alienation?

I do not perceive by what process of reasoning it can be established that the tenancy by the curtesy is abolished, as incident to this particular description of estates, any more than any other of its incidents. The estate being permitted to exist, and being recognized by law, must carry with it all its incidents, and this among the rest, unless abolished expressly or by necessary implication.

It is a very different question whether this tenancy is abrogated in relation to fee simple estates absolute, upon which much might be said. Upon that subject it would be improper and unbecoming to volunteer an opinion here, where the case does not call for it. But this case does involve the point I have endeavored to discuss; and, according to the best view I can take, with my present opportunities, I must come to the conclusion (and so I adjudge) that, if Catharine's estate was a fee conditional, her husband was entitled to a tenancy by the curtesy; and he was

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*not accountable for the rents of the land accruing between her death and his own.

The remaining question is, whether the limitation over is sufficient to convert the estate into an estate for life in Catharine, with remainder to the defendant as purchaser. The words of the limitation over are nearly the same and of identical import with those employed as to the personalty; and it would seem, at first view, calculated to produce the same effect. But the case of *Whitworth v. Stuckey*, 1 Rich. Eq. 411, 412, 413, is precisely in point, to show that, as applicable to real estate, such words are not sufficient to affect the direct limitation. And to that case, and the authorities there cited, I refer; and with the more confidence, because the Chancellor who delivered the opinion was the same who had given the judgment on Bell's will; and on this latter occasion offers his reasons for applying a different rule in relation to real and personal property.

It is ordered that the foregoing opinion stand for the decree of this Court.

It is further ordered that the Commissioner do call in the creditors of the plaintiff's intestate, to prove and establish their demands, by a day to be fixed by the Commissioner, by advertisement in the South Carolinian newspaper; and that the Commission-

er do take an account of the said estate, charging it, among other things, with the profits of the personal estate limited in remainder to the defendant, by the will of Jonathan Davenport, according to the foregoing opinion; and that the Commissioner report the proper mode of distributing the assets of the said estate among its creditors, and what balance, if any, remains for distribution to the defendant, the sole distributee. The costs to be paid out of said estate in the first instance.

The complainant appealed, on the following grounds:

1st. On the bill filed by Young and wife against Davenport, her guardian, this Court ordered the property to be delivered to Young, but declared that the guardian should have a

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lien on the *property for any balance that might be found due to him; a balance of \$461.15 was found due to the guardian, for which Young gave his note; Davenport transferred the note to Stephens, and Young gave to Stephens a new note, with McLure as surety; and the surety having paid the note since Young's death, it is submitted that his Honor erred in declaring that he is not entitled to a lien on the property for the debt.

2d. That by a proper construction of Jonathan Davenport's will, the land was devised to his daughter Catharine in fee simple.

3d. That his Honor erred in deciding that the personalty bequeathed to testator's daughter Catharine was well limited to the defendant, her only child, as purchaser in remainder.

4th. That his Honor erred in deciding that the said Catharine took only a life estate in the property bequeathed to her by the 4th and 5th clauses of the will.

5th. That his Honor erred in not directing that the estate of James M. Young, deceased, should not be held to account for the property which the said Catharine received under the 5th clause of the will, nor for the clock bequeathed to her by the 4th clause—seeing that that property, or the greater part of it, was consumed or worn out before the estate came into the possession of said Young.

The defendant also appealed, on the following grounds:

1st. That his Honor erred in holding that Mrs. Catharine Young took a fee conditional in the lands devised to her by the 3d clause of Jonathan Davenport's will.

2d. That tenancy by the curtesy does not now exist in this State; and that his Honor erred in deciding that James M. Young, deceased, was entitled to a life estate in the lands devised by the 3d clause of the will, as tenant by the curtesy.

3d. That by the terms of the will, Mrs. Catharine Young took only a life estate in the lands devised to her, with remainder to her issue as purchasers.

4th. That James M. Young, jr., took under the will, at the death of his mother, a fee simple estate in the lands devised to her.

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*Sullivan, for the plaintiff, cited 2 Jarm. on Wills, 24, 25, 178; 2 Wms. on Exors., 809, 810; Phillips v. Garth, 3 Bro. C. C., 69; Rev. Dom. Rel., 457; Scanlan v. Porter, 1 Bail., 427; Bedon v. Bedon, 2 Bail., 231; 1 Hill's Ch., 281; 3 Hill, 193; 4 McC., 442; 2 McC. Ch., 171; Hull v. Hull, 2 Strob. Eq., 190; 6 Rep., 19; 3 Rich., 289; 3 Strob. Eq., 211; 1 McC. Ch., 82 et seq.; 4 Kent, 27; 1 Co. Lit., 19; 2 Bay, 397; 1 McC. Ch., 91; 2 McC. Ch., 324; Gray v. Givens, Riley Ch., 41.

Bauskett, contra, cited 6 Cruise, 147; 3 Bin. R., 150; Archer's case, 1 Rep., 163; 4 Kent Com., 214, 220; Merest v. James, 5 Eng. C. L. R., 156; 1 Salk., 224; 2 Jarm., 354; Lees v. Mosley, 589; Cooper v. Collis, 4 T. R., 294; 44 Eng. C. L. R., 330; 4 Bur., 2579; 33 Eng. C. L. R., 373; 32 Eng. C. L. R., 483; Williams v. Caston, 1 Strob., 130; 1 Bin., 139; 2 Hill Ch., 197.

Garlington, same side.

DUNKIN, Ch., delivered the opinion of the Court.

The question referred to the Court of Errors arises out of the third and fourth clauses of the will of Jonathan Davenport, deceased. The Chancellor ruled that under the devise to Catharine Davenport she took a fee conditional in the real estate. On the part of the appellant, it is insisted that she took only a life estate, with a valid remainder to himself as a purchaser under his grandfather's will. The decision is founded on what is familiarly known as the rule in Shelley's case. All the authorities admit that a rigid adherence to the letter of this rule would frequently defeat the intention of the testator. "It is a rule of tenure, which is not only independent of, but generally operates to subvert, the intention." It must not, therefore, be understood, says Mr. Jarman, that even the technical expression, "heirs of the body," is "incapable of control or explanation by the effect of superadded expressions, clearly demonstrating that the testator used those words in some other than their ordinary acceptance, and as descriptive of another class of objects"—(2 Jarm. on Wills, 300.) Although a difference of opinion exists among Judges as to the word issue, yet, it seems

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now settled, that unless restricted by the context, this expression cannot be satisfied by applying it to descendants at a particular period. But if, from superadded expressions, or from the context, or from other parts of the will, it is manifest that the testator used the term as synonymous with "children," or intended to describe a class of persons to take

at a particular time, issue will be construed as a word of purchase, and not of limitation. And this rule is equally applicable to every other expression used as synonymous with heirs of the body. Whenever the words "heirs of the body" would be explained to mean some other class of persons, the same construction is given to the synonyme, and the rule in Shelley's case does not apply.—(2 Jarm. 281.) It must be conceded that, in the application of these rules, the cases cannot be reconciled. There seems to have prevailed an unceasing conflict between the obligation to observe a technical rule and a solicitude not to defeat the obvious intention of the testator. In England, this struggle has been so manifest, and the discrepancy in the decisions so perplexing, that a special Act of Parliament has been found necessary, (1 Vic. c. 26, s. 29,) which restricts and defines the construction to be given to words in a will importing a failure of issue. But, prior to that Act, if it could be gathered from the will that the testator did not contemplate an indefinite succession of issue, but a class of persons to take at a particular time, this manifest intention was respected and carried into effect. It was said, in argument, that the will of Davenport was prepared by a professional gentleman of sagacity and long experience, whose name appears as a witness to the instrument. Be that as it may, if the draughtsman had not before him, he clearly had in his mind, the Act of 1791; which declares the mode of distribution of an intestate's estate at the time of his death. In the various clauses of the will, the terms issue, children, and heirs, repeatedly occur. When the word heirs is used, it is obviously intended only to express the amplitude of the estate, as in the devise to his sons: "and their heirs forever."—In the clause under review, the devise is to his daughter, Catharine, "for and during the

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term of her natural life; and, at her *death, I give, devise, and bequeath the same, absolutely and forever, to"—whom? Not to her child or children, for she might have none, but to her children, grand-children, or great-grand-children, as the case might be; or, using the comprehensive and familiar terms of the statute, "to her lineal descendants." But, perhaps she might leave none of these; and the testator proceeds to provide, as, in such case, the statute provides, for distribution among collaterals, where the intestate leaves no lineal descendant. "And in case," says he, "she should die without lineal descendants, (one or more,) living at the time of her death, then it is my will that the whole of said real estate revert to my estate and be disposed of as hereinafter directed."

The statute declared that on the death of an intestate, leaving only brothers and sisters, the estate should be distributable equal-

ly amongst them. This was not quite in accordance with the testator's views. His daughter had two brothers and three sisters, who, in the contingency contemplated, would be entitled to her estate under the statute. But there were two of the sisters whom the testator desired not to partake, as he had already, in his life time, amply provided for them, or, (to use his own expressions,) he had done so "according to his own intentions and his own notions, and I am, (says he,) or at least, I think I am, the best judge in the matter." He therefore directs that, in such event, "the property bequeathed to my daughter, (Catharine,) shall be equally divided between my children, James M. Davenport, John G. Davenport, and Aimey Hill; and I give, bequeath, and devise the same to my said three children and their heirs forever, share and share alike;" the testator thereby modifying the provisions of the statute, and excluding his other two daughters, Maria Louisa McLure and Elizabeth G. Rudd. Is there any rule or decision which demands the destruction of this scheme, and a sacrifice of the manifest purpose of this testator? Giving to the terms, "lineal descendants," exactly the meaning of "issue," are there not words restraining the meaning to issue living at the death? It is argued that the construction of this devise is concluded by

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Whitworth v. Stuckey, (1 Rich. Eq. *404.) Certainly that case goes as far, in deference to the decisions in Westminster Hall, as the most tenacious could desire.—And it is somewhat remarkable, as is elsewhere noticed, that the reason for adhering to the technical construction in devises of real estate in the Courts of England, not only does not exist in South Carolina, but the contrary. Admitting, as the English authorities do, that a more liberal rule prevails in bequests of personalty, they justify the distinction on the ground that, by construing the words to import a general failure of issue, it would, in personalty, necessarily render void the gift over, which is to take effect on such contingency; but that this construction, in devises of real estate, would only have the effect of creating an estate tail, on which a remainder may be limited.—(2 Jarm. 362.) But in South Carolina this construction creates a fee conditional, upon which, according to our decisions, a remainder cannot be limited; and the disinclination to adopt such construction should equally exist in devises of real estate as in bequests of personalty. But the terms of this devise are not the same with those in *Whitworth v. Stuckey*, and other words are here superadded, evincing the intention of the testator, which are wanting in that devise. Language of the strictest technical import, as heirs of the body, will not control the construction if the intention be clearly manifested to describe thereby a class of persons to take at a particular pe-

riod. In such case the intention will prevail. The rule only requires, says Mr. Jarman, a clear indication of intention to that effect. And so, in *Ryan v. Cowley*, (Lloyd & Gould, 10,) Lord Chancellor Sugden says of the term issue, it may be employed as a word of limitation, or of purchase, and if, by the context, the testator shows that it is used as synonymous with child or children, he translates his own language, and the Court gives effect to his declared meaning. Using technical expressions, a party is presumed to use them in a technical sense, because every man is presumed to know the law. It has been already remarked, that the use of the term "lineal descendants," indicated that the testator probably looked to the scheme of the stat-

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ute which adopts this peculiar phrase in providing for the final distribution of an intestate's estate at the period of his death. But the testator had borrowed other expressions from the same statute, more familiarly known, perhaps, than any other in the statute book. The first canon of this statute provides for the distribution of the estate between the widow and children, if more than one; but if only one, the remainder of the estate shall be vested in that one, absolutely forever. Then, in the next canon, the lineal descendants of the intestate shall represent their respective parents, and be entitled, &c. The next provides for the event that the intestate shall not leave "a child or other lineal descendant": It is hardly necessary to say that the statute confers an estate in fee simple, or, in its own phrase, "absolutely forever." Each canon vests the estate in the persons who, at the death of the intestate, shall answer the description. If the testator had devised the estate to his daughter, for and during the term of her natural life, and at her death, to such persons, absolutely and forever, as would at that time, had it been her own property, be entitled to take her estate according to the statute of distributions, it would be difficult to entertain a doubt as to the meaning of the testator, and scarcely questionable that the persons thus described would take as purchasers. They might be the lineal descendants of his daughter, or her ancestors, or her collateral relations, or even her husband. They would, nevertheless, according to our decisions, be her heirs. But the testator clearly manifests that no indefinite succession was contemplated, and that he merely purposed to describe a class of persons, who, at the death of his daughter, should take absolutely the estate which he had given to her for life. He has, in the will before us, only varied the language to meet his purpose. He declares, in case his daughter should die without lineal descendants, one or more, living at the time of her death, then, he desires the estate to revert to his estate, and to be disposed of in a different manner than that prescribed by

the statute in such event. The testator, therefore, adopts the language of the statute and with the meaning intended by the statute, provided, at the death of his daughter,

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there *were living any lineal descendants, (one or more.) By "lineal descendants," the statute meant child, grand-child, great-grand-child, &c.; the testator meant the same.

But, as I have remarked, there are other expressions in this will which do not appear in *Whitworth v. Stuckey*, and which have received judicial construction, as limiting the general terms of this devise. After giving a life estate to his daughter, the testator provides, as follows—"after her death, I give, bequeath and devise the same, absolutely and forever, to her lineal descendants." These are the expressions used in the first canon of the statute of distributions.

The effect of these words, as declaratory of the intention of the testator, came under the consideration of this Court in *Myers v. Anderson*, (1 Strob. Eq. 344 [47 Am. Dec. 537]). Although that was a case of personality, no such distinction is adverted to, and the language of the Court seems too distinct, general and emphatic, to admit of any such restricted interpretation. In that will the words were, (after the gift of a life estate to Mary Brown and Margaret Brooks,) "after the death of the said Mary Brown and Margaret Brooks, to be the absolute property of the issue of their bodies, forever." "If obliged," says the Chancellor in the circuit decree, "by the rules of law to extend, in perpetuity, the interests of these legatees which is expressly given for life, and to declare that the interest which is given to their issue, expressly 'to be their absolute property,' is no interest at all,—that the absolute property is not in the issue to whom it is given, but in the mother to whom it is not given, but, on the contrary, from whom it is expressly withheld: if I am obliged by the rule in *Shelley's* case to do this, I shall feel that I am sacrificing the intention of the testator, as to which there can be no mistake." The Chancellor "conformed his decree to the manifest intention of the testator, and declared that Mary Brown and Margaret Brooks took only a life estate, and that upon their deaths, respectively, their issue took as purchasers." In affirming this decree, the Court

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of Appeals say,—“all the au*thorities agree that, if the limitation be to the heirs of the body, or issue, and to their heirs, this constitutes them purchasers: as it shews an intention to give them an estate, not inheritable from the first taker, but an original estate inheritable from themselves as a new stock of descent. The authorities also agree that, if the estate limited to the heirs of the body, or issue, be of a quality, or be given to be enjoyed in a way, incompatible with

the idea that they are to hold it in indefinite succession (as if it be given to them as tenants in common, or to be equally divided between them);—this takes it out of the rule in *Shelley's* case; and the immediate heirs or issue take as purchasers. It appears to the Court that the testator in this case, by the gift to the issue, not only of the property, or slaves, but of the absolute property in them, (a term importing the quantity of interest intended to be given,) has as effectually given them the fee, (so to speak) as if the bequest had been to the issue and their heirs; and that the gift of the absolute property, or fee, rebuts the idea that he intended it to go in an indefinite succession.”

This doctrine met the approbation of the whole Court, among whom was Chancellor Harper, who had himself decided *Whitworth v. Stuckey*, and who, in this decision, saw nothing inconsistent with it. The principles, on which the distinction was placed, are well established principles in relation to real estates, and constitute well recognized exceptions to the rule in *Shelley's* case. The language of this will is, if possible, more emphatic. It is not merely to be "their absolute property," but it is given, in the words of the statute, to them absolutely and forever. This Court is of opinion, in the terms of *Myers v. Anderson*, that this is equivalent to a devise to them and their heirs, that the daughter of the testator took only a life estate, and that the defendant, the only child of his deceased mother, was a purchaser under the will of his grand-father, and that it should have been so declared.

O'NEALL, FROST, WITHERS and WHITNER, JJ. and WARDLAW, Ch. concurred.

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*The case having been returned to the Equity Court of Appeals, in that Court the following judgment was pronounced.

JOHNSTON, Ch. The Court of Errors having determined that the defendant took the real estate covered by the 3d clause of testator's will, as purchaser, upon the death of his mother; and their decision to that effect having been returned to this Court; it is ordered that the same be deemed the judgment of this Court upon that point; and that the account which has been ordered be taken with that modification.

This Court, proceeding to deliver its judgment upon the residue of the case, concurs with the Chancellor in so much of his decree as relates to the note given to Stevens.

It, also, concurs with him in his decree relating to the personal estate of the testator, except as to so much thereof as is covered by the 5th clause of his will.

In the 4th clause the direct limitation is to Catharine and her issue. The limitation

over, in the latter part of that clause, has been properly held sufficient to convert the issue into purchasers.

But in the 5th clause issue are not mentioned in the direct gift. That is made to Catharine alone; and the limitation over (which is found in the latter part of the fourth clause) cannot have the effect to vest any thing in the issue, unless by implication; which is expressly contrary to Carr v. Porter, (1 McC. Eq. 60). This difference between the 4th and 5th clauses was overlooked by the Chancellor, from the fact that only the 4th clause was argued, and that very imperfectly. Our opinion is that Catharine took an

absolute interest in the personalty given by the 5th clause: and that the same vested in her husband jure mariti; and whatever of it remained at his death, was part of his estate.

It is ordered that the decree be modified as indicated in this judgment and in that of the Court of Errors.

DUNKIN and DARGAN, CC. concurred.

WARDLAW, Ch. was not present at the hearing in this Court.

Decree modified.

REPORTS
OF
CASES IN EQUITY

ARGUED AND DETERMINED IN THE
COURT OF APPEALS AND COURT OF ERRORS
OF SOUTH CAROLINA

VOLUME IV
FROM NOVEMBER, 1851, TO MAY, 1852, BOTH INCLUSIVE

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CHANCELLORS

DURING THE PERIOD COMPRISED IN THIS
VOLUME

HON. JOB JOHNSTON

“ BENJ. F. DUNKIN .

“ GEO. W. DARGAN

“ F. H. WARDLAW

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CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT COLUMBIA, SOUTH CAROLINA—NOVEMBER AND
DECEMBER TERM, 1851.

CHANCELLORS PRESENT.

HON. JOB JOHNSTON,
" B. F. DUNKIN.
" G. W. DARGAN.
" F. H. WARDLAW.

4 Rich. Eq. *1

*BENJAMIN MILLER and Others v. THOMAS R. ANDERSON and Others.

(Columbia. Nov. and Dec. Term, 1851.)

[*Slaves* ⇨7.]

There cannot be a valid gift, by parol, of a slave, to take effect at the donor's death—although the form of an actual delivery be gone through with.

[Ed. Note.—For other cases, see *Slaves*, Cent. Dig. § 28; Dec. Dig. ⇨7.]

[*Slaves* ⇨7.]

A father intending to make a gift, to take effect at his death, of a negro to his infant child, put in the presence of witnesses, the negro's hand into that of the child, and said, the negro was to be the child's at his, the father's death; the father afterwards spoke of and recognized the gift, but he retained possession of the negro until his death:—*Held*, that there was no valid gift.

[Ed. Note.—Cited in *Busby v. Byrd*, 4 Rich. Eq. 13.

For other cases, see *Slaves*, Cent. Dig. §§ 20-29; Dec. Dig. ⇨7.]

[*Gifts* ⇨23.]

Seemle, that, if the donor intends to part with the whole title at the time of the delivery, merely retaining possession for the benefit of the donee, the gift is valid.

[Ed. Note.—For other cases, see *Gifts*, Cent. Dig. § 40; Dec. Dig. ⇨23.]

Before Johnston, Ch., at Edgelfield, June, 1851.

Johnston, Ch. This bill, filed 22d April, 1850, is for an account and settlement of the

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estate of the late James Miller, who *died in-

testate, 29th March, 1847. He had been twice married, but both of his wives pre-deceased him—each of them leaving children.

By the first wife, who died 17th January, 1824, he had three children—Edmund, the oldest, who was born in 1819, and was about five years of age at his mother's death, and Mary, who was about two years, and Emily, who was about four years, younger.

Edmund married and subsequently died in 1845, during his father's life, leaving two children, named in the pleadings. Mary also married in her father's life-time, having become the wife of her co-defendant, Thos. R. Anderson, in the year 1836; she is still alive. Emily married also during her father's life, but pre-deceased him, leaving distributees, who are parties to the suit.

The intestate, by the second wife, had five children, all of whom (or the representatives and distributees of such of them as are dead) are parties to this proceeding. The only question which I am called upon to determine, relates to a gift of three slaves, which James Miller, the intestate, is alleged to have made to Edmund, Mary and Emily, the three children of the first marriage, immediately upon the death of their mother. These slaves, with the subsequent increase, remained in the donor's possession from the date of the alleged gift to the time of his death; and the question is, whether they are parcel of his estate, or are to be regard-

ed (excluding, of course, their increase,) as advancements to the donees.

The defendant, Anderson, became the administrator of the intestate, and it appears that he produced the slaves in question to the appraisers of the estate; and this circumstance is relied on as evidence against the gift of them by the intestate. But I think this matter is sufficiently explained by the evidence, and that no inference, unfavorable to the donation, is to be drawn from it. The question must turn entirely upon the testimony in relation to the gift, and the explanation which the conduct of the donor affords, as to his intention in making it.

Joseph Noble was present when the dona-

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tion was made, and was *produced, on behalf of the donees, to state the circumstances. He says, that on the morning after the mother of Edmund, Mary and Emily was buried, their father, in the presence of witness, witness's mother and sister, and also in the presence of his own mother and one Hatcher, called up three little negroes, Bob, (about the size of Edmund,) Sue, (about the size of Mary,) and Elvira, (about the size of Emily,) and putting Bob's hand into that of Edmund, Sue's into that of Mary, and Elvira's into that of Emily, made the gift, saying the negroes were to be theirs (the children's) at his own death, and that what he did was done in compliance with his wife's death-bed request.

The depositions of George Tillman were also read on behalf of the donees. He was the brother of the first Mrs. Miller, the mother of the donees, and though not present at the gift, the intestate told him of it a few days after it was made. No doubt the conversation related to the precise facts spoken of by Noble.

He says, that a few days after his sister's death, he and his mother, on their way to the intestate's house, met him, and he then stated to them, that, in obedience to his deceased wife's request, in the presence of "Benjamin Hatcher and Nancy Noble, he had given Bob to his son Edmund, a negro girl Sue to Mary, and a negro girl Elvira to Emily; and that he had given and delivered the hands of those negroes into the hands of his children above named."

This witness also testifies to another conversation which he had with the intestate, in August, 1846, in witness's piazza, while eating peaches. He was giving vent to his grief, says the witness, at his being bereaved of his children, Edmund and Emily—and he spoke of his endeavors to provide for them—and told how he had bought, or furnished the means of buying, several negroes for Mr. Anderson—and for Edmund, he had bought a family of negroes at Capt. Wever's sale—and to John Rainsford, (who had married Emily,) he had given about \$2,000, in notes

—and then spoke of the reason of his not having given possession, which was, that he had no more negroes than he wanted, and

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that he disliked separating his *families of negroes and substituting others or strange negroes in their stead, for negroes were troublesome at best, and that it was time enough for them to have them at his death, when he was dead and gone. This was some seven or eight months before his death. He remarked, "it might be another Scott case, for he had given the negroes in the same way that he understood Mr. John Gray gave a negro girl to a daughter, who married a gentleman by the name of Scott: by delivering the negroes' hands into the children's hands."

It appears, that after Edmund's marriage, he went to a plantation of the intestate, on Horn's creek, where he superintended as overseer—Bob being among the hands there. When he left that place and removed to another plantation of his father's, called Poverty Hill, Bob still continued as before, parcel of the Horn's creek gang. It also appears, that the intestate administered on Edmund's estate, but did not include Bob in the inventory.

In relation to Sue, the intestate also retained possession of her until his death, notwithstanding Mary's marriage and settling off in 1836, ten years before he died. The only additional circumstance respecting this slave and her issue, (for she had several children,) was a conversation related by the witness, Walker. This witness says, that after Mary's marriage, he rode up one morning to the intestate's, when he was whipping Sue, and, by way of explanation, he stated that Sue behaved very badly; that when Mary went to herself, he had given Sue to her, but she was so mean that Mary would not have her, and he had been obliged to buy another to put in her place.

As to Emily, there is nothing to be added to what has been stated. Though she married and settled off, Elvira, who is supposed to have been given to her, still remained at her father's.

I have no doubt whatever of the formal delivery of the slaves to the children, in the manner spoken of by Noble, and I have as little doubt that the intestate's intention was to vest them with a title in the slaves.

I do not think it necessary to distinguish

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between the testimony *of Tillman and Noble. Though the former speaks of declarations of the intestate, from which we might generally infer a perfect gift, yet, as it is evident that in those declarations he referred to what he had done when Noble was present, it would be a perversion of principle to extend the declarations, by construction, beyond the specific acts he then performed—

and these we have from Noble, who witnessed them, and they speak for themselves.

I have no doubt, as I have said, that there was a formal tradition of the property, and that the intention was to pass an interest in it to them. But the question is, whether the intestate intended to pass the title to them presently, reserving the custody in himself, for their benefit and as their bailee, or to pass a title to them in presenti, to take effect at his death, interposing in the mean time, a title in himself, for his own life, and for his own benefit.

If his intention was of the former description, I am of opinion there was a good and effectual gift, and having taken possession under his children, the statute, which is relied on for destroying the donees' title, could not avail for that purpose:—such a possession would not be adverse.

If, however, the intestate's intention was to reserve a life estate in himself, and to make a present formal delivery by way of investing the donees with the remainder expectant on his death, I am of opinion that this could not be done by parol; and that, whatever forms were adopted, they were ineffectual for such a purpose.

In the transmission of title in personal property, the essential thing is delivery, and the essence of that is not the form adopted, but the power which the formal act communicates. There must pass from the donor or grantor to the other party, an irrevocable control or dominion, to reside in the latter from that time forward, irrespective of any change in the intention of the former.

Where a party delivers a deed or instrument, which is in its nature irrevocable, and especially when it is founded upon proper consideration, he puts in the hands of the grantee a power of control and dominion over the property covered by the deed,

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which *that party may exercise according to the terms of the deed, whether the grantor may in future time be willing or unwilling.

I have endeavored to explain this, in my opinion, in *Jaggers v. Estes*, (3 Strob. Eq. 34,) to which I refer. An interest in personalty, to be enjoyed or enforced in futuro, may therefore be conferred by deed; and it is because the power to control the property is carried in the deed itself. That power of control is a delivery, and there is no dominion where it is wanting; for delivery is neither more nor less than the transfer of dominion.

But a future dominion cannot be transferred by parol. In the case of a deed, there is always extant in the deed itself, and beyond the control of the grantor, a power of dominion in opposition to, and in despite of, the control resulting to the gran-

tor from his retention of the possession of the property. But where there is no deed, the only means of imparting a dominion over personal property is by a delivery of it, with an intent to confer the dominion. A formal delivery, when the control of the property is not intended to go with the act, is a mere form, and no delivery. It is utterly ineffectual, and the intention to make a substantial delivery, is rebutted by the retention of the property, under a claim of title in the deliverer. He intends to pass, at the time, no control over the property. His intention is, that that control shall arise at a future time, and not presently; and the formal delivery is in anticipation of that future time at which the control is intended to be vested, and when alone a true delivery can be made.

In all cases where a right is intended to pass in personal property, unless there be a deed, or some irrevocable instrument, the property must be delivered with an intent to confer a present control, and so strong is this principle, that in cases *donatio mortis causa*, where the gift is intended to be conditional merely, and to be defeated by the recovery of the donor, the property must be delivered, or what is the same thing, put within the power of the donee. (*Ward v. Turner*, 2 Ves. Sen. 431).

Having thus settled in my own mind that,

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if it was intended *that a legal title to the property should remain in the donor for his own life, the gift of the remainder by parol was ineffectual—the question is, whether the evidence establishes a gift of that nature, or whether it establishes a present transmission of title to the donees, coupled with a retention of possession for their benefit, which would amount to a possession on their part.

I think the evidence proves a gift of the former character.

Hardly any thing could be more explicit than the donor's declaration, at the time of the intended donation, that the property was to be theirs (the donees) at his death. Is it not necessarily implied that it should be or remain his (and not theirs) until that time?

Then, upon the supposition that the property belonged to the donees in presenti, how are we to account for their permitting their father to retain possession after they came of age or married? How are we to account for the intestate not having included Bob in Edmund's estate?

Edmund died in 1845, and yet we find the intestate speaking of the gift to him, in 1846, without practically admitting that the right which the gift vested was to take effect until his own death. How are we to reconcile this circumstance without adopting the hypothesis that he retained a title in himself for life?

Again: The fact of the intestate having stated to Walker that he had attempted to give Sue to Mary, upon her marriage, is relied on. But this circumstance rather fortifies the supposition, that he considered the title to be in himself for life, at that time, and that this new gift was made in virtue of that ownership, and not merely in pursuance of the gift of 1824.

Again: In the answer of Anderson and wife, it is substantially admitted that the receipt given by them to the intestate, for advancement, did not include Sue. This is not reconcilable with the supposition, that the title to Sue passed in presenti, (with a power of present control,) in 1824. It is perhaps reconcilable with a gift in remainder, but, as we have seen, such a gift would be ineffectual.

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*Again: By way of accounting for the intestate's retention of possession, the testimony of Tillman is relied on, that it was inconvenient to him to part from the property. But this is as well reconcilable with the retention of a life estate as the present parting from the entire title, and rather more so, inasmuch as his expressions seem to imply, that, whether he should retain the possession or part from it, depended on his own option, which infers that the ownership was in him. And again, when the intestate said, "it was time enough for them (the children) to have them when he was dead and gone," was this acknowledging that the negroes then belonged to the children? Was it not rather an assertion of right in himself, by which he could, at his pleasure, postpone their enjoyment of the property?

It is adjudged and decreed, that the slaves, Bob, Elvira and Sue, with their increase, as to the two latter, were parcel of the estate of James Miller, at his death, and, as such, chargeable to his administrator; that he account for the price at which he sold Elvira; and that the others are subject to partition, for which purpose the parties have leave to take out a writ of partition. It is further ordered, that the administrator account before the Commissioner, to whom all matters of account are hereby referred.

The parties to be at liberty to apply for any other necessary order. The costs to be paid out of the said estate.

The defendants appealed on the grounds:

1. That from the evidence in the case there was a valid gift of the negroes in question by the intestate, James Miller, to his children, Edmund, Mary and Emily.

2. Because, it is respectfully submitted, that his Honor, the presiding Chancellor, should have ordered an issue at law, at the request of the defendants, to try the question whether there was a valid gift or not.

Griffin, Bauskett, for appellants.
Carroll, contra.

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*PER CURIAM. This Court concurs in the decree of the Chancellor: which is hereby affirmed and the appeal dismissed.

JOHNSTON, DUNKIN and DARGAN, CC., concurring.

WARDLAW, Ch., having been of counsel, gave no opinion in this case.

Appeal dismissed.

4 Rich. Eq. 9

LEWIS BUSBY and MARY, His Wife, v.
THOMAS B. BYRD and Others.

(Columbia. Nov. and Dec. Term, 1851.)

[*Slaves* 7.]

A parol gift of a negro to take effect in possession at the donor's death, is necessarily void, because there can be no delivery, and to a parol gift delivery is essential.

[Ed. Note.—For other cases, see *Slaves*, Cent. Dig. §§ 20–29; Dec. Dig. 7.]

[*Gifts* 11, 18.]

To constitute a delivery, it is essential that the deliverer should part with his control over the chattel; and where his intention is to vest a future interest, though he may go through the form of delivering the chattel, yet, inasmuch as he retains his control over it, there is no delivery.

[Ed. Note.—For other cases, see *Gifts*, Cent. Dig. §§ 9, 31; Dec. Dig. 11, 18.]

Before Johnston, Ch., at Abbeville, June, 1851.

Johnston, Ch. This was a bill filed by Lewis Busby and Mary, his wife, against Thomas B. Byrd, administrator of the estate of Rhoda Pullam, deceased, the distributees of the said Rhoda and others; claiming the delivery of a negro woman, Leah, and her children, and partition of the same among the four daughters of Lucy Pullam, deceased, viz: Mary, the wife of Lewis Busby, Mahala, the wife of Matthew H. Bryson, Rhoda, the wife of Wm. Sanders, and Eliza, the wife of Thomas B. Brooks.

James Pullam, the husband of Rhoda Pullam, had owned Leah, the negro in controversy. At the sale which was made of his property after his death, in the year —, Leah was bought by one Charles B. Foshee, who kept her about one year and then sold her to Rhoda Pullam, who had her in her possession from that time until her death, except the period of time during which Lucy Pullam had possession of her, and whilst John P. Coleman owned her, of which more will be said hereafter.

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*Leah and her children, who have now increased to the number of eight, are still in the possession of Thomas B. Byrd, the administrator of the estate of Rhoda Pullam,

who died in June, 1846; and he alone of the defendants has answered.

Lucy Pullam was the widow of Benjamin Pullam, who was the nephew of James Pullam the husband of Rhoda Pullam; and the plaintiffs, for themselves and for the other three daughters of Lucy Pullam, claim, that, in consequence of their relationship to the said Rhoda, she had given, in her life time, Leah and her child Ally (the only child then born) to the plaintiff, Mary, and her sisters above named. They allege, that Rhoda Pullam, "in or about the year of our Lord one thousand eight hundred and thirty-five, gave and delivered to your oratrix and her sisters, named aforesaid, who had but small means, a negro woman, Leah, and her daughter Ally. Whatever the precise terms of the said gift were, your orator and oratrix assert there was a substantial and legal gift of the said Leah and her said daughter, to the sisters of your oratrix with herself, and actual delivery of the said slaves accompanied, for some time, by possession."

The plaintiffs endeavored to show a parol gift from Rhoda Pullam; and upon that point offered many of her declarations stating in various forms, (as the witnesses remembered them), that she intended to give, and at other times that she had given, Leah and her children, or some of them, to Lucy Pullam or her daughters.

I do not regard the gift made out either by these declarations or the temporary possession of the woman, Leah, by the said Lucy Pullam; and I admitted counter declarations of the alleged donor (when subsequently in possession,) stating that she had intended to give, but had changed her mind—that she had not given, that she never intended to give Leah or her children, either to Lucy Pullam or her daughters—and that she had made her will, giving Leah to Lucy Pullam and one of her children to each of her daughters, but that she had destroyed it, &c. The testimony was somewhat conflicting, and apparently inconsistent, but I think susceptible of reasonable explanation in the view which

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I have *taken of the case. The evidence is all in writing, either in answer to interrogatories propounded by the parties or taken by the Commissioner, and is appended to this decree, so that either party may have the full benefit of it.

It will be seen that Lucy Pullam died in August, 1836, and that Leah and her child Ally had been sent back to Rhoda Pullam but a short time before her death. By referring to the testimony, it will also be seen that Leah remained in the possession of Lucy Pullam for a period of time less than a year. All the witnesses concurred in this. Some of them say that Leah was with Lucy Pullam only a few months. So that there is no clear evidence either of a declaration of

Rhoda Pullam that she had given Leah, or of Lucy Pullam's possession of her and her child, prior to the summer of 1835. Dr. Calhoun says that "he made a will for Rhoda Pullam in the latter part of the year 1835, by which the girl Leah and her children were given to L. Pullam, with an injunction, that she would give one negro child to each of her daughters, when they married, or came of age, should the woman have so many." This will was not destroyed until the year 1841, and I am of opinion that all the declarations of Rhoda Pullam, in relation to the alleged gift of Leah and her children, had reference to this will, then in existence, and the provision which she had made thereby for Lucy Pullam and her children—that she never meant that she had given up all control over the said slaves, but that she had made that disposition of Leah and her children by will, and that it was her intention that they should go in that way, unless she chose to alter and destroy the will, which she still retained the right to do, and which afterwards she did actually do, when some of the parties had offended her by taking counsel to ascertain whether they could hold the negroes under the gift. She not only destroyed the will, but destroyed it in such a manner, (by "burning it on her pipe,") as to indicate her strong disapprobation of, and contempt for, the conduct of the parties of whom she complained, and her determination to give them nothing.

This view of the testimony is supported by

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the reference to the *deed of gift, said to have been drawn by Dr. Calhoun, when the provision in favor of Lucy Pullam and her children was spoken of: he having drawn no deed of gift but a will, which was revocable; and it is also strengthened by the conduct of Lucy Pullam herself, when, in the presence of Coleman, she returned Leah to Rhoda Pullam, expressing her dissatisfaction with the manner in which she had taken the negroes, stating that her friends had told her that she was working and raising negroes for other persons, that the title to her children was worth nothing, and unless Rhoda Pullam would make a deed of gift, it would be useless for her to keep the negroes any longer. Rhoda Pullam replied, she would make no deeds about it, and if they refused to take her word for it, they might send them home: and in a few days after they were returned.

I think there is nothing in the circumstances of this case—either in the relationship of the parties, the declarations of Rhoda Pullam, or in the temporary custody, which Lucy Pullam had of these negroes, explained as it is, which would authorize the Court to presume a gift other than that made in the will drawn by Dr. Calhoun, which was revocable, and in fact revoked.

I am also against the plaintiffs on the

statute of limitations. After the return of Leah to Rhoda Pullam, as stated above, Coleman says, "she never did acknowledge any right except her own." She sent for Ally. Afterwards, in 1839, she sold Leah to Coleman, who owned her between one and two years, and then sold her back to Rhoda Pullam, at an advance of three hundred dollars. When a letter was received from Rhoda Pullam, Jr., one of the daughters of Lucy Pullam, claiming a negro or money, she declared that "the Pullam girls" had no interest in Leah; which she occasionally repeated down to her death, in June, 1846.

There is no reason to doubt, (even if there ever had been a gift,) that Rhoda Pullam, and her representative since her death, have had adverse possession of Leah and her children quite long enough to confer title to them; and there is as little room for doubt that the daughters of Lucy Pullam knew that their

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mother had re*turned them—that Rhoda Pullam had sent for Ally, and that she had changed her mind upon the subject, and held them in her own right and under her own control, and adverse to every other claim, although she still intended, until affronted, to give them by her will.

It is not an answer to the plea of the statute, to say that the gift by its terms was not to take effect until the death of Rhoda Pullam. If there ever was a gift, it was a parol gift, and such gift to take effect in possession at the death of the donor, is void for want of delivery. The formal words of delivery may be pronounced, the ceremony may be performed, but it is inconsistent and impossible that there can be a real delivery in such a case: because it is necessary, in order to complete a parol gift, that the property itself should be delivered, and by the very terms of a gift to take effect in futuro, the donor is not to deliver but to retain possession. A delivery is neither more nor less than the abandonment of control by one party, and the transfer of it to the other: and when the intent is to retain that control, a delivery is impossible. I have stated my opinion on this point in my decree in *Jaggers v. Estes*, (3 Strob. Eq. 34,) and very recently in the case of *Miller v. Anderson*, [4 Rich. Eq. 1,] which I heard at Edgefield, and content myself with a reference to what I have there said.

There is another point upon which I think I should be justified in refusing to decree a specific delivery in this case. In no view that can be taken of the testimony, is the evidence of gift so free from doubt and obscurity, as to entitle the plaintiffs to insist upon the equity of such a decree: and they should be left to their remedy at law, if there be any. It is ordered that the bill be dismissed.

The complainants appealed, on the grounds:

1. That the evidence established a gift to complainant and her sisters to the slaves mentioned in the pleadings.

2. That the statute of limitations did not begin to run until Rhoda Pullam's death, and ought not therefore to have been held a bar to complainant's claim.

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*3. That the suit for the delivery and partition of the slaves in controversy, was, in this instance, prosecuted in the proper Court, and that the remedy was not at law.

4. That there was reasonable proof of the gift of Leah and her children to complainant, Mary, and her sisters—proof of possession under such gift—and of permissive possession by Rhoda Pullam until her death: and that the decree should have been rendered for complainants in accordance with it.

Thomson, Noble, for appellants.

—, contra.

PER CURIAM. This Court concurs in the decree of the Chancellor; and it is ordered that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.

4 Rich. Eq. 14

D. M. CRENSHAW v. W. T. CRENSHAW.

(Columbia. Nov. and Dec. Term, 1851.)

[*Guardian and Ward* ⚭33.]

A general grant of guardianship of the estate authorizes the guardian to receive any estate afterwards accruing to the ward.

[Ed. Note.—Cited in *Todd v. Davenport*, 22 S. C. 150.

For other cases, see *Guardian and Ward*, Cent. Dig. § 144; Dec. Dig. ⚭33.]

[*Guardian and Ward* ⚭163.]

Where the same person unites in himself the characters of administrator and guardian of one of the distributees, and in his returns as guardian charges himself with the share of the distributee, he is no longer liable to account as administrator to that distributee.

[Ed. Note.—Cited in *Anderson v. Earle*, 9 S. C. 464.

For other cases, see *Guardian and Ward*, Cent. Dig. § 540; Dec. Dig. ⚭163.]

[*Executors and Administrators* ⚭531.]

[Where an executor, who was also guardian, charges himself, as guardian, with a specific legacy to his ward, both he and the sureties on his executor's bond are discharged from liability.]

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2427; Dec. Dig. ⚭531.]

Before Wardlaw, Ch. at Union, June, 1851.

The circuit decree, from which the case will be sufficiently understood, is as follows:

Wardlaw, Ch. This was an appeal, in behalf of the sureties in the administration bond, from a decree of the Ordinary, that

W. T. Crenshaw, as administrator of Jane Crenshaw, pay to D. W. Crenshaw, a distributee of the estate, who had cited the ad-

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*ministrator to account, the sum of \$172.46, with interest thereon from January 1, 1847.

It appeared from the report of the Ordinary, that Jane Crenshaw died intestate in 1834, leaving six brothers and sisters, of whom D. M. Crenshaw was one, the distributees of her estate, and that administration of her estate was granted to W. T. Crenshaw; that the administrator made a return to the Ordinary, May 16, 1836, which was the basis of the decree; that by proceedings in equity, said W. T. Crenshaw was appointed guardian of the person and estate of said D. M. Crenshaw; and that at the date of the appointment, the intestate, Jane, was alive; and the petition and report of the Commissioner in Equity referred to the interest of the ward in the estate of his deceased father, James Crenshaw, as the estate of the ward needing guardianship, although by the order the guardian was appointed in general terms; that the said W. T. Crenshaw, May 16, 1836, probably after his return to the Ordinary of the same date, made his return, as guardian, to the Commissioner in Equity, in which he charged himself with the interest of the ward in the estate of said intestate, Jane. The Ordinary, proceeding apparently upon the notion that the guardianship was limited to the interest of the ward in the estate of his father, decreed that W. T. Crenshaw, as administrator, was liable for his ward's share in the estate of his sister Jane.

I am of opinion that the appeal must be sustained. A general grant of guardianship of the estate authorizes the guardian to receive any estate accruing to the ward after the appointment. It is proper, in case the subsequent acquisition of estate by the ward be large, that the fact be brought to the attention of the Court, by the officer of the Court, or by some friend of the ward, so that additional security may be required from the guardian; but the guardian is appointed to protect the possible as well as the actual interests of the ward. His authority cannot be apportioned according to the security he may have given. The case of Simkins, Ordinary, v. Cobb, (2 Bail. 60,) is direct authority that if the administrator of an estate be ap-

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pointed guardian of the distributees, enter into bond as guardian, and charge himself in his returns as guardian with the balances in his hands as administrator, the administration bond is discharged. As guardian, he becomes creditor of himself as administrator, and thus uniting the characters of creditor and debtor, the debt upon the administration bond is extinguished. (Johnson v. Johnson, 2 Hill Eq. 284 [29 Am. Dec. 72].)

It is ordered and decreed, that the decree

of the Ordinary be reversed, and that D. M. Crenshaw pay the costs.

The petitioner appealed, on the following grounds:

1. Because the defendant was not appointed guardian of the interest of the petitioner in the estate of Jane Crenshaw; and he, having her estate as administrator, is liable for the same in that character.

2. Because, even if defendant made himself and his sureties, on his guardianship bond, liable for what he received as administrator, it cannot discharge the sureties on the administration bond to the petitioner.

Dawkins, for appellant.

—, contra.

PER CURIAM. We concur in the Chancellor's decree, which is hereby affirmed and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Decree affirmed.

4 Rich. Eq. 16

JAMES H. FOSTER, Adm'r. of Nancy Davis, v. JOHN HUNTER.

(Columbia. Nov. and Dec. Term, 1851.)

[Judgment ¶876.]

Where the presumption of the satisfaction of a judgment is urged from the lapse of time merely, it is indispensable that the term of twenty years be complete: and even where that is the case, the presumption is not irrebuttable, but is of such strength that it can be overcome by scarcely any evidence.

[Ed. Note.—Cited in Myers v. O'Hanlon, 12 Rich. Eq. 208.

For other cases, see Judgment, Cent. Dig. §§ 1648-1652; Dec. Dig. ¶876.]

[Judgment ¶876.]

Lapse of time, less than twenty years, and corroborating circumstances held sufficient to raise the presumption, that a decree in favor of parties, some of whom were resident in, and some without, the State, was satisfied so far as

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the parties *in the State were interested; but not sufficient to raise the presumption of satisfaction as against the parties resident without the State.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1648; Dec. Dig. ¶876.]

Before Johnston, Ch., at Abbeville, June, 1851.

This case will be sufficiently understood from the opinion delivered in the Court of Appeals.

Wilson, for appellant.

Perrin & McGowen, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. William Vickory, who died in 1804, by his will, gave his real and personal estate, with inconsiderable exceptions, to his daughter Betty, while she re-

mained unmarried; and upon her marriage or death, he directed the whole to be sold and equally divided between his daughters, Ruth Hunter and Nancy Davis. Benj. Howard and Andrew McComb were appointed executors by this will, and the latter assumed the trust. Betty Vickory enjoyed the estate devised and bequeathed to her until her death in 1826. Andrew McComb had previously died; and John McComb, his son and administrator, took out letters of administration on the estate of William Vickory, and, on June 9, 1826, sold the estate, real and personal, for the aggregate sum of \$1,312.68¾. He returned the sale bill to the Ordinary's office, but made no further returns. He died in 1828. Nancy Davis died in 1825, intestate, leaving children and grand children as her next of kin. She was residing, at the time of her death, with her sister, Betty Vickory, and was in indigent circumstances. There is some proof that John McComb, as administrator, settled with several of these children and grand children, although no receipts are produced. Ruth Hunter seems also to have died before the sale in June, 1826, leaving three children. At that sale, John Hunter, son of Ruth, purchased the land of testator for the sum of \$413, and he and his sisters, Mary and Elizabeth, purchased chattels to the amount of \$204.06¼.

John B. Pressley took out letters of ad-

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ministration, *de bonis non*, *on the estate of William Vickory, and made sale of some personalty to the amount of about \$80.

At the sitting of the Court of Equity for Abbeville, in June, 1831, John Hunter, Elizabeth Hunter, and Mary Hunter, filed their petition, setting forth, the seisin of land, will and death of William Vickory; the death of Ruth Hunter, leaving the petitioners as her only children and distributees; the death of Nancy Davis, leaving several children, some of whom resided without the limits of the State; the sale of the lands by John McComb, and the purchase of them by John Hunter, and that said John Hunter had given his notes for \$413, due June 9, 1827, which were then unpaid, and that titles for said lands had not been made; and praying that said sale might be confirmed, and titles for said land executed and delivered to said John Hunter, on his paying the purchase money aforesaid, with interest. John B. Pressley, as solicitor for the representatives of Nancy Davis residing in the State of Illinois, consented that the prayer of the petition be granted on the terms prayed. On July 2, 1831, Chancellor De Saussure ordered and decreed, that the sale of the lands be confirmed, on the terms prayed, and that the Commissioner of the Court execute titles therefor to the purchaser, unless after personal notice to the parties resident in this State, and publication in a newspaper for

three months, the parties in interest express dissent to the order.

Administration of the estate of Nancy Davis, at the instance of the distributees in Illinois, was granted to James H. Foster, on February 15, 1851, and he filed his petition June 2, 1851, praying that the decree of July 2, 1831, be revived, and that John Hunter pay the said sum of \$413, with interest from June 9, 1827, to the Commissioner of the Court, for distribution among the distributees of Ruth Hunter and Nancy Davis, or that said John Hunter pay one half of said sum to the petitioner for distribution among the distributees of Nancy Davis.

The defendant, John Hunter, in his answer, states that no money has ever been paid by him to the Commissioner for this

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land, and *that no title has ever been executed by the Commissioner to him, but he alleges that the land was bought on some agreement between himself and his sisters, and that their whole purchases at said sale did not amount to one half of the whole amount of the sales, and that it was the understanding between himself and John McComb, that he and his sisters should have the land in part of their share of the estate of William Vickory. The answer further states the information and belief of defendant, that all the children of Nancy Davis have received their shares from John McComb, except two of her daughters, now in Illinois, Frances Ross and Ruth Vickory; and insists that the distributees of Nancy Davis have no remedy except against the estate of McComb. Lapse of time and the statute of limitations are relied upon, as if specially pleaded.

No evidence is offered in support of the answer, as to the allegations of an agreement about the purchase of the lands between the defendant and his sisters, nor of the understanding between defendant and John McComb, that the land was to be taken in payment of the interest of defendant and his sisters in William Vickory's estate. Pretty strong evidence, however, is offered, that John McComb settled with the distributees of Nancy Davis resident within this State.

The Chancellor on the circuit decreed, that the decree of July 2, 1831, be revived, and that John Hunter pay to the Commissioner of the Court one half of the purchase money of the land, with interest—that the distributees of Nancy Davis be made parties to the proceeding—and that the Commissioner take an account of any portion of the proceeds of the sale of the land which may have been paid to these distributees.

From this decree the defendant appeals, insisting upon the lapse of time, and corroborating circumstances, as raising the presumption of payment, and disputing the right of the petitioner, as administrator, to proceed in the matter of controversy.

The right of the petitioner, as administrator of Nancy Davis, to prosecute this claim, is not entirely clear; but by the operation

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of the decree of July, 1831, the interest of the distributees of Nancy Davis was converted into a pecuniary demand; and her administrator is the proper person to make distribution. It is stated to us, that the petitioner is the attorney in fact of the distributees resident in Illinois; and if that fact had been alleged in the petition, he would have been properly before the Court. But all objection on this point is superseded by the order in the circuit decree, to make the distributees parties.

Is the defendant protected by the lapse of time? The decree of July, 1831, is in effect a judgment against the present defendant for \$413, with interest from June 9, 1827. The full term of twenty years had not elapsed, from the date of that decree, before the present suit was instituted; and where the presumption of satisfaction is urged from the lapse of time merely, it is indispensable that the term of twenty years be complete. Even where this is the fact, the presumption which arises is not one of those presumptions of law which are absolutely irrebuttable, although it is of such strength that it can be overcome by scarcely any evidence. In this Court, where the Chancellor exercises the function of determining upon facts as well as law, effect would be given to the presumption, wherever, in the Courts of Law, the jury should be directed to presume the fact. But where the lapse of time is less than twenty years, as in this case, circumstances opposing the conclusion of satisfaction, such as the admissions of the debtor, are entitled to full weight. *Stover v. Duren*, (3 Strob. 448 [51 Am. Dec. 634].) Here we have the statement of defendant's counsel in the petition of 1831, after the death of McComb, administrator, supported by all the circumstances of the case, that defendant's notes for the price of the land had not been paid; and much more, we have defendant's own admissions, in his answer to the present proceeding, that no money has ever been paid by him for this land to the Commissioner of the Court, and, on his information and belief, that two of the daughters of Nancy Davis, resident in Illinois, were not paid by McComb. If the understanding between defendant and McComb set up in the answer

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ever existed, and defendant, upon whom was the burden, has offered no proof of it, such understanding could not bind those who were no parties to it, and they would still be entitled to their shares in the proceeds of the land, until it was proved they were otherwise satisfied.

It is quite true, however, that the presump-

tion of satisfaction of the decree of 1831, does not depend solely upon the lapse of time; and that corroborating circumstances exist which, we think, are sufficient to bar those of the distributees of Nancy Davis, who were adult residents of this State in 1826, when the sale of this land was made by the administrator, with the will annexed. It is alleged in the petition of 1831, that most of the parties in interest were present at that sale and consented thereto, (meaning to except, as we suppose, those who were absent from the State,) and after the personal notice to those in the State, directed by the decree of 1831, and presumed to be given, no objection to the decree is manifested. The administrator, McComb, had funds in his hands, from the proceeds of the chattels sold, adequate to pay the distributees resident here, and we should presume that he did his duty. Positive evidence, in aid of the presumption, is offered, that he did pay most of these distributees. It is not likely that, in their needy condition, they would have acquiesced in defendant's possession of the land for a quarter of a century, if they had any just cause of clamor. The decree of 1831 recites, that the Court was informed that the distributees resident in the State consented to the order; their acquiescence makes this fact very probable. Administration on the estate of Nancy Davis was not indispensable to enable the parties to avail themselves of that decree.

On the whole, we consider the claim stale, except as to such of the distributees of Nancy Davis as were resident without the State on June 9, 1826.

It is ordered and decreed, that the distributees of Nancy Davis, resident without the State on June 9, 1826, and the representative of John McComb, be made parties to this proceeding. It is further ordered and decreed, that the decree of July 2, 1831, be revived, so far as the distributees of Nancy

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Davis, resident without the State on June 9, 1826, are interested; and that the defendant, John Hunter, pay to such distributees, so non-resident, who have not been otherwise satisfied, their portions of said decree for \$413, with interest from June 9, 1827. And the Commissioner is directed to state the accounts accordingly.

The order in the circuit decree, that defendant pay over to the Commissioner one half of the purchase money of the land, with interest, is recalled; and it is ordered that said decree be reformed according to the opinions herein expressed. Costs to await the accounting before the Commissioner.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

Decree modified.

4 Rich. Eq. 22

JOHN B. O'NEALL, Ex'or. of David Boozer, v.
AMELIA BOOZER et al.

(Columbia. Nov. and Dec. Term, 1851.)

[Wills ⚡561.]

Testator directed his executors "to enclose a grave-yard at Aveleigh Church, from 45 to 50 yards square, with a wall of split rock from 4½ to 5 feet high, so as to enclose the grave of my first wife, as well as my own, with sufficient space also for the grave of my present wife; and to erect over the area included by the wall, a covered wooden building of the most lasting materials, to be finished and painted in appropriate style, and in the most durable manner. And I appropriate one thousand dollars out of my estate to these purposes."—*Held*, that the grave-yard intended to be enclosed and covered was one of forty-five or fifty square yards.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1221; Dec. Dig. ⚡561.]

[Wills ⚡460.]

Words of a will may be transposed, in order to give full operation and consistency to the context.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 979; Dec. Dig. ⚡460.]

Before Johnston, Ch., at Newberry, July, 1850.

This case will be sufficiently understood from the opinion delivered in the Court of Appeals.

Fair, for the appellant.

The opinion of the Court was delivered by

WARDLAW, Ch. The will of David Boozer contains the following clause: "I desire my executors to enclose a grave-yard at

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*Aveleigh Church, from 45 to 50 yards square, with a wall of split rock from 4½ to 5 feet high, so as to enclose the grave of my first wife, as well as my own, with sufficient space also for the grave of my present wife; and to erect over the area included by the wall, a covered wooden building of the most lasting materials, to be finished and painted in appropriate style, and in the most enduring manner. And I appropriate one thousand dollars out of my estate to these purposes."

The Chancellor on the circuit determined, in the construction of this clause, that the grave-yard intended to be inclosed was one of forty-five or fifty yards square, and that the wooden building intended was not commensurate, but one sufficient to cover a space or area adequate for the three graves indicated; and he ordered the Commissioner to inquire and report as to the probable cost of inclosing such a grave-yard and erecting such a building.

The Commissioner, not pursuing exactly the terms of the order, has reported that an area of 45 or 50 yards square could not be inclosed with stone and covered by a wooden building for less than \$4,600; and that an area of 45 or 50 feet square could be inclosed

and covered as directed by the will for \$900 or \$1,000.

From the decree of the Chancellor an appeal is taken to this Court, on the ground that by the just construction of the will, 45 or 50 feet square, instead of yards, should be inclosed by a stone wall, and the whole area included within the wall be covered by a wooden building.

According to the natural construction of the terms employed by the testator, the wooden building is to cover the whole space within the wall of split rock. "Over the area included by the wall," as fully and accurately expresses this idea as any terms that could be employed. And we can perceive no intimation of any intention on the part of the testator to limit the area to be covered, to a part or section only included by the wall.

This is one circumstance which aids in ascertaining the testator's intention as to the extent of the grave-yard to be inclosed by the wall. A structure sufficiently extensive

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to cover three *graves is frequently found within rural grave-yards; but one large enough to cover 45 or 50 yards square, or half an acre, is without example; it would be most ungainly, and would exhaust, several times over, the amount of the fund appropriated by the testator for this purpose, and which cannot be exceeded by the executor.

The testator explains his purpose in inclosing a grave-yard with a wall to be, in his own language, "so as to inclose the grave of my first wife, as well as my own, with sufficient space also for the grave of my present wife." His design was to separate a place of sepulture for the bodies, when dead, of himself, and his consorts dead and living. If he really intended to inclose half an acre with the wall, his careful provision for 'sufficient space' to receive a third corpse, was utterly without occasion and meaning.

One phrase in the testator's directions to his executors in this matter, if the exact order of his words be observed, is inconsistent with all the rest of his directions. One particular in the description of the grave yard is, that it is to be 'from 45 to 50 yards square.' The construction of a written instrument should be made from all its parts; and if one phrase descriptive of the subject of disposition be irreconcilable with several other parts of the description, we should act on the maxim: *ex multitudine signorum, colligitur identitas vera*. If we should strike out the whole of this phrase as '*falsa demonstratio*,' the other portions of the bequest would be harmonious, and leave the testator's meaning beyond doubt. But a less violent process will serve the purpose. It is only necessary to transpose the words 'yards square,' to give consistency and full operation to the whole clause. If we correct a supposed inadvertence of the scribe, and read

square yards, we shall then have a space of about twenty-one feet square, to be inclosed by a stone wall and covered by a wooden building; and this will afford sufficient space for three graves; and the wall and building may be erected for the sum appropriated for the same by the testator. 'It is quite clear, that where a clause or expression, otherwise senseless and contradictory, can be rendered consistent with the context, by being transposed, the Courts are warranted in

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'making that transposition.' (1 Jarm. on Wills, 437; 2 Ves. sen. 32, 248.)

It is declared and adjudged, that the testator directed his executors to inclose with a stone wall a grave-yard of from 45 to 50 square yards; and to erect over the area included by the wall a covered wooden building, further described in the will. And it is ordered and decreed, that the Chancellor's decree be modified accordingly.

DUNKIN and DARGAN, C.C., concurred.
Decree modified.

4 Rich. Eq. 25

SUSAN and WILEY GLOVER v. ELIZ. HARRIS, GEO. A. ADDISON and Wife, and E. S. IRVINE and Wife.

(Columbia. Nov. and Dec. Term, 1851.)

[Wills 587, 614.]

Testator, intending "as for his worldly estate to dispose thereof," devised and bequeathed as follows:—"I lend to my wife, J. G., during her natural life, the use of one half of my land" (describing it) "and five negroes" (naming them); after other bequests, the will contained the following residuary clause, to wit: "It is my will, that at my decease all the property which I possess and have not before bequeathed, be sold on a credit of one and two years, and for my debts to be paid out of the debts which are due me, and the money arising from the sales of my property; and the balance to be put out at interest for the use and support of my children," &c.—*Held*, (1) that the five negroes did not pass to the wife absolutely, but for life only; (2) that the reversion, after her death, did not pass under the residuary clause, but was intestate property.

[Ed. Note.—Cited in *Lopez v. Lopez*, 23 S. C. 269; *Varn v. Varn*, 32 S. C. 79, 10 S. E. 829; *Logan v. Cassidy*, 71 S. C. 201, 203, 50 S. E. 794.

For other cases, see Wills, Cent. Dig. §§ 1290, 1393; Dec. Dig. 587, 614.]

[This case is also cited in *Logan v. Cassidy*, 71 S. C. 175, 50 S. E. 794, and distinguished therefrom.]

Before Johnston, Ch., at Abbeville, June, 1851.

Johnston, Ch. The bill in this case was filed the 21st of April, 1851; and is for a partition of slaves and an account, &c. The contest is between the descendants of Wiley Glover, Sen. and of his wife, Jemima, both deceased, in relation to the proper distribution of their estates under their wills. In

the opening of the judgment I am about to pronounce, it may conduce to the understanding of it, to state the relation of the parties, and how the controversy between them has arisen.

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*Wiley Glover, Sen., married Jemima, the daughter of one Bartlet Satterwhite. At his death, which took place the 8th February, 1806, he left a will, dated the 6th of December, 1804, (the provisions of which will be noticed hereafter,) and was survived by his said wife and two children, a son and a daughter. The son, Willis Satterwhite Glover, is now dead intestate, and the plaintiff, Susan Glover, is his widow. The plaintiff, Wiley Glover, Jr., is his son and only child, consequently these two are his sole distributees.

The daughter, Elizabeth, is the defendant, Elizabeth Harris, and the defendants, the wives of George A. Addison and E. S. Irvine, are her two daughters.

Having stated the relation of the parties to this suit, let us now go back to matters which some of the parties suppose bear more or less upon the controversy between them.

Bartlet Satterwhite, after Wiley Glover, Sen., married his daughter, executed his will the 15th of February, 1803, which contains the following clause:

"I give and bequeath unto my beloved daughter, Jemima Glover, (to her and her heirs lawfully begotten of her body,) forever, the following negro slaves, (they and their increase,) namely, Tener and Chaney; and after the demise of my wife, one negro woman, named Jude, (her and her increase)."

This testator (Satterwhite) did not, however, depart this life until the 21st of January, 1807, when he died, leaving his said will in full force, which was admitted to probate the 14th of the succeeding April.

In the mean time, to wit, on the 6th of December, 1804, Wiley Glover, Sen., the husband of Jemima, executed his will, as has been stated, containing the following clauses, among others:

"As for the worldly estate it hath pleased God to bless me with, I dispose thereof as follows: * * *

"Item: I lend to my loving wife, Jemima Glover, during her natural life, the use of one half of my land, (the same including the plantation and building where I married her,) and five negroes, namely, one negro man,

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Murphy, one woman, Tener, two boys, *Nat and Jack, and one girl, Mariah," (Murphy and Mariah are both dead, and are not in question in this case,) "three head of horses, (viz: one young sorrel mare, one bay filly, and one sorrel horse colt,) ten head of picked cattle, all my stock of hogs and sheep, two feather beds and furniture, and as much of the household and kitchen furniture and

plantation tools as she wishes to keep for her use."

* * * * *

"Item: It is my wish and desire, that when my daughter, Elizabeth Glover, comes of age or marries, the following mentioned negroes and their increase be equally divided between my daughter, Elizabeth Glover, and my son, Willis Satterwhite Glover, share and share equal, namely, Anneky, Harriet, Mary, Chaney, Harper, Ned and Wince.

"Item: It is my will and desire, that at my decease all the property which I possess and have not before bequeathed, be sold on a credit of one and two years, and for my debts to be paid out of the debts which are due me and the money arising from the sales of my property; and the balance to be put out on interest for the use and support of my children, Elizabeth Glover and Willis Satterwhite Glover.

"Item: It is my will and desire, that when my daughter, Elizabeth Glover, marries or comes of age, all the monies arising from the sales of my property, be equally divided between my daughter, Elizabeth Glover and Willis Satterwhite Glover.

"It is my wish and desire, that my wife, Jemima, shall keep and have the use of the negroes which I have before bequeathed to my daughter, Elizabeth Glover, and Willis Satterwhite Glover, until my daughter, Elizabeth Glover, and Willis Satterwhite Glover, comes of age or marries."

The executors named in the will were testator's wife, Jemima, and his friends Nathan Lipscomb and James Bullock.

This testator died, as has been stated, on the 8th of February, 1806, and on the 6th of

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March, 1806, his will was admitted to *probate, and the widow, Jemima, and James Bullock qualified as executors.

On the 11th of the same month, they caused an inventory and appraisement to be made and returned to the ordinary; in which Chaney and her three children, Harper, Ned and Tom, and Tener and her three children, Nat, Jack and Mariah, are set down as part of their testator's estate; Jude is not included in the inventory.

Jemima, the widow of Glover, intermarried with Nathan Lipscomb, the 9th March, 1808, and they had the possession of Tener and her issue.

Lipscomb's will is in evidence, dated the 26th April, 1820, and admitted to probate the 29th September of the same year, by which he willed, "that his wife, Jemima, should have all the negroes she had in her possession at the time of their intermarriage, and their increase, viz: Tener, Nat, Jack, Harry, Johnson, Caroline, Sarah and Isaac, and their future increase," &c.

Jemima Lipscomb, (formerly Glover,) died the 29th January, 1850, leaving in full force her will, executed the 18th of April, 1849, by

the 2d clause of which she bequeathed to her grand daughter, the defendant, Ann Jemima Harris, (now wife of the defendant, E. S. Irvine,) during her natural life, "Jenny and her children, Chaney and Harper, Harry and his wife, Milley, and her children, Jim, Tom, Fib, Dicey, Harry, Mary, Isaac and Emeline, and Johnson and Sarah and her children, Elvina, Jude, Peter and Lina, with all their increase," with remainder to her children, &c.

By the 3d clause, she bequeathed for life, with remainder, &c., to her grand daughter, the defendant, Rebecca, wife of George A. Addison, "Edy, Eliza, Amanda, Frances, Emma, Jane, Sarah, Edmund and Doc; and Caroline and her children, Lewis, Tira, Bill, Johnson, Josephine and Elizabeth, with all their increase," &c.

By the 5th clause, she bequeathed to her daughter, the defendant, Elizabeth Harris, (formerly Glover,) "Rachel and her children, Allen, Tilda, Cary, Gus and Lisha, and Jack and Nat, Jude and Tener, to her, her heirs and assigns forever."

The plaintiffs, the widow and son of Willis

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Satterwhite Glover, *claim under the will of Wiley Glover, Sen., insisting that the will of his widow, (afterwards Jemima Lipscomb,) is ineffectual to alter their rights, as fixed by the will of her first husband.

The defendants claim under the will of Jemima Lipscomb, and fortify their claim by the will of Bartlet Satterwhite, insisting that Wiley Glover had no such rights in the property as enabled him to bequeath it.

The negroes mentioned in the pleadings are:

- 1st. Jude and her issue.
- 2d. Chaney and her issue.
- 3d. Tener and her issue.

I shall put Chaney and her issue out of the question. They are bequeathed by Glover absolutely to his two children, and have been partitioned in a former proceeding given in evidence, which is conclusive between these parties.

With respect to Jude and Tener and their respective issues, it is very clear, that if they were in possession of Glover and wife, at the time of Glover's death, as their property, the marital rights of Glover attached, and they must be governed by his will; and it must depend on the terms of the will whether his widow had any right of disposition over them.

If, however, Glover had no right to the property at his death, the will of his father-in-law, Satterwhite, which, though first executed, came subsequently into operation, must govern; and if that is the case, I suppose there is no question, the legal operation of that will was to vest the property absolutely in Satterwhite's daughter; and (her second husband, Lipscomb, having by his will released his marital rights,) her

will is sufficient to carry the title. Now, with regard to Jude and her issue, it not only appears negatively, (from the fact that there is no evidence of Glover's possession; that they are not mentioned in the will of Glover; and especially that they were not inventoried as part of his estate,) that they were not in his possession in his life time, but the pregnant fact is also in evidence, that Satterwhite's will, which alone mentions the existence of such negroes, sus-

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pends Mrs. Glover's *right upon a prior disposition of them for life to her mother, who lived, according to the evidence, until 1817; so that it was impossible for Glover's right, as husband, ever to have attached during his life. These negroes were, therefore, well disposed of by Mrs. Lipscomb.

It remains to consider Tener and her stock: two of these, Murphy and Mariah, (I include Murphy as of that stock for convenience, though he was of a different stock,) died during the life of Mrs. Lipscomb, who had a life tenure in them, under Glover's will, and are, therefore, out of the question here.

As to the remainder of that stock, I am of opinion, that it stands upon a footing different from Jude and her issue. The evidence that Tener and her children were inventoried as parcel of Glover's estate, by his widow, under whom the defendants claim, within little over a month after his death, is pretty conclusive and very satisfactory evidence, as against them, at least, that he died possessed of them. This, too, was in the life time of Satterwhite, who may be supposed to have taken some interest in the affairs of the family and probably was not ignorant of the fact.

Upon this evidence, I conclude, that Glover, who named this stock of negroes in his will, had obtained possession of them as early as 1804, (the date of his will,) and held them as his own.

There is no evidence that they were ever in Satterwhite's possession after Glover bequeathed them; nor, indeed, is there any evidence, that they were at any time, whatever, in his possession, beyond the fact that they are mentioned in his will of 1803.

It is not unreasonable to suppose, that, after that will was drawn, he concluded to anticipate the bequest by an actual gift *inter vivos*.

In opposition to the actual possession of them by Glover, and his disposition of them, I do not feel at liberty to conclude that there was any right remaining in Satterwhite, upon which his will, when it came into operation by his own death, could act.

It has been ingeniously argued, indeed, that Glover held as bailee of Satterwhite, and by his will, only intended to confer on his wife the same interest which he sup-

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posed was given her by the *will of Satterwhite, his bailor. But where is the evidence of the bailment? If he knew of Satterwhite's will and its provisions, and acknowledged his right, where was the necessity or the propriety of attempting to make any disposition of the property, at all? Besides, even if he supposed that Satterwhite's will gave his wife a life tenure in the slaves, with remainder to the issue of her body, why did he not conform to that? Why did he dispose of Tener and Chaney differently?

My conclusion is, that these slaves must be governed by Glover's will.

Some remarks have been made upon the construction of that will.

It is remarkable that there is no general residuary clause in this testamentary paper. The testator sets out with the expression of a desire to dispose of his whole estate: which circumstance, upon authority and in reason, will justify the giving to subsequent dispositions, a wider scope and operation than they would otherwise be entitled to. But even under such circumstances, an unreasonable, unnatural or forced interpretation should not be adopted.

In this will there is no specific disposition of these slaves beyond the life interest of Mrs. Glover. There is, to be sure, a provision for the sale of "all the property which I possess and have not bequeathed." This may mean all property as to which no bequest is made at all; or it may mean all interests undisposed of in property not fully bequeathed, and certainly, under the general rule that a testator, declaring an intention to dispose of his whole estate, should have his will so construed, if it reasonably can be, as to effect his intention, I should adopt the latter construction, if it were not repugnant to the other provisions of this will. The testator not only directs his unbequeathed property to be sold, but to be sold "at his death." He could not have intended this direction to operate on these slaves, since such a sale would have defeated his specific direction, that his wife should have the enjoyment of them during her life. There is another reason, which, it appears to me, should prevent

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the construction *alluded to. It consists in the purpose which the sale was intended to effect. The sale was to raise funds to pay debts. Now, it is of the very essence of a specific bequest; such as the gift to the wife, here for life—that the property is given clear of debts, and that the debts should be paid out of other property without disturbing it.

It is argued, however, that the reversion might have been sold, and the wife allowed to retain and enjoy the slaves, without disturbance, during her life. But this property was personal property; and it is diffi-

cult to conceive how the sale could have been made good without a delivery; and how could that have been made without disparaging the rights of the life tenant.

If this property was not intended to fall within the provision for a sale, another point in the construction, which was contended for by the plaintiffs, is also overruled. The proceeds of the sale were not only to be applied to debts, but, whatever balance might remain, after the debts were satisfied, was to be divided between the two children, Willis and Elizabeth. It was urged that this should give these two an equal portion in the negroes, after their mother's death, instead of the money which the sale was intended to raise. I might concede, that where personal property is ordered to be sold and the proceeds divided, and the property is not actually sold, the persons among whom the proceeds are to be distributed have an equitable interest, entitling them to the property itself. But I have arrived at the conclusion, that this property was not directed to be sold, nor its proceeds divided, and, therefore, I cannot apply the doctrine to which I have alluded.

But it was contended, on the other hand, by the defendants, that these slaves were given by the will, out and out, to the widow. If so, there was no reversion in the case. And upon this construction, the slaves, belonging absolutely to the widow, must pass under her will; and the plaintiffs have no interest in them.

The argument was, that by the proper construction of Glover's will, though he loaned his wife, for life, one half his land; yet, as a separate thing, he loaned her the

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five negroes mentioned by him, *without restricting the loan to her life. That the word "lend," as applied to the negroes, is equivalent, in law, to a gift; and there being no restriction as to time in that part of the will, the gift was absolute.

If the loan was of the land and of the negroes, as separate dispositions and upon different terms, there might be ground for the inference contended for.

The words of the will are, "I lend to my loving wife, during her natural life, the use of one-half of my land," (describing it,) "and five negroes," (naming them).

I cannot disjoin these things. In *Moon v. Moon*, (2 Strob. Eq. 333,) the Court, for reasons appearing in the context of the will, arrived at the conclusion, that a tract of land and two negroes, given in the same clause, were given upon different terms; and that terms of restriction, employed in more immediate connection with the negroes, were applicable to them exclusively, and not to the land. But this was done by construction. But I cannot see room for construction here. The disposition of land and ne-

groes is uno flatu. They are both loaned, and loaned for use only, and for life.

I think, too, that in such a connection as this, (whatever may have been decided upon the word "loan," in other connections,) it would be both unnatural and unreasonable to suppose that the testator intended to give, in the sense, at least, of parting from his whole right.

The result, in my opinion, is, that the will of Glover operated only to dispose of these negroes during his wife's life; and the remainder in them was intestate property of his estate.

His widow was entitled to an undivided third of that remainder, and each of his children, Willis and Elizabeth, to an undivided third.

The widow, Mrs. Lipscomb, was entitled to bequeath her third; and so far as she has done so, the defendants are entitled to the benefit of her will.

The plaintiffs are entitled, by partition,

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to have the third to *which Willis Satterwhite Glover was entitled, allotted to them, and sub-partitioned between them, by allowing to the plaintiff, Susan, one-third of that share, and the plaintiff, Willis, the remaining two-thirds of the same. And they are entitled, in the same ratio, to an account of the hire or profits of said slaves, from the death of Mrs. Lipscomb, at the hands of the defendants, in whose hands respectively, the said slaves have been. All which is hereby adjudged and decreed: and let a writ of partition issue, and an account be taken by the Commissioner accordingly.

If any of the slaves have died since the remainder fell in, or have been disposed of by either of the defendants, and are not now in their possession, the Commissioner will take an account of the value of such slaves, and report it for the judgment of the Court; which will be reserved on those matters until the report comes in. He may also report any special matter, subject to the same conditions. The defendants to pay the costs.

The defendants appealed on the following grounds:

1. Because there was no evidence that Bartlett Satterwhite ever gave Tener and her increase to Wiley Glover, or his wife, Jemima, except what is contained in his (Satterwhite's) will. The bequest in his will did not and could not take effect until his death; but he died after Glover, and therefore he, Glover, never had the right to dispose of said negroes.

2. Because there was no evidence that Wiley Glover ever had possession of Tener, except the circumstance of his having disposed of her by will; but if he had the custody of her at the time he wrote his will, 6th December, 1804—a period subsequent to the making of Satterwhite's will, 15th February, 1803—it is reasonable and natural to

conclude that his possession was not absolute, but permissive, and solely in reference to the will of Satterwhite, by which Tener was given to his wife, which gift, however, was inchoate and imperfect, until the will took effect by the death of Satterwhite.

3. There was no evidence of a gift of Tener from Satterwhite to Glover or his wife, other than that in Satterwhite's will. There

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*was no evidence even of possession by Glover, except the effort to dispose of her by will, which conforms to Satterwhite's will, in not assuming to dispose of her beyond the life of Jemima, his wife; therefore, the defendants insist, that there was no gift to Glover, nor such unqualified possession by him as will presume a gift in his favor.

4. But if it be assumed that Wiley Glover had the right to dispose of Tener, by presuming a gift, other than that embraced in Satterwhite's will, and in opposition to it; then the defendants insist that Wiley Glover, by his will, disposed of all his interest in Tener and her increase to Jemima, his wife, the donor of defendants.

5. The defendants insist that Tener was given absolutely to Jemima Glover, by the will of her father, Bartlett Satterwhite, certainly by the will of her husband, Wiley Glover. But if it should be held that "there is no disposition of these slaves beyond the life interest of Mrs. Glover," then the interest in remainder, which was not bequeathed, should have been sold at the death of Glover, under the express provisions of his will. And a bill having been filed for that purpose many years since, the matter is now "res adjudicata."

6. The interest in Tener and her children undisposed of by the will of Wiley Glover, was an interest in reversion, as to which he died intestate—which on his death vested instantly in those entitled to distribution; and they are now barred by lapse of time and the statute of limitations.

7. Mrs. Jemima Glover—afterwards Jemima Lipscomb—held these negroes, from the death of Satterwhite, in 1806, until she died in 1850. She held them as her own, adversely to every other claim, especially after the death of Nathan Lipscomb, in 1820, under whose will these negroes were given to her for the third time: and the complainants are therefore barred by lapse of time and the statute of limitations.

Perrin & McGowen, for appellants.

—, contra.

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*The opinion of the Court was delivered by

JOHNSTON, Ch. This Court, being entirely satisfied with the view which the Chancellor has taken, as regards the possession of the slave Tener and her children by Wiley

Glover, and the operation of his will upon her, as his property:—deems it necessary to notice only two points made in the argument of the appeal here:

1. Was that slave given by the will of this testator, in the first instance, to his wife absolutely; or only for life?

2. If for life only, did the residuary clause of the will attach upon the reversion; or did it remain intestate?

1. No case has been pointed out at all obliging the Court to put a construction upon the words of the will, contrary to their plain and manifest meaning. Nothing can be plainer than that the testator intended, as he says in his will, to loan to his wife the use of this property, during her natural life.

The case of *Moon v. Moon*, 2 Strob. Eq. 333, even if it apply almost in terms to this case, is no authority for a construction against the plain intent of the will. That case was ruled upon the construction of the particular will before the Court,—and the decision was made with a view to promote, and not to contradict, the real intention.

There is a difference between the phraseology of that will and this:—and where the difference of phraseology points to a different intention in the two cases, principle,—(the same principle which governed the construction in that case,)—compels us to come to a different result in this.

The two cases agree in this: that the testators both intended to dispose of their whole estates:—that after a disposition of realty and personalty in the same clause, which certainly as to one class of property was intended to be only for life, and as to the other was equivocal, the testators take up a portion of the property and make it the subject of further disposition,—but totally neglect the other.

So far the two cases agree. But they differ in other respects.

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*In *Moon v. Moon*, the words of the will, (supplying necessary words,) are these: "I give my wife, N. T. M., the tract of land whereon I live, containing 200 acres, more or less; also" (I give her) "two negroes, to wit, my man Stephen and my girl Harriet, during her natural life, or widowhood," &c.

In this case, the will is, "I lend to my loving wife, J. G., during her natural life, the use of one half my land," (describing it,) "and five negroes," (naming them).

Is it not palpable that the words, "during her natural life," are, in the latter case, connected immediately with the words of disposition, so as to qualify them, before they are applied by the testator to the subjects disposed of. The effect is, that whatever subjects are touched by the disposition are affected by the qualification attached by the testator to the words of disposition themselves.

The words of this clause of Glover's will

have the same meaning as if he had said, "I am now going to point out property which I intend for my wife, but I intend to loan it to her, for her use during her life: and upon these terms my will is that she have the land and five negroes." The phraseology of Moon was different. He imposes no restriction upon the words of disposition in themselves, but uses them in their natural sense. Applied in their natural sense, they gave his wife a fee in his land; and so would they have given her the negroes absolutely, if he had not, in immediate proximity with that disposition, imposed a restriction upon the gift, as made by the words of disposition.

In that case, a full and unqualified disposition was made, applicable to both land and negroes,—and then a restriction is imposed upon that disposition, so far as related to the negroes.

In this case, nothing but a qualified disposition proceeds from the mouth of the testator, equally affecting all the property to which he applies it. If our language afforded a verb signifying, "I lend for life," we should have this testator's meaning if we inserted that single word instead of the words of disposition employed by him.

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*I think, too, as I have intimated in the decree, that the word "lend," used in such a connection as this, is evidence of an intention to make a limited disposition. Take the words, "lend," "use," "for life"; they all harmonize in shewing that there was no intention,—there could be none,—to give the property absolutely and forever. In *Waller v. Ward*, 2 Sp. 793, it is said: "the term use might sometimes afford argument for an intention to give only a life estate:"—and I think when it is connected with the word "lend" and the words "during her life"—all standing in one group—it is difficult to conjecture any other intention.

2. Being satisfied that these slaves are only given for life, I am, also, of opinion, that the residuary clause of the will does not embrace them; and therefore they are intestate property after the efflux of the life estate.

I can add very little to what I have said in the decree upon that subject.

The direction, then, is to sell, at the testator's death, all the property to which the special residuary clause was intended to apply. The very fact that the interest now under consideration was of necessity, at that time, a reversionary interest, upon which no act of administration could be performed until the prior life estate expired and the reversion accrued,—of itself forbids the idea that it was intended to be parcel of the property then directed to be subjected to an act of administration.

It is ordered, that the decree be affirmed, and the appeal dismissed.

DARGAN and DUNKIN, CC., concurred.

WARDLAW, Ch., having been of counsel in the cause, gave no opinion.

Decree affirmed.

4 Rich. Eq. *39

*EDMUND ATCHESON and Others v. DOUGLASS ROBERTSON, Ex'or., and Others.
(Columbia. Nov. and Dec. Term, 1851.)

[Wills \hookrightarrow 736.]

Where legatees, whose legacies were of equal grade, had been paid in unequal proportions, and afterwards a fund, insufficient to pay all the balances, was recovered from the estate of a deceased executor who had committed waste,—held, that such fund should be applied in the first instance towards equalizing the legatees who had received less than the others, before any part should be applied to the legacies of those who had been more favored.

[Ed. Note.—Cited in *Lay v. Lay*, 10 S. C. 219.

For other cases, see Wills, Cent. Dig. § 1879; Dec. Dig. \hookrightarrow 736.]

[Executors and Administrators \hookrightarrow 318.]

Where a legacy to an executor is of equal grade with those of other legatees, and, because of a devastavit committed by a deceased co-executor, the assets are insufficient to pay all the legacies, he, the executor, is not entitled to retain his whole legacy, but only his due proportion.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1324; Dec. Dig. \hookrightarrow 318.]

[Executors and Administrators \hookrightarrow 111.]

Counsel fee allowed the executor out of the assets, and *Wham v. Love* (Rice Eq. 51) approved.

[Ed. Note.—Cited in *McClellen v. Hetherington*, 10 Rich. Eq. 204, 73 Am. Dec. 89.

For other cases, see Executors and Administrators, Cent. Dig. § 449; Dec. Dig. \hookrightarrow 111.]

Before Johnston, Ch., at Edgefield, June, 1851.

The bill was filed by legatees of William Robertson deceased.

The testator died in May, 1841, leaving a will, of which two of his nephews, (the defendant, Douglass Robertson, and James Robertson, now deceased,) were executors, and also entitled to legacies under the will.

On the 24th of November, 1841, the executors sold the estate on a credit of twelve months, and shortly afterwards divided the sale notes between them; Douglass Robertson receiving notes to the amount of \$4,739.53, and James to the amount of \$4,677.09.

On the 7th of September, 1847, Douglass took from James, his co-executor, who then seemed to be in failing circumstances, a mortgage, to secure himself from the consequences of his (James's) devastavit of the assets in his hands.

James died intestate shortly after executing this mortgage. His estate came into the

hand of the defendant. Hill, to be administered, and realized but a small sum applicable to the mortgage.

The bill claimed an account of William Robertson's estate, and that Douglass Robertson be held responsible for the waste committed by his co-executor, James.

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*The case came to a hearing upon the merits, in June 1850; and the Court decided that Douglass was not liable for the devastavit of his co-executor; but that the estate was entitled to the benefit of the mortgage which he had taken for his own protection. (3 Rich. Eq. 132 [55 Am. Dec. 634]).

The accounts were referred to the commissioner. Upon the reference, it appeared that payments had been made, of unequal amounts, to the different legatees, whose legacies were all of equal grade. The commissioner, in his report, distributed the remaining assets in proportion to the balances still due the legatees, and not in proportion to their legacies, as they stood before any payments were made upon them. To this part of the report, the defendants excepted, and insisted that the assets should be distributed in proportion to the original amounts of the legacies, and not in proportion to the amounts to which they were reduced by the partial and unequal payments which had been made to the legatees.

In his report, the commissioner, also, held Douglass Robertson entitled to retain the whole amount of his own legacy out of the amount of assets which came to his hands, and to distribute the residue only, among the other legatees. To this part of the report, the plaintiffs put in an exception, (number 2,) insisting "that the commissioner erred, in allowing the defendant, Douglass Robertson, to retain, out of the assets in his hands, the entire share of his testator's estate, to which he would have been entitled had there been no waste of the same; and submitting that he should have received credit, only for his proportionate share of those assets, his possession thereof being fiduciary merely, and no appropriation of any part thereof having been made by him to the payment of his individual share of the same."

The commissioner, in his report, also charged the fund to be distributed with the counsel fees paid by Douglass Robertson, for defending this suit: to which the plaintiffs put in an exception, (number 1,) insisting that it was error to allow this charge, inasmuch as the fees "were expenses incurred,

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not for the benefit of the testator's estate, but in resisting the claims of the legatees, and in sustaining a defence utterly hostile to their interest."

The case came up upon the report and exceptions.

Johnston, Ch. I shall sustain all the exceptions.

In relation to the defendants' exception, though it is said there are authorities both ways, (which are not produced, however,) I cannot perceive why the assets remaining for distribution should not be applied, in the first instance, towards equalizing the legatees who have received less than the others, before going on to pay those of them who have been more favored.

I have more doubt respecting the second exception of the plaintiffs than any other. But it appears to me that Douglass Robertson had no right to retain his entire legacy out of the assets which came to his hands, and throw the other legatees upon the assets in the hands of his co-executor; thus burdening them with the whole of the loss occasioned by his devastavit. He was bound to make fair distribution of what came to his own hands, and was, therefore, entitled to retain only his due proportion.

The first exception of the plaintiffs appears to be decided by the case of Wham v. Love. Rice Eq. 51. This Court has nothing to do with counsel fees, except when they are expenses of administration. The fees in this case were not for the benefit of the estate, nor were they incurred in preserving it, or adding to the funds to be distributed; but simply in defending the executor, in a matter entirely personal.

It is true, he successfully defended himself, and established his innocence of the charges brought against him. That entitled him to his costs. But though the Court has authority to decree costs, according to the merits of the case; it can go no further. It has no authority to decree counsel fees in any case, unless they are incurred as expenses of administration. An executor's case differs, in no respect, from any other case: and unless we take upon us to decree counsel fees in

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every case, according to the merits of the parties, we have no right to do it, on the ground of merit alone, in the case of an executor.

Ordered, that the exceptions be sustained, and the report recommitted, to be reformed.

The defendant, Douglass Robertson, appealed, on the following grounds:

1. That he was entitled, under the practice of this Court, and in equity and justice, to be allowed the fee paid his solicitor in defending this suit, as by the result of the case, it appeared that he was improperly brought into Court, and not liable as to the matters charged against him in the bill.

2. That, being in possession of the fund, he was entitled to retain what was due to himself as legatee, otherwise he derives no benefit from his own diligence and honesty, and is made, to some extent at least, answerable for the devastavit of his co-executor.

Griffin, for appellant.

Bauskett, contra.

The judgment of the Court was announced by

DARGAN, Ch. On the main issues involved in this appeal, we entirely approve of the views of the Chancellor in his circuit decree. In *Lupton v. Lupton*, (2 Johns. Ch. 614,) where some of the legacies had been paid in full, and others of equal grade remained unpaid, and the executor had committed a devastavit, and was insolvent, so that the latter could not be recovered from him, it was held, that those legatees who had received payment, were not bound to refund, or to contribute, in the way of apportionment, towards the satisfaction of those who had received nothing, even though some of the unpaid legatees were infants at the time of the application for contribution; there having been originally a sufficiency of assets in the hands of the executor to pay all the legacies. But the question here raised between the legatees of Wm. Robertson, is essentially different. Their legacies are of equal grade, and they have received partial payments in unequal amounts, from a fund heretofore de-

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voted to that purpose. Another fund, *which has been recovered from the estate of a deceased executor, who had committed waste, is now to be applied in payment of these legacies, but which is still insufficient to satisfy them in full. The commissioner supposed, (and he so reported,) that the fund in hand was to be applied in payments to the legatees, in proportion to the unsatisfied balances due upon their respective legacies. The Chancellor overruled his judgment in this particular; and this Court concurs with the Chancellor.

If the fund had been applied, before bill filed, in full satisfaction of some of these legacies to the exclusion of others, without an intention to give a preference, (there being no original deficiency of assets,) this Court might, and probably would, in accordance with the doctrine asserted in *Lupton v. Lupton*, (already cited,) refuse to decree a restitution for the purpose of equalization; and leave the parties who had been satisfied, in the enjoyment of the advantages gained by their diligence. Equality is a favorite rule in this Court. And the equalization of payments can be attained in this case without any decree for restitution, and simply by the application of the fund now under the control of the Court. It should be applied, first, to equalize the payments on all the legacies; and the residue should be applied rateably on all the legacies, as the Chancellor has decreed.

Another question has been raised, under these circumstances. Douglass Robertson, the executor of Wm. Robertson, is also a lega-

tee. His legacy is of the same grade with those of the other parties to this bill. There is a deficiency of assets to pay all the legacies, in consequence of the devastavit of his co-executor, James Robertson, as has been before stated; and Douglass Robertson claims, as executor, the right to detain, of the assets which have come into his hands, enough to satisfy his own legacy in full, before any application of the fund is made in payment of his co-legatees; in analogy to the right of an executor to detain for the payment of his own debt against the testator. No authority has been adduced in support of the doctrine here advanced; and, regarded as a principle, it is not supported by a sem-

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blance of equity. *An executor receives the assets of the estate in trust, for the common benefit of all the parties in interest, according to their respective rights, as fixed by the will. If the testator gives him a legacy, and intends that he should have priority of payment, such intention would be declared upon the face of the will. And it is inequitable, that an executor should, by virtue of his office, (which is a mere trust,) be allowed preferences as a legatee, to which he is not entitled by the provisions of the will. The Chancellor has so decided; and this Court concurs.

In the settlement of his accounts, the executor claimed to be reimbursed for his counsel fee paid in this cause. This charge was allowed by the commissioner, and disallowed by the Chancellor. The decision of the Chancellor, overruling the report of the commissioner in this respect, has been made a ground of appeal; and a majority of this Court are of the opinion, that the counsel fee should have been allowed, as a credit upon the executor's accounts.

This executor has, (as most executors do,) kindly undertaken the execution of the trusts imposed upon him by the will; and this litigation, as an incident, has grown naturally, and, I would say, almost necessarily, out of his administration of the estate. And it is but sheer justice that he should be re-imbursed and made whole for all outlays that were reasonably incident to the execution of the trust; not as compensation, but as a part of the expenses of its administration. This, I conceive, not to be inconsistent with the decision in *Wham v. Love*, (Rice Eq. 51,) which lays down the same rule. But, it is said, that *Wham v. Love* decides, that the executor is not entitled to be re-imbursed for his counsel fees, where the litigation has been raised for his own benefit. There can be no rule more undeniably just and fair. But I think it would be an unwarranted construction of the decision in that case to say, that where an executor is obliged, for his own security, to resort to the aid of this Court, for the settlement of an estate which he has adminis-

tered, he shall forfeit re-imbursement for counsel fees, (otherwise deemed just and reasonable,) because there arise in the settlement of his accounts, or in the adjustment

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of the *equities between himself and his cestui que trusts, questions in which his interest and theirs are antagonistic. Such questions arise in almost every case of this character. I think a rule may be laid down as reasonable as it is simple; that an executor should be allowed re-imbursement for a reasonable counsel fee paid by him for the settlement of the estate in equity, where the aid of the Court appears necessary and proper. If he has any knotty points or important interests of his own, for which he pays extra fees, the excess should be paid out of his own pocket.

It is ordered and decreed, that the circuit decree be modified, and that the report of the commissioner be re-committed, and he be instructed to correct his report, by allowing the counsel fee, paid by the executor, as a credit on his accounts. In all other respects the appeal is dismissed and the circuit decree affirmed.

JOHNSTON, Ch. I am satisfied with my ruling in the decree, upon all points, except the counsel fee.

On that subject, I am not willing to abridge the principle of *Wham v. Love*. All expenditures for the benefit of an estate, in the hands of the executor, are proper charges, and should be allowed him, in passing his accounts. I suppose that where a bill is filed for the direction of the Court, or to clear out incumbrances,—or, in short, in any case where the decree of the Court is necessary to remove doubts and settle or distribute the estate,—fees paid by the executor, in such cases, should be allowed him: and this would be no violation of the doctrine of *Wham v. Love*.

My objection to the allowance of the fee, in this case, was, that it was not expended in promotion of the interests of the cestui que trusts: at least a very large part of it.

But there is a circumstance in the case which reconciles me to the allowance of it. It is, that the estate has received the benefit of the mortgage taken by Douglass Robertson from his co-executor. The title in that property was, by the mortgage, in Douglass: and it would seem inequitable to take it from

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him and confer *its benefits upon the legatees generally, without allowing him the expenses claimed by him.

DUNKIN, Ch., concurred.

WARDLAW, Ch., having been of counsel, expressed no opinion.

Decree modified.

4 Rich. Eq. 46

JAMES HEATH v. JOHN G. BISHOP,
JOHN BISHOP, Sen., and BURREL
BISHOP.

(Columbia. Nov. and Dec. Term, 1851.)

[Trusts \hookrightarrow 151.]

Though the mode of procedure for the relief of the creditor is different, equitable estates are as much subject to the payment of the debts of the cestui que trust, to the extent of his present vested interest in severalty, as legal estates are to the payment of the debts of the owner.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 195; Dec. Dig. \hookrightarrow 151.]

[Trusts \hookrightarrow 151.]

There is no form or mode by which property, with the present vested right of several enjoyment, as to either the corpus or the income, may be given to and enjoyed by one, and not be liable for the payment of his debts;—infants and married women constituting no exceptions, for they are incapable of contracting debts.

[Ed. Note.—Cited in *Howe v. Gregg*, 52 S. C. 101, 29 S. E. 394; *Humphrey v. Campbell*, 59 S. C. 43, 46, 37 S. E. 26.

For other cases, see Trusts, Cent. Dig. §§ 195, 195½, 197; Dec. Dig. \hookrightarrow 151.]

[Wills \hookrightarrow 648.]

Semble, that a limitation or condition annexed to a devise or gift, that the estate shall revert, or pass to some third person, on the bankruptcy or insolvency of the first taker, or on an attempt by a creditor to subject it to the payment of his debt, would be valid: or, in cases of trust, that, by the machinery of a shifting use, or a power of revocation, the estate may be made to pass away from the first taker upon the same contingencies.

[Ed. Note.—Cited in *Jones v. Bellinger*, 91 S. C. 4, 73 S. E. 1049.

For other cases, see Wills, Cent. Dig. § 1539; Dec. Dig. \hookrightarrow 648.]

[Trusts \hookrightarrow 151.]

If the rents and profits are to be paid to the cestui que trust, from time to time, at the pure and absolute discretion of the trustee, or as some other appointor to uses, may, at his discretion, appoint and direct, with a limitation or power to appoint over to other uses, such an interest, not being vested in the cestui que trust, and being vague, uncertain and undefined, cannot be subjected to the payment of his debts; semble.

[Ed. Note.—Cited in *People's Loan & Exchange Bank v. Garlington*, 54 S. C. 424, 32 S. E. 513, 71 Am. St. Rep. 800.

For other cases, see Trusts, Cent. Dig. §§ 195, 195½, 197; Dec. Dig. \hookrightarrow 151.]

[Trusts \hookrightarrow 151.]

Or, it seems, if the rights of the debtor are so mingled with those of other beneficiaries that they cannot be separated without injury to his co-cestui que trusts,—inasmuch, as there is no present right of several enjoyment, and there can be no partition, the interest of such debtor cannot be subjected to the payment of his debts.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 195, 195½, 197; Dec. Dig. \hookrightarrow 151.]

[Creditors' Suit \hookrightarrow 8.]

Gift of slaves to a trustee, in trust, "to pay over to J. G. yearly," &c., "the net profits or income from the labor or hire of said slaves, for the better support and maintenance of the said J. G.," with remainder, in fee, after the death of J. G., and with this condition, that the trustee

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shall permit the donor, "if it *shall be absolute-

ly necessary for his support, to use, keep and enjoy the said slaves during his natural life." &c.: J. G. having no property upon which executions against him could be levied, and being out of the State.—*Held*, that his interest in the slaves was liable in equity to the claims of his creditors; that a bill filed for that purpose should be a creditors' bill, and all the creditors should be called in.

[*Ed. Note*.—Cited in *Nelson Carlton & Co. v. Felder*, 6 Rich. Eq. 69; *Rivers v. Thayer*, 7 Rich. Eq. 167; *S. S. Farrar & Bros. v. Haselden*, 9 Rich. Eq. 337; *Curlee v. Rembert*, 37 S. C. 221, 15 S. E. 954.

For other cases, see *Creditors' Suit*, Cent. Dig. § 38; Dec. Dig. ⚡151.]

[*Trusts* ⚡151.]

Held, further, that the donor had no right to re-take, use and keep the slaves, he not having shown that they were absolutely necessary for his support.

[*Ed. Note*.—For other cases, see *Trusts*, Cent. Dig. §§ 195, 195½, 197; Dec. Dig. ⚡151.]

Before Wardlaw, Ch., at Chester, July, 1851.

Wardlaw, Ch. The plaintiff is a judgment creditor for \$62.13, with interest thereon from January 15, 1834, and costs, \$8.90, of John G. Bishop, who is absent from the State, and without property here, upon which a fi. fa. could be levied; and plaintiff seeks, in this proceeding, to obtain satisfaction of his judgment from certain equitable assets of his debtor.

John Bishop, senior, father of John G. Bishop, on February 3, 1846, conveyed to Burrel Bishop a negro woman, Hannah, about 45 years old, and a negro boy, Henry, about 12 years old, in trust, "to pay over to John G. Bishop yearly, and from year to year, or as much oftener as necessary or convenient, the net profits and income from the labor or hire of said Hannah and Henry, for the better support and maintenance of the said John G. Bishop," with the farther disposition of the fee in said slaves, after the death of said John G. Bishop, and with this condition—that the trustee "shall and do permit and suffer me, the said John Bishop, if it shall be absolutely necessary for my support, to use, keep and enjoy all and singular the said slaves, Hannah and Henry, or the value of them, or whatever part I may think necessary during my natural life, without paying anything for the same or in respect thereof, and not otherwise; and that from and after my decease, to be held, enjoyed and disposed of as hereinbefore provided."

It appears that the trustee has in his hands notes, &c., to the amount of \$240, and cash to the amount of \$25, arising from the hire of said slaves. The petition is taken pro confesso against John G. Bishop, who left the State some years ago. Burrel Bishop,

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*the trustee, in his answer, admits the facts, and claims commissions. John Bishop, senior, in his answer, sets forth, that his purpose in the execution of the trust deed, was to provide support and maintenance for his

son, John G., who is thriftless, of understanding not sound, and liable to imposition by artful men; and claims that, as he, the grantor, is now aged, of feeble health, and limited estate, the income from said slaves should be appropriated, under the condition, to his own support. No evidence in support of the answer was offered, although it seemed to be taken for granted that John Bishop, senior, was a poor man, but not in absolute indigence.

It was suggested at the bar, that there were other unsatisfied creditors of John G. Bishop; but no petition nor proof was offered in their behalf. I have no difficulty in overruling the particular defence made in the answer of John Bishop, senior; but I have some difficulty in recognizing the equity of the plaintiff to satisfaction of his demand from this trust fund.

Conceding that the plaintiff has so far exhausted his legal remedies as to be entitled to proceed against the equitable assets of his debtor, (*Perry v. Nixon*, 1 Hill Ch. 335, and the cases there cited,) it may still be doubted whether he can proceed against this particular interest of defendant. Surely a father may provide a maintenance for a prodigal and insolvent son beyond the reach of creditors. The plaintiff here cannot pretend that he trusted John G. Bishop on the faith of this interest, for the credit was extended long before the execution of the deed conveying the two slaves. The property is settled by a father of small means, for the support and maintenance of his son; and it is manifest that the income is not more than adequate for this purpose. Where the whole income of a trust estate is at the disposal of a husband, this Court may still reserve a portion from the grasp of his creditors for the maintenance of his wife and family, (*Bethune v. Beresford*, 1 Des. 174; *Jones v. Fort*, 1 Rich. Eq. 50.) Many men as strongly need the protection of the Court from the

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consequences of their *improvidence, as married women do from the improvidence of husbands.

If John G. Bishop were within the jurisdiction and without other means of maintenance than from the hire of these two slaves, I should probably reject the prayer of this petition. But he makes no defence here; it does not appear that he has claimed any portion of this income for some years; and, for all that I know, he has abundant maintenance elsewhere than in this State. With some hesitation, I shall grant the plaintiff relief.

It is ordered and decreed, that Burrel Bishop, from the funds in his hands as trustee of John G. Bishop, pay to the plaintiff the principal, interest and costs due upon his judgment, and the costs of this petition.

The defendants appealed, on the grounds:

1. Because the fund out of which the petitioner seeks payment of his debt, being created for the express purpose of supporting and maintaining John Bishop, jr., it is contrary to the principles of equity to lend its aid to defeat the object of the donor's bounty, by subjecting said fund to the payment of debts of John Bishop, jr., and especially those which existed long anterior to the creation of said trust.

2. Because the donor, John Bishop, senior, having reserved to himself the right to said fund, in case the same should be necessary for his support and maintenance, and the said donor being still alive, and having the right to claim the benefit of such reservation, this Court has no power to defeat such right by ordering said fund to be paid to creditors of *cestui que trust*.

3. Because the said decree should have ordered said fund, (in case the same is subject to the payment of the debts of J. Bishop, jr.) to be distributed among all his creditors in equitable parts, and should have ordered a reference, with leave for the creditors to present and establish their demands.

McAliley, Boyce, for appellants.

Boylston, Williams, contra.

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*The opinion of the Court was delivered by

DARGAN, Ch. As a general rule, with some few exceptions, it may be stated, that the attributes with which the laws of this country have invested the institution of property, attach alike to equitable as to legal estates (*a*). Under the maxim, that equity follows the law, the system of trusts has been moulded into an almost perfect analogy and correspondence with legal estates. Equitable interests admit of the same modifications as to the quantity of right, duration, time, conditions and modes of enjoyment, that appertain to estates at law. The same canons of descent as to real property apply to both systems. They are in the main subject to the same rules of succession. They may alike be held in severalty, in joint-tenancy, coparcenary, and in common. They are devisable and assignable, (*b*) and what is more germane to the present enquiry, they are both subject to the payment of debts; though the mode of procedure for the relief of the creditor is different.

There are certain ideas that are inseparable from the institution of property, among the most prominent of which are, the right of alienation, and its being subject to the payment of debts. In all cases like the present, the enquiry must be, whether the debtor has a vested, determinate interest in the equitable estate sought to be subjected, with the present right of enjoyment in severalty. If

he has, the right of the creditor, follows as a corollary in mathematical science does the main proposition. Under the above qualifications and conditions, the creditor is entitled to relief, and in some form or other, the debtor's estate, be that more or less, should be disposed of or sequestrated for the satisfaction of his debt.

I am not aware of any form or mode by which property, with the present right of several enjoyment, as to either the corpus or the income, may be given to and enjoyed by one, and not be liable for the payment of his debts. The case of married women, and other persons under disability, constitute no exceptions, for such persons are incapable of contracting debts.

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*A testator or donor may give property with a limitation or condition annexed, that it shall revert, or pass to some third person, on the bankruptcy or insolvency of the first taker, or on an attempt by a creditor to subject it to the payment of his debts: and such a limitation would be valid (*c*). Or in cases of trust, by the machinery of a shifting use, or a power of revocation, the estate might be made to pass away from the first taker, upon the same or any other contingencies within the period prescribed against perpetuities. It is obvious that such cases as these constitute no exception. For the very circumstances that cause the equitable estate of the debtor to be liable, cause it also to pass from him and cease to be his property. In the instances supposed, the insolvency of the debtor, or the attempt of the creditor to make the property liable, destroys the debtor's estate. When the creditor stretches forth his hand to grasp it, it eludes him and flits away like a shadow.

If a trust be created with the view of providing against the improvidence of the beneficiary, and it be directed that the rents and profits be paid to him from time to time, at the pure and absolute discretion of the trustee, or as some other appointor to uses, may at his discretion appoint and direct, with a limitation or power to appoint over, to other uses, such a vague, undefined and uncertain interest in the beneficiary, could not be made subject to his debts; because such an interest does not amount to property vested in him. Or if, in the scheme of the trust, the rights of a debtor are so mingled with those of other beneficiaries, that they cannot be separated without injury to his *co-cestui que trusts*, and thus destroying the scheme of the settlement; inasmuch as there is no present right of several enjoyment, and the Court would refuse a partition, the interest of an indebted beneficiary of such a trust

(a) Butler's note to Co. Litt. 280, b.

(b) 2 Story Eq. § 974.

(c) *Dommett v. Bedford*, 3 Ves. 149, 6 T. R. 684; *Shoe v. Hale*, 13 Ves. 404; *Yarnold v. Moorhouse*, 1 Russ. & Mylne, 368; 1 Chit. Gen. Pr. 66.

could not be made subject to the payment of his debts. I do not affect to say, that I have laid down all the exceptions, or seeming exceptions, to the rule, that the debtor's equitable estates and interests may, in this Court,

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be subjected to the payment of the *claims of his creditors. But I have said enough to shew, that there is no qualification of the rule which would protect, or exempt from such liability, the interest of the defendant, John G. Bishop, in the trust estate created by the deed of his father, John Bishop. Before I leave this branch of the case, it will be proper for me to cite some of the cases, on the authority of which the foregoing observations are made.

In *Brandon v. Robinson*, (18 Ves. 429,) the trust, (which was created by will,) was that the eventual share of the testator's son, Thomas Goom, should be laid out by the trustees in the public funds or government securities, "and that the dividends, interest and produce thereof, as the same became due and payable, should be paid by them, from time to time, into his own proper hands, or on his proper order or receipt, subscribed with his own proper hand, to the intent that the same should not be grantable, transferable, or otherwise assignable, by way of anticipation of any unreceived payment or payments thereof, or any part thereof;" and the will directed, that upon the decease of Thomas Goom, the trustees should pay the said share and dividends, &c., to such persons as would, in the course of administration, be entitled to any personal estate of the said Thomas Goom, as in cases of intestacy.

Thomas Goom became a bankrupt, and the plaintiff was the surviving assignee under the commission; and the will prayed an execution of the trusts of the will and an account, and that the estate may be sold and the clear residue ascertained, and that the plaintiff might receive such part or share thereof, or interest therein, as he shall be entitled to as assignee, &c. To which bill, the defendants, the trustees, put in a general demurrer. The Lord Chancellor (Eldon) said: "There is an obvious distinction between a disposition to a man until he becomes a bankrupt, and then over, and an attempt to give him property and to prevent his creditors from obtaining any interest in it, though it is his." "There is no doubt, that property may be given to a man until he shall become bankrupt. It is equally clear, generally speaking, that if property be given to a man

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for his life, the donor cannot *take away the incidents to a life estate. And, as I have observed, a disposition to a man until he shall become bankrupt, is quite different from an attempt to give to him for life, with a proviso that he shall not sell or alien it. If that condition is so expressed, as to amount to a

limitation, reducing the interest short of a life estate, neither the man nor his assignees can have it beyond the period limited."

In *Piercy v. Roberts*, (1 Myl. & K. 4,) the testator bequeathed a legacy of £400 to his executors, in trust, to pay the same to his son, Thomas Jortin Roberts, in such smaller or larger portions, at such time or times, and in such way or manner, as they, or the survivor of them, should, in their judgment and discretion, think best. Thomas Jortin Roberts became insolvent, and took the benefit of the insolvent debtor's Act. The bill was filed by the assignee of the insolvent debtor's estate against the executors, to recover the legacy and interest, or so much thereof as remained unpaid. The Master of the Rolls (Sir John Leach) said: "The question is, whether this legacy passed to the assignee of the insolvent upon the insolvency of the legatee, or whether it may remain in the hands of the executors, to be applied, at their discretion, for the benefit of the legatee. The insolvent being the only person substantially entitled to this legacy, the attempt to continue in him the enjoyment of it, notwithstanding his insolvency, is in fraud of the law. The discretion of the executors determined by the insolvency, and the property passed by the assignment."

In *Graves v. Dolphin*, (1 Simons, 66,) the testator, Benjamin Graves, gave his real and personal estates to trustees, in trust, (among other things,) to pay an annuity of £500 to his son, John Graves, for the term of his natural life. The testator then proceeded to declare that the said yearly sum of £500, given to his son, John Graves, for his life, was intended for his personal maintenance and support during his natural life, and should not, on any account or pretence whatever, be subject or liable to the debts, engagements or incumbrances of his said son; but that the same should be, for the purposes

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aforesaid, from time to time, when it *should be due, paid over into the proper hands of his son only, and not to any other person or persons whatsoever. He further directed, that the receipt of his son only, should be a good and sufficient discharge to his trustees for the said annuity. John Graves became a bankrupt, and his assignee sold the annuity to the defendant. And the question was, whether the annuity passed to the assignee by virtue of the assignment of the commissioners. It was contended on the part of John Graves, that the annuity did not pass. His counsel relied on the direction in the will, that the annuity should be from time to time paid into the proper hands of John Graves, and that his receipt only should be a sufficient discharge for the same.

The Vice Chancellor, (Sir John Leach,) said: "The testator might, if he had thought fit, have made the annuity determinable by the bankruptcy of his son; but the policy of

the law does not permit property to be so limited, that it shall continue in the enjoyment of the bankrupt, notwithstanding his bankruptcy." The judgment was that the defendant was well entitled to the annuity.

In *Green v. Spicer*, (1 Russ. & M. 395,) the Master of the Rolls decided the same point in favor of an assignee under the insolvent debtor's Act, although the trustee had a discretion as to the time and manner of applying the rents and profits of the trust estate to the support and maintenance of the beneficiary of the trust, on the ground that the whole beneficial interest in the rents and profits had vested in him.

The case of *Hallett v. Thompson*, (5 Paige, 583,) was a suit in behalf of the plaintiff, who was a judgment creditor of the defendant, Thompson. The bill was filed after the return of execution unsatisfied, for the recovery of the debt out of a legacy by the testatrix, in the following words: "I give and bequeath unto my friend, Jeremiah Thompson, of the city of New York, the sum of \$4,000, which sum I nevertheless order my executors to retain in their own hands, and put at interest, and pay the interest thereof yearly to the said Jeremiah, during his natural life; unless the said Jeremiah shall, during his

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life, by an instrument under his *hand and seal, require the payment of the said legacy to himself." In that case, she ordered the legacy and interest to be paid over to the legatee. She then proceeds to direct, if the legacy should not be paid over to Thompson during his life, it should be paid to such person or persons as he should by his last will appoint; and in default of such testamentary direction by him, it was to be paid to his heirs at law. The testatrix further declared it to be her will, that neither the legacy, or the interest thereon, should, in any case, be liable to Thompson's creditors for any debt due by him. The complainant prayed that Thompson might be decreed to execute such an instrument, as was required by the will to obtain payment of the legacy from the executors, and that the complainant's judgment might be paid out of the legacy and the interest due thereon. The defendant, Thompson, put in a general demurrer to the bill, for the want of equity. The Chancellor said: "The legacy in this case is perfectly under the control of Thompson, the legatee, so that he may obtain payment thereof whenever he pleases. This power to compel payment is a beneficial interest in the legatee, which would pass to the assignees under the English bankrupt and insolvent debtor's Acts." After commenting upon some of the provisions of the New York revised statutes, that were thought to be applicable to the case, and citing some of the English cases, the Chancellor proceeds to say: "Independent of any statutory provisions, therefore, I have no doubt it would be competent for this

Court, and its imperative duty, to compel the defendant, Thompson, to execute this beneficial interest, so as to enable the complainant to obtain payment of the legacy, to be applied in satisfaction of the judgment, as far as it would go."

"As a general rule," he further observes, "it is contrary to sound public policy to permit a person to have the absolute and uncontrolled ownership of property for his own purposes, and to be able at the same time to keep it from his honest creditors." The demurrer was overruled, and the complainant had a decree for the \$4,000 in the hands of the executors, to be applied in satisfaction of his judgment.

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*The case last cited, suggests a reference, (which I consider not irrelevant,) to the course which this Court adopts for the relief of creditors, against an insolvent debtor, who has, under a trust, a general power of appointment to uses.

Mr. Sugden, in his work on powers, (page 335,) says: "Of course the beneficial interest a man takes under the execution of a power, forms part of his estate, and is, like the rest of his property, subject to his debts; nor, indeed, can an appointment be made, so as to protect the funds from the debts of the appointee."

"But equity goes a step farther, and holds, that where a man has a general power of appointment over a fund, and he actually exercises the power by deed or by will, the property appointed shall form part of his assets, so as to be subject to the demands of his creditors, in preference to the claims of his legatees or appointees." He proceeds to say, that the power must be actually executed, as equity never aids the non-execution of a power (d); and to draw a distinction as to the rights of voluntary appointees to uses, and those for valuable consideration, the claims of creditors prevailing against the former and not against the latter. This principle of subjecting the appointed estate or fund to the claims of creditors over those of the voluntary appointees, proceeds upon the ground, that a general power of appointment gives to the appointor a beneficial interest in the fund, which amounts to property in him; and that *ex equo et bono*, his creditors have a right to claim all his estate if necessary, to be applied in satisfaction of their demands.

I will now turn my attention more particularly to the case before the Court. John Bishop, by his deed, dated February 3, 1846, for love and affection and a nominal pecuniary consideration, conveyed to Burrell T. Bishop, his heirs, executors and administrators, two negroes therein particularly described, in trust, to pay over to John G. Bishop, yearly and from year to year, or as much oftener as necessary or convenient, the nett

(d) *Holmes v. Coghill*, 12 Ves. 260.

profits and hire of the negroes, for the better

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support and maintenance of the *said John G. Bishop. The deed then gives to the trustee under certain circumstances, amounting almost to an absolute discretion, the power to sell the negroes; and provides, in case the negroes should be sold, that the trustee shall pay to John G. Bishop the interest that should accrue on the fund arising from the sale. The trust further declares, that at the death of the said John G. Bishop, the trustee "shall divide one-half of the price of the negroes to the issue, the children then alive, of the said John G. Bishop; the other half" to the trustee and others, the donor's children. It was further declared, that if John G. Bishop should leave no lawful issue of his body begotten alive at the time of his death, the share given to his children should be equally divided among Burrell T. Bishop and others, the donor's children. There was a farther trust declared in the deed, by which the donor was to be permitted, if absolutely necessary for his support, to keep and use the negroes, or the value of them, "without any charge for such use, during his natural life; and at his death to be held, enjoyed and disposed as before directed."

It is not shewn or pretended, that the use of the negroes, or fund arising from their sale, is absolutely necessary or indeed necessary in any sense for the support of John Bishop, the donor. John G. Bishop is alive, but not a resident of the State. The remainder-men have no present right of enjoyment. The complainant has obtained a judgment against John G. Bishop; upon which a *fi. fa.* has issued, and it has been returned *nulla bona*. It has been proved that the defendant has no other property in the State upon which satisfaction can be made of the execution. And the complainant, by petition setting forth these facts, prays that the income which John G. Bishop has for life in the aforesaid trust estate, may, by a decree of this Court, be made subject to the satisfaction of his judgment.

After the review which I have made of the authorities which bear on this subject, it would be superfluous to enter into any further argument, for the purpose of shewing that there is no ground upon which the claim of the creditor can in this instance

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*be resisted. Many of the cases that have been cited are much stronger than this, in favor of the beneficiary of the trust. All the cases that bear an analogy to the case before the Court, go to shew that where the beneficiary has a right to the present enjoyment, in severalty of the benefits conferred upon him by the trust, the creditor has an equity that will not be disregarded by the Court, however elaborate may be the attempt to deprive such interest of the incidents of property, and thus to exclude the

claims of creditors. The declaration that the provision in the trust was for the better support and maintenance of John G. Bishop, if it was intended to exclude the claims of creditors, will be ineffectual for that purpose. For we have seen, that schemes much more skilfully constructed for that object, and with the most studied forms of language, have been overthrown and creditors let in.

It is the opinion of this Court, that the income to which John G. Bishop is entitled, in the trust estate created by the deed aforesaid, is subject to the claims of his creditors, and that the circuit decree is right in adjudging that the complainant's judgment should be paid out of the same.

Having now, at greater length than I had intended, disposed of the merits of the cause, I will briefly advert to a matter of practice. It is the opinion of the Court, that this proceeding should have been in the nature of a creditor's bill; that is to say, the petitioner should have sued in behalf of himself and the other creditors, who would come in and make themselves parties to the cause, and offer to contribute to the expenses thereof. Whenever this Court takes hold of an equity for the purpose of giving relief to a creditor, it will do so in behalf of all the creditors, and will marshal the fund among them according to their respective rights. It is a wholesome rule of practice and will be insisted on. It prevents multiplicity of suits, the accumulation of costs, and injustice among the creditors themselves. It also saves the debtor's estate from unnecessary charges, and its enforcement will be a mercy to him.

No question as to this point was made at

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the circuit trial; but *it was suggested, that there were other creditors. These creditors, if any such exist, will doubtless be stirred up, after this decision, to prosecute their claims. It would be best to dispose of them all at once and in one proceeding. This Court will do now what should have been done on the circuit. It will order the petition to be amended, so as to make it a creditor's petition, and direct notice to be given to creditors, after the usual form, to appear and present and prove their demands. And after the report on the claims of creditors has come in, the circuit Court will proceed to give judgment in their favor according to their respective rights.

It is ordered and decreed, that the circuit decree be affirmed so far as it adjudges the fund in question to be subject to the payment of the claims of the creditors of John G. Bishop; and so far, also, as it adjudges that the plaintiff has proved his debt.

It is further ordered and decreed, that the plaintiff amend his petition, so as to make it conform to the character of a creditor's bill.

It is further ordered and decreed, that when the petition shall have been so amended, the commissioner give notice to creditors, through the newspaper press, to appear before him and prove their demands, on oath, on or before the first day of June next, and that the said commissioner report thereon.

It is further ordered and decreed, that the case be remanded to the circuit Court, for the purpose of hearing said report, and of adjudging the claims of creditors that may be set forth therein, marshalling the fund among them according to their respective rights.

It is further ordered and decreed, that if no other creditor shall present and prove a claim, or if the fund be sufficient to pay all the claims that are presented and proved, the circuit Court proceed to give a final decree in behalf of the petitioner, and such other creditors as may have presented and proved their demands, for the whole amount of their respective claims.

JOHNSTON, DUNKIN, and WARDLAW, CC., concurred.

Decree modified.

4 Rich. Eq. *60

*JAMES LONG and Wife v. J. A. M. CASON.

(Columbia, Nov. and Dec. Term, 1851.)

[Guardian and Ward ⇨61.]

The defendant, being administrator of an estate in which plaintiff had an interest as distributee, was appointed by the Court of Ordinary guardian of the plaintiff: in defendant's returns as guardian, he charged himself with the amount in his hands as administrator, but omitted to charge himself with interest: for the balance appearing to be due on his returns, the ordinary made an ex parte decree against him, and for the amount of the decree he confessed judgment to the ordinary: other persons were then appointed by the Court of Equity, guardians of the plaintiff, and they received from the sheriff the amount of the judgment confessed to the ordinary: shortly after plaintiff arrived at age, but more than four years after the date of the decree and the receipt to the sheriff, plaintiff commenced this proceeding to recover from defendant the interest which he had omitted to charge himself with in his returns:—*Held*, that neither the decree of the ordinary, nor the judgment confessed to him, could be regarded as an estoppel of plaintiff from the further prosecution of her rights against defendant.

[Ed. Note.—Cited in McDuffie v. McIntyre, 11 S. C. 562, 32 Am. Rep. 500.]

For other cases, see Guardian and Ward, Cent. Dig. § 284; Dec. Dig. ⇨61.]

[Limitation of Actions ⇨72.]

Held further, that plaintiff was barred by the statute of limitations.

[Ed. Note.—Cited in Moore v. Hood, 9 Rich. Eq. 325, 70 Am. Dec. 210.]

For other cases, see Limitation of Actions, Cent. Dig. § 395; Dec. Dig. ⇨72.]

[Judgment ⇨665.]

A judgment cannot operate as an estoppel as against parties not legally before the Court which pronounced the judgment.

[Ed. Note.—Cited in Renwick v. Smith, 11 S. C. 304.]

For other cases, see Judgment, Cent. Dig. § 1177; Dec. Dig. ⇨665.]

[Limitation of Actions ⇨103.]

Though technical trusts are got, as between trustee and cestui que trust, within the statute of limitations, yet, if the trustee does an act which imports to be a termination of his trust, the statute will from that time commence to run in his favor.

[Ed. Note.—Cited in Sollee v. Croft, 7 Rich. Eq. 42; Parks v. Noble, 9 Rich. Eq. 98; Colburn v. Holland, 14 Rich. Eq. 241; Mason v. Johnson, 13 S. C. 24; Motes v. Madden, 14 S. C. 492; Dickerson v. Smith, 17 S. C. 305; Hayes v. Walker, 70 S. C. 52, 48 S. E. 989.]

For other cases, see Limitation of Actions, Cent. Dig. §§ 500, 506-510; Dec. Dig. ⇨103.]

[Limitation of Actions ⇨103.]

An act done in a public office, open for the information of parties interested, must be taken notice of by them; and where the act purports to be a termination of a trust, it will, as a general rule, give currency to the statute of limitations in favor of the trustee.

[Ed. Note.—Cited in Roberts v. Johns, 24 S. C. 588; Fricks v. Lewis, 26 S. C. 240, 1 S. E. 884; Boyd v. Munro, 32 S. C. 253, 10 S. E. 963; Robertson v. Blair & Co., 56 S. C. 110, 34 S. E. 11, 76 Am. St. Rep. 543; Kilgore v. Kirkland, 69 S. C. 86, 48 S. E. 44.]

For other cases, see Limitation of Actions, Cent. Dig. §§ 500, 506-510; Dec. Dig. ⇨103.]

[Limitation of Actions ⇨103.]

Where a guardian, displaced from his trust, has a settlement, purporting to be in full, with his successor duly appointed, he from that time occupies the position of a stranger to his former wards and their new guardian.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 500, 506-510; Dec. Dig. ⇨103.]

[Adverse Possession ⇨4.]

Where a trustee has the legal title, or where he may prosecute a suit in behalf of his cestui que trust for the matter in controversy, and is barred, as against a stranger, by the statute of limitations, the cestui que trust, even though he be an infant, will also be barred as against such stranger.

[Ed. Note.—Cited in Barnwell v. Marion, 54 S. C. 230, 32 S. E. 313.]

For other cases, see Adverse Possession, Cent. Dig. § 23; Dec. Dig. ⇨4.]

[Guardian and Ward ⇨125.]

A guardian is a trustee who may prosecute a suit in behalf of the ward for his equitable choses in action; where, therefore, as to such choses, the guardian is barred by the statute of limitations, the infant, in the absence of collusion, is barred also, as against strangers and must resort to his remedy against the guardian.

[Ed. Note.—Cited in Wightman v. Gray, 10 Rich. Eq. 530; Crosby v. Crosby, 1 S. C. 345; McDuffie v. McIntyre, 11 S. C. 560, 561, 32 Am. Rep. 500; State ex rel. Van Wyck v. Norris, 15 S. C. 260; Waring v. Cheraw & D. R. Co., 16 S. C. 424; Werber v. Cain, 71 S. C. 349, 51 S. E. 123.]

For other cases, see Guardian and Ward, Cent. Dig. § 428; Dec. Dig. ⇨125.]

[This case is also cited in Barnwell v. Marion, 54 S. C. 223, 32 S. E. 313, and distinguished therefrom.]

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*Before Johnston, Ch., at Anderson, June, 1851.

This case will be sufficiently understood from the opinion delivered in the Court of Appeals.

Harrison, for appellants.

Reed, Vandiver, Orr, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. By the appointment of the ordinary of Anderson district, J. A. M. Cason, on June 6, 1836, became an administrator of the estate of William Cason, who died intestate; and on November 18, 1839, by like appointment, became guardian of Cynthia and other infant children of the intestate. In his returns as guardian to the ordinary, it seems that, by 'unintentional inaccuracy,' as the ordinary reports, he omitted to charge himself with interest on the balance which had been in his hands, as administrator, for some years. On February 23, 1846, the ordinary made a decree, that it appears on settlement, that J. A. M. Cason is indebted to his wards in the sum of \$2710.39; and on February 27, 1846, Cason confessed a judgment to the ordinary for this sum. Mrs. Cason and Jacob Pickle were appointed by the Court of Equity, March 6, 1846, guardians of the same wards; and on April 6, 1846, they, as guardians, gave a receipt to the sheriff for the amount of the judgment confessed by J. A. M. Cason. James Long and Cynthia Cason intermarried December 28, 1849, and the wife did not attain the age of twenty-one years until March 6, 1850. James Long, on October 21, 1850, cited J. A. M. Cason to account before the ordinary for the mistake as to interest above mentioned; and Cason, appearing by counsel, insisted, that, granting the mistake, he was protected from further accounting by the decree of the ordinary and the judgment at law, which were ratified by the subsequent guardians by their act acknowledging satisfaction to the sheriff, and further that he was protected by the statute of limitations. The ordinary overruled these defences, and ordered Cason to account further. From

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this order Cason *appealed to this Court; and at the sitting for Anderson, in June last, the Chancellor decreed that Cason was not liable to account, and reversed the order of the ordinary. Long and wife appeal from that decree; on various grounds contesting the sufficiency of Cason's defences.

The decree of the ordinary, of 1846, cannot be regarded as an estoppel of Long and wife from the further prosecution of their rights. That decree seems to have been made at the instance of the guardian, without the presence of any person authorized to represent the wards. The case, in this particular, is governed by the authority of *Miller v.*

Alexander, (1 Hill Eq. 27.) There, the ordinary, without citation of the distributees or their being present, upon an ex parte settlement of the accounts of an administrator, decreed a certain sum against the administrator, but omitted to charge him with interest collected upon notes. The Court held the decree not to be conclusive, and say: "It was wholly an ex parte proceeding, made up entirely at the instance of the administrator, to enable him to settle with his cestui que trusts. In order to be conclusive, it ought to be the judgment of the Court, between parties regularly in Court, on the same matter then in issue between them. It must appear by the proceedings, that the parties were legally in Court."

Whether the ordinary can vacate his former decree, without a direct application for that purpose—whether the proceeding in this case amounts to such application, and whether the decree, until vacated, must not be held valid by other Courts, are questions upon which some difference of opinion may exist; and the discussion of them may be waived in the present case.

The same reasoning which establishes the inconclusiveness of the ordinary's decree, shows also that the judgment confessed by the guardian to the ordinary cannot have the force of an estoppel. In that proceeding, too, the wards were unrepresented.

It may be, however, that the decree of the ordinary in 1846, although not a technical estoppel, is a starting point for the running of the statute of limitations. In procuring

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that decree, the *guardian, Cason, evinced his intention to terminate his trust to his wards. He intended the settlement to be in full. He acknowledged his liability as guardian for the amount decreed against him, and confessed judgment for this sum; and by the strongest implication denied all further liability. Moreover, in a few days afterwards, he was displaced from his trust, and successors to him appointed by this Court. These successors, more than four years before any further proceeding against him, received from him through the sheriff, the amount of the decree and judgment, and made no further claim upon him. They thus ratified the ordinary's decree. These acts of Cason, purporting to be in full execution of his trust, place him in the character of a stranger to his former wards and their new guardians, and put them upon the assertion of their rights, at the hazard of losing these rights by lapse of time.

Technical trusts, as to claims between trustees and beneficiaries, are not within the statute of limitations. But, to use the language of our last reported case on this subject, (*Brockington v. Camlin*, 4 Strob. Eq. 196,) "if the trustee does an act which imports to be a termination of the trust; if he has a settlement which is intended to be in full;

if he settles as to part and claims the residue in his own right; if he denies the trust in the presence of the cestui que trust; these acts, or any of them, will so far disturb and dissolve the strictly fiduciary relations between the trustee and his cestui que trust, as that the statute of limitations will commence to run from the date of such acts." This doctrine is fully supported by authority. (*Starke v. Starke*, Car. L. J. 509, S. C. 3 Rich. Law, 438; *Moore v. Porcher*, Bail. Eq. 198; *Glover v. Lott*, 1 Strob. Eq. 79; *Coleman v. Davis*, 2 Strob. Eq. 340; *Payne v. Harris*, 3 Strob. Eq. 39.) In the last case there had been an accounting of the administrators of an intestate before the Ordinary, in which some of the distributees, in their absence, were excluded by misapprehension of the provision of the statute of distributions. The Chancellor says: "I take it, that an act done in a public office, open for the

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information of parties interested, must be taken notice of by them; and that the statute obtained currency against the parties mentioned, from the date of the division." This remark, although generally true, may not be applicable to extreme cases. A cestui que trust is always barred by length of time operating against the trustee. (*Hovenden v. Lord Annesley*, (2 Sch. and Lef. 629.) In *Lowell v. Mackworth*, (2 Eq. Ca. Ab. 579.) Lord Hardwicke says: "The rule, that the statute of limitations does not bar a trust estate, holds only as between cestui que trust and trustee, not between cestui que trust and trustee on one side and strangers on the other; for that would make the statute of no force at all, because there is hardly any estate of consequence without such trust."

Where there is no imputation of fraud, an infant beneficiary will be bound by a legal bar incurred through the laches of his trustee. In *Wych v. East Ind. Co.*, (3 P. Wms. 309.) A. had agreed with the company for a certain allowance, and afterwards died intestate, leaving an infant son. B. took out administration during the minority of the son, but instituted no suit upon the contract. The son, within the term of the statute after attaining maturity, but not within the term after the cause of action accrued, brought his bill against the company for an account; and they pleaded the statute of limitations. Lord Talbot said: "The administrator, during the infancy of the plaintiff, had a right to sue; and though the cestui que trust was an infant, yet he must be bound by the trustee's not suing in time; for I cannot take away the benefit of the statute of limitations from the company, who are in no default, and are entitled to take advantage thereof as well as private persons; since their witnesses may die, or their vouchers be lost. And as to the trust, that is only between the administrator and the infant, and does not affect the company." In a note to

this case is cited the opinion of Lord Maclesfield, in *The Earl v. The Countess of Huntington*, that a fine and five years' non-claim would bar a trust term, in favor of a purchaser, though the cestui que trust was

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an infant. (*Pentland v. Stokes*, *2 Ba. and Be. 75; *Boney v. Ridgard*, 1 Cox, 145; *Miller v. Mitchell*, Bail. Eq. 441; *Lewin on Trusts*, 604.) In *Moore v. Barry*, (1 Bail. 504.) an infant legatee of a slave was held to be barred by the statute of limitations, where, through the laches of the executor before assent to the legacy, a stranger had acquired title by possession. In *Glover v. Lott*, (1 Strob. Eq. 79.) where an executor had paid a legacy of an infant to her father, and returned the father's receipt in his account current to the ordinary, and the infant was afterwards taken in marriage by an adult, it was held, that the husband was barred by the statute in four years from his marriage.

It seems clear upon the authority of these cases, that Long and wife, notwithstanding the infancy of the wife, are barred by the statute of limitations, from opening the settlement and decree ratified by their guardians, if these guardians were their trustees as to the matters of the settlement, and authorized to prosecute their claims for the correction of the errors in the decree. In general, an infant shall lose nothing by non-claim, or neglect in demanding his right; and he is expressly excepted from the operation of our statute of limitations; but if an adult has the legal title in trust for the infant, or may prosecute suit in his behalf for the matter in controversy, the policy of the statute, to protect possession and preclude litigation, should have full operation. It remains for us to enquire, whether guardians appointed by this Court are not entitled to sue for, and receive the equitable choses of their wards.

It is said in *Kent's Commentaries*, (2 K. 228.) that a guardian may sell the personal estate of his ward, for the purposes of the trust, without a previous order of the Court, and that, if the sale be fair, the title of the purchaser is undoubtedly good, although the safer course is to have the previous order of the Court. In *Field v. Schieffelin*, (7 Johns. Ch. 150.) and in *Bank of Virginia v. Craig*, (6 Leigh, 399.) the doctrine is broadly asserted, that guardians have the same title to the personal estate of their wards, as executors have to the personal assets of

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their testators. It would be hazardous to recognize this doctrine as to the chattels of wards; and this Court in the case of *Bailey v. Patterson*, (3 Rich. Eq. 156.) set aside the purchase of a slave from a guardian. In general, guardians cannot change the nature of infant's estates, but they may even do that, as is said by Lord Hardwicke in *Inwood v. Twyne*, (Amb. 419, 2 Eden, 148.) "under par-

ticular circumstances; and the Court will support their conduct, if the Court would do it under the same circumstances." They are entitled, however, to the possession and management of all the property of their wards, and to the collection and disbursement of all the income, profits and credits arising therefrom. Their authority extends to bind the infants by all such acts as appear to be for the advantage of the infants, and for which the guardians are liable to account. I apprehend that a guardian has plenary right to receive moneys coming to his ward, and to prosecute, compound and acquit any debt or liability to the ward. He always acts under responsibility to his ward for the faithful and judicious performance of his trust, and is liable for any fraud, gross negligence, or other breach of trust. But a stranger dealing with him as to the choses of the ward, may rightfully presume that he is acting for the benefit of the infant, and in the absence of any evidence of collusion, does not partake of the guardian's responsibility. It appears to me highly important to the interests of infants and to the repose of the community, that guardians should have such power over the rights and credits of their wards. If the debtor of the infant, cannot safely account and pay to the guardian, for the hire of a slave or any other liability, the estates of infants must suffer the impoverishment resulting from having every demand settled by a law suit. If the statute will not run against an infant represented by a guardian, we may conceive of a case in which a debtor would be liable to reclamation for undesigned mistake after more than twenty-four years. Why should an infant with guardian be barred by lapse of time any more than by the statute of limitations? But it will hardly be disputed that, as to such choses

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as cannot be assigned at law, and are *not legal demands, he is barred by lapse of time. (*Miller v. Mitchell*, Bail. Eq. 437; *Buchan v. James*, Sp. Eq. 382.) The hardship of barring by the statute, an infant after a settlement made by his guardian, is not much greater than in the case of any other beneficiary who is barred through his trustee.

These views have strong support from authority. In *Field v. Schieffelin*, the sale and assignment by a guardian to a stranger of bond and mortgage belonging to an infant, were held valid. The same doctrine is held in *Livingston v. Jones*, (Harring. Ch. 165.) So, also, the guardian's transfer of the infant's stock in a bank is valid—(*Bank of Virginia v. Craig*.) The case of *Ellis v. Essex Mer. Bridge*, (2 Pick. 243,) was like the last, except that the guardian was of one non compos. Ex parte Dale, Buck, 365, is cited by Macph. on Infants, 541, for the doctrine, that money left by a guardian in the hands of one who becomes bankrupt, passes to the assignees, for such a trustee is the true owner.

A guardian is permitted to prove, under a commission of bankruptcy, a debt due to an infant. Ex parte Belton, 1 Atk. 251; *Walcott v. Hall*, 2 Bro. C. C. 305.

In *Capehart v. Huey*, (1 Hill Eq. 409,) where the guardian executed a release of the ward's claims against a witness, in order to render the witness competent, the Court say: "A guardian, as the officer of the Court of Equity, is charged with the preservation of all the rights and interests of the ward. He cannot, however, generally change the nature or diminish the capital of the estate; but with this exception, he is authorized to do any act for the infant which a prudent man in the management of his own business would do. Such an act must of necessity fall within the rule, well stated in Bing. on Inf. and Cov. 152: 'it seems generally that those acts of the guardian are binding on the infant, which are for the benefit of the infant, and for which the guardian can account; for so far his authority extends.' The release here is an act for which the guardian can and must account, if he thereby fails in recovering the share of his ward." Now, if the guardian has authority to release one lia-

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bility to his ward, he may any other in *right merely; and if for one purpose, he may for any other appearing to be for the advantage of the infant; and in every case he is liable to account to his ward. It would be difficult to state any matter, more clearly for the benefit of the infant, than the ascertainment of his distributive share of his father's estate, and the adjustment and settlement of the accounts of his former guardian.

It is held, in *Johnson v. Johnson*, (2 Hill Eq. 284 [29 Am. Dec. 72],) that, where an executor becomes guardian of an infant legatee he must account in the latter character, for whatever funds he had in his hands as executor were transferred, by operation of law, to his account as guardian. *Simkins v. Cobb*, (2 Bail. 60.) On what principle can his debt as executor be regarded as extinguished by his appointment as guardian, unless as guardian he had the legal right to settle and adjust and receive the balance due on his accounts as executor.

In *Massey v. Massey*, (2 Hill Eq. 496,) the statute of limitations was held to protect the ward, sued after he became of age with his guardian, from reimbursement of an erroneous payment made in his behalf to his guardian, more than four years before bill filed, but less than four years after the ward's maturity, although the guardian himself did not plead the statute. That case is the exact correlative of the present one; and the rule should work both ways. If the infant be protected, under the statute, by the guardian's receipt of money four years before suit, he should be barred by the guardian's laches in not prosecuting and receiving for the statutory term.

I conclude, that Cynthia Long, having guardians competent to protect her interests, and to prosecute in her behalf for any error in the settlement of the accounts of her former guardian, is not exempt by her infancy from the bar of the statute of limitations.

It is not necessary in this case, to determine what may be the operation of the statute against an infant with guardian, as to legal demands standing in the name of the infant. Our judgment is limited to the case presented. We hold, that, as to a chose of the infant, not assignable at law, and pecu-

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liarily within *the power and duty of the guardian, the laches of the guardian in the absence of collusion, by operation of the statute of limitations, bars the infant as to strangers, and leaves him to his remedy against the guardian.

It is ordered and decreed, that the appeal be dismissed, and the decree be affirmed.

JOHNSTON and DUNKIN, CC., concurred.

DARGAN, Ch. I think that where the ordinary has made a decree on a subject matter and between parties within his jurisdiction, such decree is conclusive unless it should be reversed or modified on appeal. And though there be errors or inaccuracies in it, he has no power to entertain an application in the nature of a bill of review for the correction of those errors. His official power over the matter ceases when he has rendered his decree. He has not the power even to enforce his own decrees. More strongly would the case appear, where the parties, as in this instance, have regarded the proceedings before the ordinary as a final settlement, and have received the shares decreed to them in full.

I think also that where an infant has a guardian who makes a settlement for him, or, which is the same thing, adopts one already made and gives a discharge, if the subject matter is such as falls within the power and authority of the guardian, the infant is as much concluded as if he was an adult. A settlement like this could only be opened upon such general grounds of equitable relief as would be available to all persons not under the disability of infancy.

On the foregoing grounds I concur in the decree which has been rendered by this Court. But I am not prepared to admit, or to place my concurrence on the ground that an infant is to be deprived of the saving in the statute of limitations in his favor, because he has a guardian. The statute itself makes no such distinction; nor am I aware of any authority for it, either as to chattels or choses in action. It is said that

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the statute runs *against an infant from the time he has a guardian, because then he has

some one to look after his rights and to sue for him if necessary. He may sue before he has a guardian if he chooses. The statute places him under no disability from suing, but gives him a longer time to bring his action. Married women and lunatics may also sue during their respective disabilities; yet it has never been supposed, that, because they might sue, this was to destroy or to take away the savings in the statute in respect to them.

The statute of limitations runs against trustees, executors and administrators, because it runs against the legal estate, which is vested in them for the purposes of their trusts. And the rights of their cestui que trusts may be lost by their laches, where the statute has been permitted to run so as to create a bar. And in such a case, the only remedy would be against the trustee for an abuse of trust. But the guardian is not possessed of any legal estate in his ward's chattels or choses. If a guardian should take a note or other security, payable to himself for the rents and profits of his ward's real or personal estate, or calling in the ward's choses should reinvest them in other securities payable to himself, in these and similar cases I should have no hesitation in saying, that the statute of limitations would run against the guardian, and through the guardian against the infant ward; for the reason that the legal estate in such securities was vested in the guardian. But in no case, where the legal title in the ward's estate is not vested in the guardian, would I say that the statute would run against an infant except under the specific provisions of the Act itself.

Decree affirmed.

4 Rich. Eq. *71

*JOHN A. BROWN v. MARY W. POSTELL and Others.

(Columbia. Nov. and Dec. Term. 1851.)

[*Appeal and Error* ⌘870.]

A decree determining a case upon its merits, but ordering a reference to ascertain the amount due, and not determining the mode in which satisfaction should be made of the amount when ascertained, may be appealed from when an appeal is taken from the decree on the report.

[Ed. Note.—Cited in *Simpson v. Downs*, 5 Rich. Eq. 425; *Verdier v. Verdier*, 12 Rich. Eq. 142.

For other cases, see *Appeal and Error*, Cent. Dig. §§ 3451, 3487, 3489, 3491, 3512; Dec. Dig. ⌘870.]

[*Trusts* ⌘151.]

Conveyance of property in trust, that husband and wife and his children should be supported and maintained out of the property during their natural lives, and, after the death of husband and wife, that the estate should be equally divided among the children: the husband, first, and the wife, after his death, contracted debts, personally, for rent, overseer's

wages, and necessities supplied for the use of the family:—*Held*, that for these debts the creditors had no equity to make the trust estate, as such, liable.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 195, 195½, 197; Dec. Dig. ☞151.]

[*Trusts* ☞151.]

Held further, that the creditors of the wife could not enforce their demands out of her individual interest, (1) because the bill was not framed with that aspect; and (2) because her interest could not be separated without breaking in upon the scheme of the trust, which required that the property should be kept together until the death of the survivor of the husband and wife.

[Ed. Note.—Cited in *Rivers v. Thayer*, 7 Rich. Eq. 167.

For other cases, see *Trusts*, Cent. Dig. § 195; Dec. Dig. ☞151.]

This case was heard in June, 1846, in York district, before Johnson, Ch., who made the following decree:

Johnson, Ch. The late Jehu Postell, by deed dated in February, 1819, conveyed to Charles Williams certain slaves by name, ten in number, with their subsequent issue and increase, upon certain terms, which are very confusedly and inartificially expressed. Those upon which the question to be considered turns, are thus expressed: "The said Charles Williams shall stand possessed, as trustee aforesaid, and the said Jehu Postell and Mary, his wife, &c., as also his present children or any other children, by him, the said Jehu Postell, lawfully to be begotten, are to be supported and maintained out of the said property, during the term of their natural lives; and at the death of the said Jehu Postell and Mary, his wife, &c., the said Charles Williams shall stand possessed of the said property, for the said Jehu Postell, during the term of their natural lives, and at their deaths, to such of their children as may be living, share and share alike," &c.

Jehu Postell retained possession of the ne-

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groes until his death *in 1833, and the defendant, Mary W., his widow, and their children, have had possession of them ever since. Charles Williams is also dead, and neither he nor his executors have ever interfered with them, and no trustee has been substituted in his place. Defendant, Mary W., contracted a debt with the complainant, a merchant, for goods, which, he charges, were necessities for herself and children. He has obtained his judgment at law, against her, for the debt, and the sheriff has returned nulla bona on the fi. fa. against her, and the bill prays that the trust property may be charged with the payment of his demand.

Notwithstanding the informality of the deed, I think it may fairly be deduced that the grantor intended that the support and maintenance of his widow and children, should be a charge as well on the corpus as the income of the trust property, and if the account raised by the complainant against

the defendant, Mary W., was for necessities supplied for the use of the family, it is a charge on the trust property.

It is stated that an order of the Court has been heretofore made, authorizing the sale of a portion of the negroes, to supply the wants and pay the debts contracted by defendant, Mary W., for the use of the family, and that out of the proceeds she purchased a house and lot in the village of York. It is admitted that this property is unproductive, and it is the desire of the defendants that it should be first sold, to meet the demands upon the trust property.

It is therefore ordered and decreed, that the commissioner enquire and report, whether the account raised by the complainant against defendant, Mary W. Postell, was for necessities supplied for the use of herself and family. It is further ordered, that the said house and lot, in the village of York, be sold by the commissioner, on the first Monday in August next, or some convenient sale day thereafter, on a credit of twelve months, with interest from the day of sale; the purchase money to be secured by bond and personal security, and a mortgage of the prem-

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ises, and the proceeds *of sale, when collected, to remain in Court, subject to its further order.

In June, 1847, the case was heard on the report of the commissioner before his Honor Chancellor Caldwell, who, discovering that some of the cestui que trusts had not been made parties to the bill, made the following order:

Caldwell, Ch. It is ordered and decreed, that all the children of Jehu and Mary W. Postell be made parties by service, if within the State, or by publication, if without its limits, to the proceedings in this case, and that the report be recommitted to John M. Ross, Esq., special referee, without prejudice, and the evidence to be offered de novo, and that all the creditors of Mary W. Postell, who have claims against the trust property aforesaid, have leave to come in as plaintiffs to this bill, on their proportionally contributing to bear the expenses of this suit, and that the said referee do enquire and report, whether their respective claims were for necessities furnished to her or her children; whether on her credit, or on the credit of the trust estate; whether any of them, and which, was contracted for the benefit of the trust estate, or whether it ought to be made liable for the same; also, of what property the trust estate consists; what is the annual income thereof; how the same has been applied, and who has possession thereof, or has received the rents and profits; also, what benefit she and her children, respectively, have derived from the trust estate; and who would be a fit and proper person to be appointed in the

place of Charles Williams, the deceased trustee.

In June, 1851, the case again came up, on the report, and exceptions thereto, before his Honor Chancellor Wardlaw, who pronounced the following decree:

Wardlaw, Ch. This case comes up before me on exceptions, by the defendants to the report of a special commissioner, establishing certain debts due to the plaintiffs as charges upon the trust estate, of which defendants are beneficiaries, and recommend-

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*ing the payment of them from the rent of the land, and the hire of the negroes comprising the trust property.

The third exception objects to the allowance of the claims of the plaintiffs, because there was no evidence that credit was given on account of the trust estate. The commissioner, in the absence of all proof, infers that credit was given on the faith of the trust estate, from the fact that the beneficiaries, Mary W. Postell and her seven children, had no property, besides the trust estate, when the debts were created. It also appears that the debts are for rent, overseer's wages, and for necessities supplied for the use of the family, and that the deed creating the trust, provides for the support and maintenance of the family out of the trust estate. Charles Williams, named as trustee in the deed, never interfered with the management of the trust property, although it is alleged in the bill that he signified his willingness to accept the execution of said trust; and since his death his executors have abstained from all interference, and, although named in the bill, they are not made parties to the suit. No other trustee has been appointed. The trust property continued in the possession of Jehu Postell, the husband, until his death in November, 1833, and since has been in possession of the widow, Mary W. Postell, and her children. The debt to Bratton & Erwin was partly contracted by Jehu Postell; but after his death, the note of Mary W. Postell and Thomas Williams, Jr., was accepted in payment by Bratton & Erwin. All the other debts were contracted by Mary W. Postell, all or nearly all of her children being then minors; one of them is still under age. Whenever the debts were contracted with merchants or tradesmen, the items in the accounts were charged to Jehu Postell or Mary W. Postell; and in the case of every debt presented, for note or single bill was taken by the creditor, and generally judgments in the Court of Law have been also taken against her. The debt to Starr & Graham was contracted more than four years before the order was passed allowing other creditors besides Brown, the original plaintiff, to come in and prove their demands, and all

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the other debts were contracted *more than

four years before the filing of the bill. The statute of limitations is relied upon by defendants, and is pleaded by Starr & Graham against all other creditors. The trust deed was regularly recorded.

The creditors here have not furnished proof satisfactory to my mind that the credit they extended to Mary W. Postell was on the faith of the trust estate. Persons having notice of a trust are not to be encouraged in dealings with the beneficiaries, which may subject the trust property to liability, and in many cases to utter destruction. There is little use in creating trust estates and appointing trustees to manage them, if every man in the community may exercise his discretion as to what is necessary for the preservation of the trust estate and the execution of the trusts. The interest of the trust and the comfort of the immediate beneficiaries are not identical, else any one may supersede the trustee, and, under the plausible pretence of supplying necessities to the beneficiaries, ruin the estate. The only safe rule in the absence of express proof, is to presume in such case, that the creditors trust to the economy and honesty of the beneficiary, and expect reimbursements from the income actually received or soon to be received. It cannot be pretended that the creditors occupy a more favorable position than the trustee himself; and the trustee, without the previous direction of the Court, or its subsequent sanction, upon some sudden emergency, cannot encroach upon the capital, or exercise discretion in disbursements, beyond the income annually accruing. But we are not rashly to remit creditors to the rights of trustees; for in this way we shall foster dereliction by trustees and irresponsible management of trust estates. I shall not undertake to review our cases on this subject, which are somewhat conflicting; but I think the principles I have set forth are fairly deducible from *Magwood v. Johnston*, (1 Hill Eq. 236); *Reid v. Lamar*, (1 Strob. Eq. 27); and *Morton v. Adams*, (Id. 72.) I conclude that the plaintiffs trusted to the personal liability of Mary W. Postell. This conclusion is strengthened by the fact, that the plaintiffs accepted from her higher securities for the debts by sim-

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*ple contract, (*Gardner v. Hust*, 2 Rich. 601.) and by the fact of their great delay in prosecuting a remedy against the trust estate.

It seems that under the decree of 1846, improvidently made before all the beneficiaries were parties to the suit, a lot in Yorkville, belonging to the trust estate, has been sold and purchased by the plaintiff, Brown, for a small price, and that the sale was confirmed in 1847; and it was urged that the sale should be set aside, and an account ordered for rents and profits. I cannot venture to decide an issue not made by the pleadings, and I must leave the parties to

proceed hereafter in this matter as they may be advised.

It is ordered and decreed that the bill be dismissed.

The complainant appealed from the decree of Chancellor Wardlaw, on the following grounds:

1. Because, it is respectfully submitted, his Honor erred in holding there was no sufficient evidence that credit had been given by J. A. Brown and the other complainants, on the faith of the trust property.

2. Because his Honor held, the creditors had lost their right to compensation out of the trust estate, by accepting the notes of Mary W. Postell, and it is submitted that there is error in this, and that the creditors, by such acceptance, did not destroy their equities to payment for benefits conferred on the trust estate.

3. Because, if his Honor decided correctly that sufficient evidence had not been furnished of credit being given by the complainants on the faith of the trust property, he should have decreed the sale of the house and lot in Yorkville, binding and conclusive on the defendants, and particularly on those of them who gave their consent to said sale.

4. Because his Honor is mistaken as to the fact of all the defendants having pleaded the statute of limitation—only some of them having done so.

5. Because his Honor should have decreed the defendants to pay costs.

6. Because, under the decree of Chancellor Johnson, the complainants were entitled

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to recover, on proving, as they did, *that the accounts raised by them against M. W. Postell, were for necessities for the use of herself and family.

Williams, for appellants.

Witherspoon, contra.

The opinion of the Court was delivered by

DARGAN, Ch. The most serious difficulty encountered by the Court in the decision of this cause, is the question raised in the complainant's sixth ground of appeal. The complainant contends that the decree of Chancellor David Johnson, of the 17th June, 1846, did adjudge, that he should recover his debt out of the trust estate; provided, on the reference ordered, he succeeded in establishing his demands as stated in the bill. He contends, that having proved his claim, as will appear by the commissioner's report, the decree is conclusive upon the defendants as to his right to recover.

This Court is of the opinion that the decree of the 17th June, 1846, did adjudge the cause upon its merits, and that the Chancellor did judicially decide, that the complainant should recover; provided, he proved his debt before the commissioner. This Court is further of the opinion, that this decree, un-

less it is now properly in review before this Court in the way of appeal, is final and conclusive upon the parties. And this brings up the question, whether the decree of the 17th June, 1846, can, at this stage of the proceedings, be brought before this Court on an appeal. We are of the opinion that it may. And the complainant having appealed from the decree of June term, 1851, disallowing his claim and dismissing his bill, it opens the way for the appellees to make the same questions which they might have made if the last decree had been against them.

Although the decree of the 17th June, 1846, did adjudge that the complainant should recover, it was in the nature of an interlocutory order for judgment. No execution or attachment could have been issued upon it. It did not ascertain the amount to be recovered, or the mode in which satisfaction

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was to be made. The *amount was to be determined by the investigation before the commissioner, and the mode of satisfaction out of this trust estate still rested in the discretion of the Court. It was, therefore, not a final judgment, but one that was to be rendered complete by further proceedings. The case was not ripe for the final action of the Court, until June Term, 1851, when a decree was rendered, from which this appeal has been taken.

It is unquestionably true, that the parties aggrieved by the decree of June, 1846, might then have appealed from that decree. Or they might, in their discretion, (waiving their present right of appeal until the final judgment of the Court,) bring, by way of appeal, all the former adjudications of the circuit Court in review before this Court. This latter is virtually the position of the appellees now before the Court.

A question might arise, (which, however, does not arise in this case,) as to what would be the effect of an intermediate appeal between the interlocutory and final decree of the Court. The better doctrine is, that such intermediate appeal should conclude all questions that were made, or might have been made, in the appeal, and leave open only such as were not then adjudged and could not then have been adjudged. The case of *Price v. Nesbit*, (1 Hill Eq. 445,) goes much farther than this. It recognizes no such distinction, and rules that, as long as there remains any thing for the Court to do in a cause, all the preceding orders and decrees may be reviewed on appeal. The extent to which the right of appeal was allowed in that case, has given rise to much discontent. It is supposed by many to have sanctioned a rule that was mischievous and cumbrous in its operation. It is not necessary for me, on the present occasion, to borrow any force from this case.

Whether the decree of the 17th June, 1846, was not of binding obligation upon all suc-

ceeding circuit Courts, is another question to that now before us. That decree is considered now to be fairly before this Court on appeal, and as an appeal, we have a right to hear it.

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*It is the opinion of this Court, that the decree of the 17th June, 1846, is erroneous in its construction of the deed creating the trust. The deed is inartificially drawn. But the intent of the donor is sufficiently clear. The trust declared was as follows: Jehu Postell, by deed dated February, 1819, gave to Charles Williams certain slaves by name, in trust, that Jehu Postell and Mary, his wife, and his present children and any future children by him lawfully to be begotten, should be supported and maintained out of the said property during the term of their natural lives, and at the death of the said Jehu Postell and Mary, his wife, the trust estate was to be equally divided among the children. This is, in substance, the provisions of the deed of trust.

If this be considered as an attempt to subject the trust estate, as such, to the claims of the creditors, this Court perceives no equity in the application. The credit was not given to the trustee, who is long since dead, nor to the trust estate, but to some of the beneficiaries personally. The corpus of the estate the Court would not touch under any circumstances; and if the income, which is small, were devoted to the payment of this large amount of debts, there would be no income left to answer the objects of the trust. There is no equity in the application as a demand against the trust estate.

The counsel of the appellant, in the argument, insisted, that if the Court did not recognize an equity in the complainant's claim against the trust estate, he should be allowed to enforce his demand out of the individual shares of such of the beneficiaries as had contracted the debts that he was seeking to recover. He claimed the right to enforce his demands against the equitable estates of his debtors individually.

There are two insurmountable impediments to the Court's adopting this latter view of the case. In the first place, he has not framed his bill with that aspect. That is not the case he has called on the defendants to answer, or this Court to adjudge. The second difficulty arises from the nature of the trusts declared in the deed. The Court could not subject the share of one of the

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*beneficiaries of the trusts to his or her debts, without breaking in upon the whole scheme of the trust. The interest of one could not be separated without injury to the other cestui que trusts. There is no present right of enjoyment in severalty. The Court would not decree a partition. The scheme of the trust, according to the provisions of

the deed, is, that the estate is to remain as a whole until the death of the survivor of Jehu Postell and Mary, his wife. The latter still survives. On her death, the children will be entitled to a partition and enjoyment of their respective shares in severalty.

The decree is affirmed and the appeal dismissed.

JOHNSTON, DUNKIN and WARDLAW, CC., concurred.

Decree affirmed.

4 Rich. Eq. 80

JOHN BOMAR, Jun., v. JANE MULLINS.
(Columbia. Nov. and Dec. Term, 1851.)

[*Executors and Administrators* ⇨39.]

The right of an administrator to interfere at all with the lands of his intestate, is so equivocal, that his claim to the rents and profits will not be recognized, where the lands are held by adverse title.—*Semble*.

[*Ed. Note*.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 280, 285–294; Dec. Dig. ⇨39.]

[*Husband and Wife* ⇨120.]

Wife having a life estate in land, husband conveys it to a trustee for her sole and separate use for life, with right to dispose of two-thirds at her death, and with remainder in one-third to himself; husband and wife afterwards purchase the estate in remainder,—then sell the land, and husband with the proceeds purchases other land, taking himself the title; the land thus purchased by husband becomes impressed with the trusts of the marriage settlement.

[*Ed. Note*.—Cited in *McLeod v. Tarrant*, 39 S. C. 275, 17 S. E. 773, 20 L. R. A. 846; *Green v. Cannady*, 77 S. C. 197, 198, 199, 57 S. E. 832.

For other cases, see *Husband and Wife*, Cent. Dig. § 431; Dec. Dig. ⇨120.]

[*Husband and Wife* ⇨14.]

Where land is conveyed to husband and wife, they become seized of an estate in entirety—neither can alien so as to bind the other, and the survivor takes the whole.

[*Ed. Note*.—For other cases, see *Husband and Wife*, Cent. Dig. § 73; Dec. Dig. ⇨14.]

[*Estates* ⇨10.]

Wife having an estate for life, and husband and wife being seized of the remainder in entirety, the estate for life does not merge in the estate in remainder.

[*Ed. Note*.—For other cases, see *Estates*, Cent. Dig. § 11; Dec. Dig. ⇨10.]

Before Wardlaw, Ch., at Spartanburg, June, 1851.

This case is instituted by plaintiff as administrator of the chattels and credits of Daniel Mullins, who died intestate, against the defendant, the widow of the intestate,

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for an account of rents and *profits of the Mullinax-mill tract of land and the Foster tract, to which the intestate had titles in his own name, and of which, since his death, the widow has retained the possession, claiming them as purchased with trust funds belonging to her.

John James, former husband of defendant, by his will, gave one-half of his estate in fee to his daughter, Polly T., wife of Thomas C. Austin; and of the other half, gave to the defendant two negroes absolutely, and the use of the residue for life, with remainder in the residue to his said daughter in fee. This estate was divided between the widow and daughter of testator; and to the widow were assigned, the homestead, ten negroes, horses, hogs, household and kitchen furniture, provisions, &c. Being in possession of this estate, she married the intestate, Daniel Mullins, who had no property, and was, and continued to be, during life, drunken, indolent and unthrifty. Soon after the marriage, namely, September 5, 1829, Daniel Mullins conveyed to a trustee all the property of every description, real and personal, to which he became entitled by virtue of his marriage, with the income and profits thereof, in trust for the sole and separate use of his wife for life, with power in the trustee, with her consent, to sell and reinvest; "and in trust also to permit her, the said Jane Mullins, by any will and testament, duly executed, to dispose of two-thirds of said property, or two-thirds of such part as she could have disposed of lawfully before her marriage with me, (himself,) and then in trust to reconvey the remaining one-third of the said property to me (himself) discharged of the trust hereby created." This deed was recorded September 7, 1829, in the office of the Register of Mesne Conveyances for Spartanburg—in which district the parties resided—and recorded May 23, 1833, in the office of Secretary of State; and as this latter date was within six months from the passage of the Act of 1832, (6 Stat. 482,) the deed is valid, according to the provisions of that Act, against the debts, sales and mortgages of the husband, contracted, made and executed after the ratification of the Act. Thomas C. Austin and Polly T., his wife, by release,

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dated December 10, 1829, conveyed to Daniel Mullins and Jane Mullins, all the interest and remainder of the grantors, in the plantation, slaves, stock, furniture and other property, then in possession of the grantees under the will of John James; December 21, 1829, the said Polly T. renounced her inheritance; and the deed was recorded April 5, 1830. About 1839, Daniel Mullins and wife sold the James homestead to Harvey Finch for \$1,540, paid in 1840, '41 and '42. At what times and for what prices the Mullinax and Foster lands were purchased, it did not appear by the evidence, but it appeared that the Mullinax tract consisted of eight acres, upon which there was a shoal; and the Foster tract of 103 acres, mostly old field; and I inferred that the aggregate cost was less than the price of the homestead. Except as to \$50 paid by Finch to Mullinax, and discounted in the payment for the homestead, it did not

strictly appear from what funds these two tracts were paid for; but from the evidence as to the means and habits of Daniel Mullins, and as to the sale of the homestead not otherwise invested, I conclude that the payments were made from the trust funds. It did appear that most of the labor and expense in erecting and repairing the mill and dam on the Mullinax tract was furnished and expended from the trust estate. Daniel Mullins exercised some supervision in the erection and repair of the mills, and in the management of the plantation, but in the latter particular, at least, the defendant was the more efficient manager. D. Mullins also received the proceeds of the crops, but in the disbursement of them, as in payment of supplies for the family and plantation, his wife generally attended and co-operated. All debts for such supplies have been paid; but Mullins, at his death in 1844, left unpaid large liabilities to the plaintiff and others, contracted as surety for one Williamson, who had been substituted as trustee under the aforesaid post-nuptial settlement. These debts have no connection with the trust estate, and they were contracted after the registry of the deed in the office of the Secretary of State. Williamson is dead, insolvent; and D. Mullins is utterly insolvent, unless these two tracts of land are made liable for his debts.

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*It was not contested on the part of the plaintiff that if these two tracts of land were purchased with trust funds, the trusts of the deed would be imposed upon them; nor was the fact of their being so purchased, otherwise contested than upon the assumption, that D. Mullins was entitled to receive and disburse the proceeds of the crops of the plantation which was settled; and that he was entitled to one-third of the corpus of the estate in remainder; and that he appropriated his interest or share in these particulars to the purchase of these lands.

But under the deed, D. Mullins was not entitled to any beneficial interest in the income of the trust estate, and if in fact he received and disbursed this income, he must be considered as doing so in the character of agent or trustee for the cestui que trust; and it is at the option of the cestui que trust to pursue him for the debt arising from his breach of trust, or to claim the lands in which the trust funds have been invested. (Story Eq. § 1210-11; 322.)

It is true, that at the death of the defendant, the representatives of D. Mullins will be entitled to a reconveyance of one-third of the estate settled, which defendant might lawfully dispose of; but this estate in remainder being unproductive, afforded Mullins no means or resources for the purchase of property. As to the extent and particulars of the estate in which Mullins has an interest of one-third in remainder under

the trust deed, some perplexing questions may arise, which are not necessary to the determination of this case. Except as to the two negroes absolutely belonging to Jane Mullins at the time of the settlement, there was no property in her at that time of which she could lawfully dispose at her death; and as it is not clear, that beyond one-third of these negroes, Mullins has any vested interest or remainder, it is prudent to reserve any opinion, until, upon the determination of the life-estate, the proper parties can be brought before the Court.

It is said, however, that from the sale of the James homestead by Mullins and wife, a fund came into the hands of Mullins, which he was entitled to appropriate to his own use.

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adequate for the *purchase of the Mullinax and Foster tracts. In the homestead, under the will of her former husband and the settlement of Mullins, Jane Mullins was entitled to a life estate. By the deed of Austin and wife to Mullins and wife, executed after the settlement, the remainder in fee was conveyed to Mullins and wife; and such conveyance in general constitutes a peculiar estate of which the main incidents are, that both are seized of the entirety—neither can alien so as to bind the other, and the survivor takes the whole. (2 Kent, 132; 4 Kent, 362.) As the conveyance of the whole estate in this land to Finch was apparently with the consent of the husband and wife, the husband, prima facie, would be entitled to a portion of the value of the remainder in fee in the lands. But the money paid as the consideration of the conveyance of the land, negroes, &c., in fee from Austin and wife, \$3,200, must have been derived from the estate settled to the separate use of Jane Mullins, and the estate thus purchased should be charged with the trusts of the settlement.

It is adjudged and decreed that the Mullinax and Foster tracts of land belong to the trust estate settled by the deed of Daniel Mullins, dated September 5, 1829. It is also ordered that the plaintiff pay the costs of this suit.

The complainant appealed, on the grounds

1. Because the lands in dispute were the property of D. Mullins, and there is no proof that they were paid for by the trust funds; the titles being in him, the decree should have been for plaintiff.

2. Because D. Mullins was entitled to one-third of the entire estate which he conveyed in trust, which gave him means to purchase this property.

3. Because the sale of the homestead in which he was interested to the extent of one-third, was ample means in his hands to pay for these two small tracts of land.

4. Because the decree was against law and evidence and the facts of the case.

Bobo, for appellant.

—, contra.

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*The opinion of the Court was delivered by

WARDLAW, Ch. The parties to this suit are the administrator and the widow of Daniel Mullins, who died intestate; and the subject of the suit is the rents and profits of land: which land is claimed on one side to belong to the intestate, and on the other to belong to the trust estate of defendant. Debts of the intestate are incidentally mentioned in the course of the proceedings, but the creditors are not made parties to the bill; and the case is to be determined on the principles which would be applicable to a suit between the intestate and the defendant. The right of an administrator to interfere at all with the lands of his intestate, is so equivocal, that we are not bound to recognize his claim for rents and profits, where the lands are held by adverse title. The circuit decree refuses to the plaintiff the relief he seeks, and has no other result. It does not conclude the claims of any person who is not a party nor a privy to the suit.

Upon the question of fact, whether the Foster and Mullinax tracts were purchased with the trust funds of the defendant, this Court will not review closely the judgment of the Chancellor. The proof of the fact is not direct and precise, but is satisfactorily deduced from all the circumstances of the case. Granting that it might be insufficient to induce the active interposition of the Court in favor of the defendant, if she were claiming a remedy, it affords abundant justification to the Court in staying its hand, and leaving the parties where they are found.

The conclusion of the Chancellor as to the fact, is assailed, principally, under the third ground of appeal, upon the assumption, that by the sale of the homestead to Finch, the intestate converted into money an interest in remainder to which he was legally entitled; and that he invested this money in the two tracts now in controversy.

If the remainder in the homestead were at first purchased by Mullins and wife from Austin and wife, with the trust funds of defendant, the trusts would follow the re-investment; upon general principles, and according to the express terms of the settle-

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ment of D. Mullins. That this remainder was so purchased, can hardly be doubted, if we bear in mind that this purchase was made three months after the settlement, and little longer after the marriage of Mullins and wife; and that Mullins had no means of his own.

Supposing, however, that D. Mullins contributed from his private resources to the purchase of this remainder, still he would not be entitled in equity, to any portion, during the life of his wife, of the proceeds of a subsequent sale of the whole estate in the

land. Jane Mullins, under the will of her former husband, was entitled to an estate for life in this land, and this estate was settled to her sole and separate use by the deed of D. Mullins. Afterwards Mullins and wife acquired an estate in entirety in the remainder in fee. These estates will not be suffered to coalesce. There would be no merger of such estates at law. The title of one of Mr. Preston's chapters, in his treatise on merger, is: 'The freehold of the wife will not in any case merge in the freehold of the husband.' Where the husband has a freehold and also the fee in right of his wife, and there is no particular reason for keeping the estates apart, the law permits the merger; but if one of the estates, the freehold or the fee, be held by entirety, as in this case, the reason for exemption from merger is applicable. (Preston on Merger, 308; Shep. Touch. 316.) If there had been a legal merger, that would not be permitted in this Court to defeat equitable estates and interests. (Thorn v. Newman, 3 Swan. 603; Nurse v. Yerworth, Ib. 608.) Much less, where there is no legal merger, will this Court introduce the doctrine of merger into trusts, merely for the purpose of defeating equities, and destroying its own jurisdiction in the protection of the interests of married women. (Whittle v. Henning, 2 Phil. 731.) The rules of this Court for the protection of married women are designed to protect them against the influence of their husbands, when exercised for appropriating to themselves property which the wives ought to enjoy. The Court will protect the reversionary interest of the wife in personalty, by

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considering it still reversionary, notwithstanding all interested in the precedent estate, by surrender or otherwise, may attempt to unite all parts of the estate in her person, for the purpose of enabling her to dispose of the whole. (Whittle v. Henning.) The Court will not consent that she shall waive her chances of survivorship. The wife, in the present instance, equally needs this protection as to her real estate. It is doubtful, whether a life estate in the wife is her inheritance, in the sense in which the word is used in our statute, prescribing a form by which she may convey her inheritance.^(a) At least, equity requires us to consider the proceeds of the sale of her land as still retaining the incidents of the original estate—and that she is still entitled to the income for her separate use for life, with the chance of taking the whole capital by survivorship, as an incident of the estate by entirety. According to this view, D. Mullins was not entitled to appropriate to his own use any portion of the money received from Finch, the vendee.

We concur with the Chancellor, that D.

(a) Hays v. Hays, 5 Rich. 31.

Mullins is not entitled to a present interest of one-third of the estate conveyed by his deed. It would be a preposterous construction, which would give him a right to immediate re-conveyance of one-third of the estate, when he expressly gives the whole to his wife for life, and also gives to her the right to dispose of two-thirds thereof by will. His claim to the re-conveyance of one-third is subject and subsequent to these rights of the wife.

It is ordered and decreed, that the decree be affirmed, and the appeal be dismissed.

JOHNSTON and DARGAN, CC., concurred.

DUNKIN, Ch., absent at the hearing.
Decree affirmed.

4 Rich. Eq. *88

*SAMUEL MEEK v. W. H. B. RICHARDSON and Others.

(Columbia. Nov. and Dec. Term, 1851.)

[Courts ⇌ 82.]

The practice, under the rules of Court, may be moulded at the discretion of the Chancellor, so as to meet the exigencies of the case, and to promote the ends of justice: and with this purpose he may suspend their operation in particular cases, where justice seems to require it; observing them as a general chart by which the proceedings of the Court are to be conducted, where no special equity makes a deviation proper.

[Ed. Note.—Cited in Messervy v. Hillier, 12 Rich. 491; Scott v. Davis, 9 Rich. Eq. 40; Tindal v. Tindal, 1 S. C. 113.]

For other cases, see Courts, Cent. Dig. § 295; Dec. Dig. ⇌ 82.]

[Appeal and Error ⇌ 87.]

From the exercise of such discretion on the part of the Chancellor, in enforcing or suspending the rules, no appeal lies.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 586; Dec. Dig. ⇌ 87.]

Before Dargan, Ch., at Sumter, June, 1851.

The bill in this case was filed April 15, 1851, and on April 21, subpoenas to answer were duly served on the defendants, who resided about thirty miles from the Court House. On June 2, the bill was taken pro confesso. On Tuesday, June 3, the sitting of the Court for Sumter commenced, and on that day the order pro confesso was set aside as to the defendant, W. H. B. Richardson, and he filed his answer. On Wednesday, the case was continued, and on Friday, June 6, the other defendants, John P., James B., Thomas C. and Richard C. Richardson, moved, by their solicitors, F. J. & M. Moses, that, as against them, the order pro confesso be set aside and that they have time to answer. In support of the motion, an affidavit and statement were submitted, as follows:

"Thomas C. Richardson, one of the defendants to the case of Samuel Meek, makes

oath that on 21st April last, he was served with process of subp. ad resp.; that his brothers John and James B. were also served. That at request of his brothers, he wrote to Col. Moses to engage his services, and begging to be informed what they must do in the matter. That it turned out that Col. Moses was in Charleston, and on the first Tuesday of the sitting of the Appeal Court, he met Col. Moses at the depot, who had not then received the letter, and it was agreed between him and Col. M. that as soon as Col. M. returned from Columbia he would write by mail to defendant when to come up. That Col. Moses has informed him that he wrote a joint letter to deponent and his

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*brothers, informing them he was at home, and they must come up before first Monday in June to file their answers. He swears that to this day he has never received the letter or heard of it from either of his brothers, and believes it was never received. That waiting to hear from Col. Moses they did not come up, and only now came upon his sending an express down for them. He swears it was entirely from the fact that his action was to depend on the notice of Col. Moses, that he did not come up; that the complainant has not a shadow of law, justice or morality in the claim he has set up against him, and to deprive them of the opportunity of answering, under the circumstances, would be inequitable. This deponent further says, he informed his brothers of the understanding with Col. Moses: deponent swears he did not know the Court was sitting until the messenger of Col. M. came down."

"Defendants' solicitor stated that an affidavit was then in the course of writing, nearly completed by Richard C. Richardson, another of defendants.

"The Chancellor said it was unnecessary, as he would regard the affidavit already made as extending to all the defendants.

"Mr. F. J. Moses, defendants' solicitor, submitted the following statement, affidavit to which was dispensed with by complainant's solicitor.

"That about the last of April, 1851, he met Richard C. Richardson in Charleston; that said Richardson expressed gratification at meeting him, stating that he desired to see him on business; that he had been served with a writ by one Samuel Meek, requiring him to appear at Sumter Court House in ten days, and he did not desire to be guilty of any neglect in making his defence; wished it attended to. Counsel explained the process to him, informing him he would have to answer, which he could not do without a copy of the bill; that he would leave Charleston (as he expected) on 30th April, go to the Court of Appeals at Columbia the week following, and on his return from Court of Appeals, would write him when to come up, and prepare his answer.

"That on Tuesday morning, the 6th May,

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Mr. Moses, on his way to the Court of Appeals, met at Middleton depot, the defendant, Thomas C. Richardson, who informed him of the suit by Meek, and the wish of his brothers and himself to engage his professional services; that he had written a letter to Mr. M., on the subject, which letter Mr. M. had not then received.

"Mr. M. informed him, that on his return from the Appeal Court, he would write to him and his brothers, informing them when they must come up and attend to the filing of the answer, &c. That on his return from Court of Appeals, which was on the night of May 8, he found at his office the letter alluded to by said T. C. Richardson, dated April 30, post-marked May 1.

"Mr. M. further states, that within at farthest, as he thinks, two days after his return home, he wrote a letter by mail addressed to John P. Richardson, James B. Richardson, and Thomas C. Richardson, at Fulton post office, informing them they must come up before the first Monday in June, to prepare the answer in the Meek case, and that by same mail, he addressed a letter to the same effect to the said Richard C. Richardson.

"That during the term, as they did not come up, on Wednesday evening, he sent a letter down for them, and three of them appeared in Court at its opening on Friday morning, and submitted the motion above set forth."

As stated in the brief, his Honor the Chancellor said, that if he considered he had any discretion in the matter, the cause shewn was abundant for its exercise in favor of the application, but that as he regarded his hands tied by the rule of Court, he was obliged to overrule the motion.

The defendants appealed, on the grounds:

1. Because, under the circumstances, the said order should have been granted.
2. Because the Court has the entire control over the pleadings of a cause, and the right to permit an answer to be filed at any time, when by so doing the complainant could in no wise be prejudiced.
3. Because the cause having been continu-

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ed, the complainant could not have been delayed or otherwise prejudiced by the motion.

4. Because the failure to file the answer on the day of the meeting of the Court was the effect of accident and surprise, from which the said defendants were entitled to relief, and the refusal of leave to do so, would seriously affect them in their defence on the merits of the case.

F. J. Moses, for appellants.
DeSaussure, contra.

The opinion of the Court was delivered by

DARGAN, Ch. I did not hold on the circuit, as the brief represents, that there were no circumstances under which the Chancellor could exercise the discretion of relaxing the 36th rule of Court. On the contrary, I said, distinctly, that there were extraordinary circumstances, such, for instance, as accidents resulting from the act of God, which would justify the Chancellor pro hac vice to set aside the rule, and to permit the answer to be filed on such equitable conditions as he might think proper to impose. And I put cases by way of illustrating my views. I said, that if the omission was occasioned by sickness, or any other calamity or misfortune, which occasioned the answer not to be filed in time, I would feel myself authorized to interpose. But I did not consider the case as falling within that class. It was an omission, which did not result from calamity, misfortune, sickness or inevitable accident. In the case made by the affidavits, and similar cases, I considered the rule as of imperative obligation, and in reference to such cases, used language very much like that imputed to me in the brief.

It is the opinion of this Court, that the practice under the rules, may be moulded at the discretion of the Chancellor, so as to meet the exigencies of the case, and to promote the ends of justice. And with this purpose in view, he may suspend their operation in particular cases, where justice seems to require it; observing them as a general chart by which the proceedings of the Court

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are to *be conducted, where no special equity makes a deviation proper. At the same time it is the clear doctrine, that the exercise of such a discretion on the part of the Chancellor, in enforcing or suspending the rules, is not a matter from which an appeal will lie. Where there is a right to exercise discretion, there is no right of appeal from its exercise.

I am now persuaded, that I had a greater latitude of discretion than I had supposed on the circuit. As the parties and their counsel did appear to have used a considerable degree of diligence, with my present views, if the case were now before me, I should allow the defendants, on the case made, to file their answers. On this statement to the other members of the Court, and on my own motion, this Court has consented to reverse the decision of the circuit Court, and to grant the defendants leave to file their answers.

It is ordered and decreed, that the order pro confesso be set aside; that the defendants have leave to file their answers on or before the first day of March next.

JOHNSTON, DUNKIN and WARDLAW, CC., concurred.
Decision reversed.

4 Rich. Eq. 92

JOHN PETTUS and Others v. W. J. CLAWSON and Others.

(Columbia. Nov. and Dec. Term, 1851.)

[*Limitation of Actions* ⇨102.]

Where on the last annual return of an administrator with the will annexed, the ordinary struck a balance, and gave him a certificate that the balance thus ascertained was the sum due by him on his accounts,—held, that such act of the administrator, having been done in a public office, open for the information of parties interested, and purporting to be a final settlement, gave currency, from its date, to the statute of limitations; and that such of the legatees as were then adult, or, being infants, failed to prosecute their rights against the administrator within the statutory period after arriving at age, were barred.

[Ed. Note.—Cited in *Fricks v. Lewis*, 26 S. C. 239, 240, 1 S. E. 884; *Ariail v. Ariail*, 29 S. C. 93, 7 S. E. 35; *Boyd v. Munro*, 32 S. C. 253, 10 S. E. 963; *Robertson v. Blair & Co.*, 56 S. C. 110, 34 S. E. 11, 76 Am. St. Rep. 543; *Kilgore v. Kirkland*, 69 S. C. 86, 48 S. E. 44.

For other cases, see *Limitation of Actions*, Cent. Dig. § 505; Dec. Dig. ⇨102.]

[*Equity* ⇨423.]

Upon demands not bearing interest at law, equity usually allows interest, but may in its discretion withhold it.

[Ed. Note.—Cited in *Tompkins v. Tompkins*, 18 S. C. 25; *Turnipseed v. Sirrine*, 60 S. C. 287, 38 S. E. 423; *Bowen v. True*, 74 S. C. 489, 54 S. E. 1018.

For other cases, see *Equity*, Cent. Dig. §§ 986-990, 992-998, 1009-1014; Dec. Dig. ⇨423.]

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[*Infants* ⇨105.]

*As laches cannot be imputed to an infant, he should, it seems, always be allowed interest where he prosecutes his rights within the statutory period after arriving at age.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 302-305, 307, 311-313, 322; Dec. Dig. ⇨105.]

[*Executors and Administrators* ⇨104.]

In charging an administrator with interest, not only should all funds received in the current year be regarded as unproductive until the close of it, but all expenditures in the course of the year should be regarded as made before the balance is struck, to bear interest.

[Ed. Note.—Cited in *Tompkins v. Tompkins*, 18 S. C. 28; *Nicholson v. Whitlock*, 57 S. C. 42, 35 S. E. 412.

For other cases, see *Executors and Administrators*, Cent. Dig. § 428; Dec. Dig. ⇨104.]

[*Executors and Administrators* ⇨72.]

Before an administrator should be charged with notes marked by the appraisers on the inventory as good, there should be some proof of their collection, or of negligence in collecting.

[Ed. Note.—Cited in *Tompkins v. Tompkins*, 18 S. C. 27.

For other cases, see *Executors and Administrators*, Cent. Dig. § 321; Dec. Dig. ⇨72.]

Before Wardlaw, Ch., at York, June, 1851.

Wardlaw, Ch. This suit is brought by the legatees and representatives of legatees of J. D. O. K. Pettus for an account and settlement of his estate.

J. D. O. K. Pettus died October 29, 1821, leaving of force his will dated March 24,

1819, whereby he gave his estate, after the payment of his debts, in unequal portions to his wife, Violet, and his two children, living at the date of the will, Stephen and Hannah M. A. Another son, John, was born to the testator May 16, 1821, about 3½ years after the birth of Hannah, and 5 years after the birth of Stephen. Stephen Pettus, senior, administered with the will annexed, and on January 8, 1822, sold the whole estate, except two negroes, Ellick and Venus, which, after being hired out one year, were delivered to the widow, Violet, under the bequest of them to her for life. The said administrator made annual returns of his transactions for several years, not including, however, charges for interest on annual balances, nor credits for commissions. In the last of these annual returns, on January 5, 1829, the balance appearing against the administrator on his whole receipts and expenditures, is \$288.96¾, and the ordinary gave the administrator a certificate that this sum was the balance due. Violet Pettus removed with her children to North Carolina in 1822, and died there February 21, 1829. No administration here has been taken out on her estate. Her sealed note for \$336.15, for purchases at the administrator's sale of her husband's estate, is produced as unpaid. In 1845, Thomas Roswell, who had

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married *Hannah, daughter of testator, cited the administrator, Stephen Pettus, before the ordinary to account, but no decree was made by the ordinary. Stephen Pettus, senior, died in 1846, and defendant, Clawson, administered upon his chattels and credits. Stephen Pettus, junior, and Hannah Roswell have also died at dates not appearing. The original bill in this case was filed May 14, 1847, by John Pettus, Thomas Roswell and his infant daughter, Mary V. Roswell, all residents of North Carolina, against W. J. Clawson, administrator of Stephen Pettus, senior; and afterwards, in 1848 or 1849, on a day not appearing by my copy, a supplemental bill was filed by J. C. Smith, as administrator of Hannah Roswell and Stephen Pettus, jr.

The commissioner of the Court being defendant, the matters of account, all equities being reserved, were referred specially to J. B. Smith, a solicitor of the Court. To his report, and to the accompanying evidence in writing, I refer for any further statement of the facts which may be necessary.

The report of the special commissioner is well considered and clear, but I think fails in giving proper influence to the lapse of time. Applying rules fit enough for recent administrations, the commissioner has attained the startling result, that the estate of Stephen Pettus, senior, was indebted, on June 17, 1851, on his administration of the estate of J. D. O. K. Pettus, in the sum of \$4,268.10, and this he distributes, on prin-

ciples which seem unexceptionable, among the widow and children of testator or their representatives. At the day of filing the bill in this case, which, when filed, presented regularly the claim of John Pettus only, there had been the lapse of more than 25 years from the grant of the administration to the defendant's intestate, more than 18 years from the last authentic act of the intestate in the administration, and five years, lacking a day, from the maturity of the statutory legatee, the youngest of the original parties in interest; and, in the meantime, trustee and beneficiaries, except one, had all died.

The citation to account before the ordinary does not obstruct the immunity from time, because it was abortive and not pur-

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sued *within reasonable time by subsequent proceedings, and instituted irregularly by the applicant alone, if his wife were alive, and not officially if she were dead. Acts done in a public office, open for the information of parties interested, must be taken notice of by them; (*Payne v. Harris*, 3 Stro. Eq. 42); and if Stephen Pettus's return to the ordinary of January 5, 1829, had purported more clearly to be a full execution of his trust, the claims of all the plaintiffs might have been considered as barred by the statute of limitations, except that of John Pettus, saved by a day. Under all the circumstances, the claims of the plaintiffs must be restricted to the narrowest limits consistent with the rules and principles of the Court. In my judgment, the plaintiffs are not entitled to more than, taking the burden of proof, to surcharge and falsify the accounts current of Stephen Pettus, in order to ascertain the amount of the surplus he owed, as administrator, to the legatees, on January 5, 1829, allowing the defendant the same privilege of correction. Thus interest against the administrator to the time mentioned and commissions in his behalf, and other receipts and expenditures by him, actually proved, may be taken into the calculation, and other mistakes may be corrected. I am not satisfied with the mode of calculating interest pursued by the commissioner, in ascertaining the balance due on January 5, 1829, although he seems to be justified by the case of *Davis v. Wright*, (2 Hill, 560). It is so difficult to save the most honest and diligent trustee from loss by the moth of interest, that not only should all funds received in the current year be regarded as unproductive until the close of it, but all expenditures in the course of the year should be regarded as made before the balance is struck, to bear interest; such mode of calculation is adopted in the offices more particularly under my observation (a). I am further of the opinion, that, under

(a) Vide *Dixon v. Hunter*, 3 Hill. 204; *Duncan v. Tobin*, Chev. Eq. 143 [34 Am. Dec. 605].

the circumstances of this case, the sum thus ascertained to be in the hands of the administrator, on January 5, 1829, should bear interest only from the filing of the bill. Interest is not incident in strict right to

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*mere delay of payment, unless it be secured by contract, or follow a breach of trust. (Bell v. Free, 1 Swan, 90; Gittins v. Steele, Ib. 199; Payne v. Harris, 3 Strob. Eq. 44; Smith v. Hunt, 3 Rich. Eq. 465; Davis v. Wright, 2 Hill, 567.) In the last case it is said, "Interest is given as legal damages for the unlawful detention of a debt; can there be any unlawful detention when there is no one authorized to receive? It is clear there cannot be; when a day is fixed for payment of an ascertained sum, and it is not then paid, interest is generally the necessary consequence of the neglect; but to this position are some exceptions. In this case, when was the debt payable? 'On demand' is the answer. There could be no demand until administration was granted, and hence interest was not recoverable sooner." So, in the present case, the lack of authority for any person to receive the shares of the infant legatees, and their own laches, after maturity, in demanding payment, justify the exercise of a sound discretion in refusing interest.

The defendant filed various exceptions to the commissioner's report, and I have already availed myself of the sixth objection to the general principles of the report, to express my views on the equities reserved. I shall notice cursorily some of the others, principally for the sake of illustration.

The first objects to the allowance of \$128.89 of notes, and \$30.60 of accounts, marked by the appraisers on the inventory as good, not charged by the ordinary, nor proved to be collected by the administrator. I think plaintiffs are bound to furnish some proof of the collection of these demands, or of negligence in collecting.

The second objects to the allowance of certain sums received on fil. fas. of intestate, and another sum for rent. These items seem to be fairly proved by plaintiffs, in surcharge of the accounts current.

The third objects to the omission of various items of credits allowed by the ordinary. The omission was not verified to my satisfaction in most of the instances. The pay-

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ment of \$66.72 on *Alexander's note was sufficiently vouched, and was omitted by inadvertence and should be allowed. The items of \$683.64 and \$78, vouched by the receipts of Violet Pettus, as paid for the board of her children and medicines for them, are not sufficiently falsified by the proof that her relations and neighbors are ignorant and distrustful of her receiving these sums. The other reason assigned for rejecting these items, that her share in

the estate should be set off against these claims, cannot operate in a suit to which she is no party. These should be reconsidered.

The fourth objects to the exclusion of interest accruing, after the sale bill fell due, on demands bearing interest, and the costs paid by the administrator and allowed by the ordinary. On this point the commissioner has followed the general rule, but it deserves his reconsideration, whether actual payments, so long made and so proved, should be set afloat on a naked presumption. It would be more satisfactory to have express evidence that the administrator, with funds in his hands, did not promptly pay, when presented, demands so obviously just as to need no litigation. An original debtor is in default if he does not punctually fulfil his contracts; but one made a debtor by relation, may know nothing of the justness of the claims upon him, or even of their existence; some of the debts, upon which the interest (which has been rejected) accrued after the sale notes fell due, were owing to creditors in another State. We must not expect from trustees more than the ordinary diligence of men in their own affairs.

The fifth exception complains that the commissioner has placed the debts and credits in years different from those in which they are set down in the accounts current, audited by the ordinary. As I understand the matter, these changes have been made in conformity to the dates of the vouchers themselves, and amount merely to the correction of mistakes.

It is ordered and decreed, that the report be recommitted to the special commissioner, to be reformed according to the principles of this opinion, with leave to either of the parties to offer additional evidence.

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*The complainants appealed, on the following grounds, viz:

1. Because, according to the decree, interest on the amount in the hands of Stephen Pettus, administrator of J. D. O. K. Pettus, on 5th January, 1829, is only to be calculated from the date of the filing of the bill in this case—when it is submitted that interest should be charged from said 5th of January, 1829, and that under the circumstances of the case, as proved, it would be against equity and right to restrict interest as allowed in the decree.

2. Because, at all events, interest should be allowed from the time of the citation to account before the ordinary, and it is respectfully submitted, that the Chancellor was mistaken as to the fact of said citation being irregularly issued and not prosecuted with due diligence, it being proved that both Roswell and wife were parties to the proceedings in the ordinary's court, and that the bill in this case was filed shortly after the death of Stephen Pettus and in due time.

3. Because, it is submitted, that the mode

of computing interest adopted by the referee in this case is correct and proper; and that an administrator ought not to be permitted, having funds in his hands to pay debts, to suffer interest on these demands to accrue against the estate, and to derive benefit to himself from his negligence.

4. Because his Honor held that the complainants should furnish evidence that Stephen Pettus, administrator, had collected the notes and accounts inventoried by him as good, when, it is respectfully submitted, the burthen of proof should be thrown on the defendant, and the complainants showed enough by producing the inventory.

5. Because, it is submitted, his Honor erred in holding the defendant was entitled to a credit of \$683, and also of \$78 for charges of Violet Pettus against her children for board and medicine, when there was not only the absence of all proof to shew the payment of these sums, but abundant evidence to shew said children were maintained by their grandfather, and not by Violet Pettus.

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*6. Because, if said sums of \$683 and \$78 are allowed as credits to the defendant, the same should be taken from the share of Violet Pettus, and the complainants should be charged with no part of same.

Williams, for appellants.
Witherspoon, contra.

The opinion of the Court was delivered by

DARGAN, Ch. J. D. O. K. Pettus died 29th October, 1821, having duly executed his will, which bears date the 24th of March, 1819. The testator disposes of his whole estate in unequal proportions, in favor of his wife, Violet, and his two children then in esse: namely, Hannah, born in 1817, and Stephen, born in the year 1816. After the execution of the will, to wit, on the 16th May, 1821, John, another son, was born to the testator; for whom, as born after its execution, the will made no provision. As a pretermitted child, (according to the rules of law upon the subject,) John is entitled to be let into the possession and enjoyment of a portion of his father's estate disposed of by the will. His share is to be raised by contributions from the legacies given to the other children; and in amount must equal the average of those legacies.

One Stephen Pettus became the administrator, with the will annexed, and on the 8th January, 1822, sold the whole estate, with the exception of two negroes, which were disposed of according to the bequests of the will. He made annual returns of his accounts with the estate, to the ordinary, for several years; in the last of which, made on the 5th January, 1829, the balance appearing against the administrator on account of his whole receipts and disbursements, is \$288.96. The ordinary then gave him a certificate, that this

sum was the balance due by him to his testator's estate. Violet Pettus, (the testator's widow,) removed with her children to the State of North Carolina in 1822, where she continued to reside until her death in February, 1829. The children, and the heirs at law and distributees of those who are dead, have resided in that State ever since. There has been no administration upon the estate of

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Violet Pettus. In 1845, Thomas Roswell, who had intermarried with Hannah Pettus, (the daughter of the testator,) cited Stephen Pettus, the administrator, before the ordinary to account; but the ordinary made no decree, and the proceedings had no result. Stephen Pettus, jr., and Hannah Roswell also died before the institution of this suit; and their representatives are parties to this bill, claiming an account of the administration of the testator's estate. Stephen Pettus, sen., also died, (in 1846,) and Clawson, the defendant, is the administrator of his estate; and resists the claim to account on various grounds; of which, those that are deemed material, will be hereafter considered. There has been a report upon the accounts from a special referee, (the Commissioner of the Court being the administrator of Stephen Pettus, senior.) Exceptions were taken to the report; and from the Chancellor's decree upon the report and exceptions, an appeal has been brought before this Court.

I will not discuss the various grounds of appeal seriatim; but will confine my observations to such of the questions which they raise, as I deem proper for serious consideration.

The main issue involved in the case, is whether the parties who are seeking an account of the administration of the testator's estate, are, under the circumstances of the case, entitled to an account at all. The original bill in the cause was filed May 14, 1847, by John Pettus, Thomas Roswell, and his infant daughter Mary V. Roswell, (a daughter of the testator's legatee, Hannah Roswell,) all residents of North Carolina, against Wm. J. Clawson, the administrator of Stephen Pettus, senior. And at a subsequent day, (not appearing to the Court,) a supplemental bill was filed by J. C. Smith, as administrator of Hannah Roswell and Stephen Pettus, junior. This makes the record complete, as to the proper parties who should be before the Court.

But it will be perceived, that from the date at which the administration was committed to the defendant's intestate, more than the quarter of a century had passed away; and more than eighteen years had elapsed from

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the date of the last act of administration, when Stephen Pettus, senior, made his last return to the ordinary, and when that officer, on what purported to be a final settlement, struck a balance on his accounts, and

gave him a certificate, that the sum of \$288.96 was due by him to his testator's estate.

I do not say, that this last accounting and settlement before the ordinary was a decree. I do not think it was. It was obviously *ex parte*, and cannot have, and probably was not intended to have, the force of a judgment. But it was a transaction which purported to be a final settlement of the estate. "Acts done in a public office," as the Chancellor in his decree has said, in an office proper for such acts, and where they may of right be done, and open at all times "for the information of parties interested, must be taken notice of by them." And the doctrine is fully sustained by the authority cited, (*Payne v. Harris*, 3 Strob. Eq. 42;) to which others might be added. The Chancellor proceeds to say, "if Stephen Pettus' return to the ordinary of January, 1829, had purported more clearly to be a full execution of the trust, the claims of all the plaintiffs might have been considered as barred by the statute of limitations, except that of John Pettus, saved by a day." In the opinion of this Court, the Chancellor did not give sufficient force and significance to the facts upon which the question as to the statute of limitations will turn. I regard those facts in a stronger light. They speak an unequivocal language to the effect, that the administrator had wound up the estate, and had fully executed the trust, with the exception of the balance acknowledged to be due. In *Brockington v. Camlin*, (4 Strob. Eq. 196,) where the administrator had fully administered the estate, with the exception of some negroes, to which, in the presence of the distributees, he asserted a personal and independent claim, the assertion of the claim was held to have given currency to the statute. Suppose that in this instance, the administrator had served the parties in interest with a copy of his last account and return; or that he had given them notice in writing, or by parol, that he had fully executed his trust, with the exception of the

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*balance acknowledged to be due, could it be doubted, that the effect would have been, to have divested him of his fiduciary character, except as to that balance, and to have placed him, to use the quaint but expressive language of some of the authorities, "at arm's length," with the beneficiaries of the trust? Well; this, or a similar declaration, the administrator did spread upon the records of the ordinary's office. And if there be any reason or force in the decisions, that acts done in a public office must be taken notice of by the parties interested, the same result must follow.

Independently of the statute of limitations, it appears to me, that except as to the claim of John Pettus, the demand for an account is, under the circumstances, too stale and antiquated to meet with favor in this Court.

It is against good policy to lend too ready an ear to an application to rip up these long standing settlements and accounts. The Court cannot proceed to render judgment, except at the risk of doing great injustice. The transactions under investigation are obscured by the lapse of many years. The administrator is dead. He died under the belief, founded on what was undoubtedly a bona fide settlement before the ordinary, that he owed his testator's estate only \$288.96, with the subsequently accruing interest. His case has been defended by his own administrator, aided only by the evidence which the wreck of eighteen years leaves at his command. Under these circumstances his accounts have been examined, and on June 17, 1851, the referee reports a balance due by the estate of the administrator of J. D. O. K. Pettus of \$4,268.10. This is a most startling result, and cannot but strongly impress one's mind, with the danger of doing great injustice in these investigations. The case itself is aptly illustrative of both the benignity and wisdom of that rule, which affords to persons called upon for a settlement of stale and antiquated demands, the protection of a legal oblivion. It is the opinion of this Court, that the Chancellor should have sustained the plea of the statute of limitations, and dismissed the bill against all the complainants, except John Pettus. The case of John Pettus stands upon a

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different footing, as to *this ground of defence. He was an infant, and on account of his residence without the limits of this State, was entitled to five years after he came of age to bring his suit. He filed his bill one day before the removal of his disability; which was of course sufficient to save his rights. The case must go on as to him, and he will be entitled to recover such an amount as he would be entitled to recover if the claims of his co-plaintiffs had not been considered as barred.

There is only one other point which it is my purpose to discuss. The Chancellor, in his decree, has disallowed the charge of interest, except from the filing of the bill. He has conclusively shown, by the authorities which he has cited, that the allowance of interest is a matter within the discretion of the Court. Equity allows interest upon demands, as to which, interest is not recoverable at law; upon the principle, that it would be inequitable to withhold it; and in cases of trust, upon the maxim which prevails in this Court that a trustee shall not be permitted to make a profit for himself out of the trust estate. This Court having imposed upon itself rules for the allowance of interest on the ground that equity demands it, can refuse, and has refused it, where in the judgment of the Court, there are equitable circumstances which forbid its allowance. The equity for interest prevails, unless there be some stronger countervailing equity. The authorities

abundantly prove, that the allowance of interest in this Court is only a general rule; and that there are exceptional cases. It is a discretion belonging to the Court, however, which, in my judgment, if I may be allowed to use an expressive tautology, should be very discreetly exercised.

So far from impugning, I sustain the doctrine of the circuit decree in this respect considered as an abstract proposition. The claims set up on behalf of the representatives of Hannah Roswell, and Stephen Pettus, have been disposed of, and disallowed. If the claims on their part had not been considered as barred, and it were necessary to state an account as to them, I am not prepared to say, that it would not be proper, as the Chancellor

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decreed, to withhold the interest, except from the time of filing the bill. In *Smith v. Hunt*, (3 Rich. Eq. 465,) great laches on the part of the complainants in the prosecution of their demand for an account, until the interest account had swelled to a great and disproportionate magnitude, was held to be a sufficient reason for withholding a large portion of the interest. In reference to those parties, whose claims have been dismissed, this enquiry would be speculative, and outside of the record. But it is very material to enquire, whether under any circumstances, interest can be withheld from John Pettus, who was an infant, and who filed his bill for an account, within the five years allowed him by the statute of limitations after the removal of his disability. Laches is certainly not predicable of an infant before he attains his majority; nor is it imputable to him during the period, in which the statute afterwards allows him to bring his suit. There is no principle or precedent, so far as I can perceive, which forbids an interest account to be stated in favor of John Pettus. In stating the accounts, interest must be allowed according to the rules which prevail in this Court on that subject.

In regard to the other questions raised in the grounds of appeal, it is sufficient to say, that this Court concurs with the Chancellor, and is satisfied with the circuit decree.

It is ordered and decreed, that the bills be dismissed as to all the complainants in the cause, with the exception of John Pettus.

It is further ordered and decreed, that so much of the circuit decree as disallows interest in favor of John Pettus be reversed, and that the referee, in re-stating the accounts, as is herein ordered to be done, do charge interest on the administration accounts of Stephen Pettus, senior, according to the usual practice of this Court.

It is further ordered and decreed, that the report be referred back to the special referee, and that he re-state the accounts, and make his report conformable with this decree, and with the circuit decree so far as the latter is

not reversed or modified by this appeal decree.

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*It is further ordered and decreed, that in all respects, in which the circuit decree is not reversed or modified by this decree, the said circuit decree be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN and WARDLAW, CC., concurred.

Decree modified.

4 Rich. Eq. 105

WILLIAM MAYBIN v. JOHN T. KIRBY, SIMPSON, BOBO, THE SOUTH CAROLINA MANUFACTURING COMPANY, and R. ARNOLD, Adm'rs.

(Columbia. Nov. and Dec. Term, 1851.)

[*Pledges* ⇨22.]

Deposit of certificate of stock in an incorporated Company, in consideration of a liability incurred for the depositor, held, to create a lien in equity upon the stock to the extent of the liability; and such lien enforced against a subsequent purchaser.

[Ed. Note.—For other cases, see *Pledges*, Cent. Dig. § 46; Dec. Dig. ⇨22.]

[*Assignments* ⇨102.]

The assignee of a chose in action is not within the rule which protects a purchaser for valuable consideration, without notice; the assignee takes only such interest as the assignor has, and is bound by all the equities binding on the latter.

[Ed. Note.—Cited in *Moffatt v. Hardin*, 22 S. C. 29; *Patterson v. Rabb*, 38 S. C. 147, 151, 17 S. E. 463, 19 L. R. A. 831; *Westbury v. Simmons*, 57 S. C. 481, 35 S. E. 764.

For other cases, see *Assignments*, Cent. Dig. § 178; Dec. Dig. ⇨102.]

[*Assignments* ⇨85.]

Where the equities of persons, claiming under the original holder of a chose in action, are equal, the maxim, prior in tempore, potior in jure, will apply: if the first assignee be guilty of fraud, or of such gross negligence in the assertion of his right, as enables the assignor to practice a deceit on a second purchaser, his equity will be postponed to that of the second bona fide purchaser.

[Ed. Note.—Cited in *Maxwell v. Foster*, 67 S. C. 386, 45 S. E. 927.

For other cases, see *Assignments*, Cent. Dig. § 149; Dec. Dig. ⇨85.]

[*Sales* ⇨235.]

A plea of purchase for valuable consideration, without notice, is no protection against an adverse claim of which the purchaser might have had notice, by using due diligence in investigating the title.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 683; Dec. Dig. ⇨235.]

[This case is also cited in *Hampton & B. R. & Lumber Co. v. Bank of Charleston*, 48 S. C. 134, 26 S. E. 238, without specific application.]

Before Wardlaw, Ch., at Spartanburg, June, 1851.

The decree of his Honor the circuit Chancellor, states the facts in the case, and is as follows:

Wardlaw, Ch. The plaintiff, as surety for one William Clarke, has paid certain sums of money; and he seeks in this bill to be reimbursed out of shares held by Clarke in the stock of the S. C. Manufacturing Company.

This Company was incorporated by the Legislature in 1826, for the manufacture of iron, with the usual powers of corporate bodies, and with the privilege of holding es-

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tate to the value, at first, *of \$50,000, and afterwards of \$200,000, (8 Stat. 350, 353). Of this Company, Kirby and Bobo were large stockholders, and Clarke was a stockholder to the extent of 265 shares, at \$100 a share. Clarke had been agent of this Company for several years before 1842, when he became agent of the Nesbitt Manufacturing Company, of which Elmore, Hampton and Nesbitt were stockholders, but for the year mentioned, or longer, he continued his agency for the former Company.

Josiah Kilgore, administrator of Hugh Bailey, obtained judgment at law against Clarke for \$6,738.30, and in the summer of 1843, was pressing the collection of this money, but on September 10, 1843, he agreed, in a letter to the sheriff, to indulge Clarke, on his payment of \$2,000 within twenty days. Kilgore at this time held sixty of Clarke's shares in the S. C. Manufacturing Company, as collateral security for his debt, although the formal assignment of these shares in the stock book of the Company was not made by Clarke to Kilgore until February 16, 1844.

To enable Clarke to raise the money necessary to procure indulgence from Kilgore, the defendant, Kirby, made a note for \$2,000, dated September 27, 1843, payable to Bobo 90 days after date, at the Commercial Bank in Columbia, and Bobo endorsed the note, took it to Columbia and delivered it to Maybin, with a letter from Clarke, who was last endorser. In this shape the note was first offered to the Bank for discount, and the offer declined unless a town endorser was added. Maybin then endorsed the note and it was discounted at the Bank, and on October 5, 1843, Maybin received the proceeds and sent \$1,950.31¼ by Caswell Bogan to the sheriff at Spartanburg. The sheriff received this sum October 7, and, the balance being advanced by Clarke, on October 10, paid \$2,000 to Kilgore on his fi. fa. This note, when discounted, was marked "special," which, according to the usage of the Bank, indicated that payment was expected at maturity, without renewal. The note was protested for non-payment, on December 29, 1843.

In contemplation of the making and en-

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dorsement of this note, *Clarke, on September 21, 1843, assigned, in the stock book, 100 of his shares in the S. C. M. Co., to Kirby and Bobo for their indemnification on this note, and for the indemnification of Bobo on

a note of \$500 to Cleveland, wherein he was Clarke's surety. This latter note has been paid long ago. On the same day, Clarke assigned 100 shares for the use of the Company, in consideration of a debt of \$4,000 to the Company.

On January 6, 1844, Clarke, in writing, promised that, if Maybin would give him the use of his name, on a note of \$2,000 to be discounted in the Branch of the Bank of the State of South Carolina, at Columbia, and on the renewals of the same, he would immediately deposit with him a certificate of stock in the S. C. M. Co. for 265 shares, with power of attorney to sell the same, if default were made by Clarke in paying up said note and renewals, and after satisfying such debt to return the overplus to Clarke. On the same day, and on the same instrument, Elmore, Hampton and Nesbitt, provided in writing to guarantee to Maybin the payment, by Clarke, of such note and renewals on the taking of the security aforesaid. On January 9, 1844, a note for \$2,000 was made by Maybin, payable in 60 days to Clarke, at the Branch Bank aforesaid and endorsed by Clarke, Hampton and Elmore. On this note was written in pencil, by one of the officers of the Bank, "Nett proceeds, \$1,979, W. Maybin's check for this amount on 10th March, \$1,979." Maybin drew the \$1,979 from the Branch Bank, Jan. 10, 1844, and on the same day paid to the Commercial Bank \$2,006.60, in discharge of the Kirby note and interest and protest, received that note and deposited it in the Branch Bank, saying it would be an additional security. On the 26th of January, 1844, Clarke wrote a letter to Maybin, saying: "I send you the stock named, of which I hope to have arranged in time to give satisfaction. I will see you in a short time;" and enclosing a certificate, under the seal of the Company, signed by Ben. Wofford, President, and Simpson Bobo, Secretary, dated in 1843, without further specification of time, that William Clarke is entitled to 265 shares in the S. C. M. Co., on each of which

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\$100 *have been paid, and that "this certificate is transferable in person or by attorney, at the Secretary's office, on the surrender hereof."

On April 19, 1844, Kilgore, in presence of Clarke and Kirby, assigned to Kirby his fi. fa. against Clarke, upon which the balance then due was \$3,982, taking Kirby's two notes for \$982 and \$3,000, and delivering to him the 60 shares of Clarke's stock, which he held as collateral security, although he took Clarke's receipt for these shares. On June 19, 1844, Clarke assigned to Kirby, in the books of the Company, "subject to all prior liens," his 265 shares as security for the Kilgore debt. On April 18, 1847, the S. C. M. Co. gave their note, since paid, to Kilgore, in place of Kirby's note for \$3,000.

In December, 1844, Gen. B. B. Foster heard the following conversation between Maybin and Kirby, in Columbia, viz: M. Where is Clarke? K. At home. M. He must be the most careless man in the world. I have taken up a note for him in the Bank. K. Is it the note for which Bobo and myself were sureties? M. It is. K. Give me the note. M. No, I have a settlement to make with Clarke, and I wish to see him before I give up the note.

On October 10, 1845, Clarke, reciting, that as agent of the S. C. M. Co., he had used the means of that Company for the benefit of the Nesbitt Manufacturing Company, to the amount of \$10,147.75, with interest from September 9, 1844, and that the former Company had agreed to prosecute this claim against the latter Company, assigned to the S. C. M. Co., in the stock book, his 265 shares in the Company, for the security of the said debt, or for the expenses of litigation, as the case might be.

On January 1, 1847, Clarke assigned to the Company, on its books, 80 of his shares absolutely.

On January 2, 1847, about \$1,075 remained due upon the note in the Branch Bank, and the renewal note for that sum had been protested. Of the payments made for the reduction of the note from the original principal of \$2,000 and the interest accruing, Maybin admitted that Clarke had paid \$325 on May

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13, 1844, \$10 in September afterwards, and at other times \$60, but claimed that all other payments had been made by himself, and the books of the Bank showed that the payments had been made by him, and there was no evidence, beyond his admissions, that Clarke had furnished him with money. I mention here, without understanding the application of the evidence, that plaintiff produced a note for \$40.17, dated January 19, 1843, by Clarke, President of the Nesbitt Manufacturing Company, to Stacker, and the note of Clarke to Maybin, dated January 19, 1846, for \$113.66. Stacker was the agent in Columbia of a stage contractor, and Maybin was a tavern keeper there, and it seemed to be inferred that these notes were given for Clarke's stage and tavern expenses in attending to his notes in Bank.

On this January 2, 1847, in a conversation between Elmore and Clarke, Elmore called Clarke's attention to the note in the Branch Bank, suggested the injury to Maybin's credit from the non-payment of the note and the propriety of its re-instatement in the Bank. Clarke acknowledged Maybin's kindness in making advances for him on the renewals and his obligation to indemnify Maybin, and he, Clarke, drew a note to Maybin, payable at the Branch Bank, which was left in blank, as neither Elmore nor Clarke knew the amount that had been paid by Maybin, and he drew a power of attorney to Maybin, author-

izing Maybin to reinstate and renew the said note as often as might be necessary and pledging his said stock anew for the previous advances of Maybin, and for any he might make subsequently. Both Clarke and Elmore at this time supposed that the original note of January 9, 1844, had been made by Clarke and endorsed by Maybin, and so described it in the power of attorney, and from this misdescription the paper was unsuitable and unused.

On January 15, 1847, Clarke, in consideration of his indebtedness to the S. C. M. Co. in the sum of \$17,753.29, sold and transferred to said Company his 265 shares in the stock of said Company, 19 mules, 4 horses, stock of cows and calves, all his wagons, carts and harness, all his corn, fodder, oats

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and hay, all *his wood, coal and ore on hand, and all his tools as carpenter and farmer, and for the furnace or for coaling or raising ore or cutting wood, conditioned that unless he paid his debt within two months, the agent of the company might sell the same, after two months' public notice of the time and place of sale. This mortgage was executed by Clarke, during his last illness, in the presence of one J. G. Clowdy.

Clarke died January 17, 1847, and administration of his estate was granted February 22, 1847, to Robert Arnold who is a defendant in this suit. His estate is utterly insolvent. -

On July 23, 1847, Maybin brought suits at law as second endorser of the note in the Commercial Bank, against Kirby as maker and Bobo as first endorser of said note. The case against Kirby was tried on the circuit, at March term, 1849, and resulted in a verdict for defendant, (which was confirmed by the Court of Appeals at December term, 1849,) on the ground that the note in the Commercial Bank was in fact paid by Clarke, for whose accommodation it was discounted. The equities of the plaintiff, growing out of his payments on the note in the Branch Bank, were not concluded. The case against Bobo has not been tried, but on the motion of the defendant, I put the plaintiff to his election as to Bobo, to proceed at law or in this forum: he elected to proceed in equity. I also mention, to avoid any appearance of suppression, that I overruled the exceptions filed by the plaintiff to the answers, and that I rejected the depositions of Colonel Elmore, taken in the cases at law, but not read there.

On December 6, 1847, William Walker, as agent of the S. C. M. Co., under the mortgage of January 15, 1847, sold at public outcry after two months' public notice, 185 shares in the stock of said Company, being the whole of Clarke's shares, after deducting the 80 assigned to the Company on January 1, 1847, and they were bought by the Company at 35 dollars a share, making the aggregate sum of \$6,475. At this sale it was announced by

the agent that the Company would assume the risk of paying or discharging all precedent liens, and that the purchaser should

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*have an unincumbered title. This announcement, according to the answer of Walker, Agent and President of the Company, was made in reference to any claim that might be set up under the mortgage to Kirby and Bobo, "as the plaintiff, since Clarke's death, had intimated that he intended to make the Company pay."

A. W. Thomson, from the beginning a stockholder in this Company, testified that Maybin, in his presence, got from the Branch Bank the original notes to the Commercial Bank, and the Branch Bank, and the papers connected therewith, and that before the suits at law were brought, he, the witness, offered on the part of Maybin to Bobo, who was Secretary and Solicitor of the Company, to surrender the scrip for Clarke's shares and all liens to the Company, if Maybin's claim should be paid; but he mentioned nothing of Clarke's payments to the Branch Bank, nor of the note to the Branch Bank, regarding the note in the Commercial Bank, as the measure of Maybin's damages. Bobo and Walker, in their answers do not admit, but deny notice of Maybin's possession of this scrip, before the suits at law or the sale in December, 1847, and if the fact be important, it is not proved according to the rules of evidence; in my view the fact is unimportant. It is admitted that before this bill was filed the Company had full notice of Maybin's claim.

At a meeting of the stockholders of the S. C. M. Company, held January 27, 1837, a by-law was adopted, "that all transfers of stock shall hereafter appear on the books of the Secretary by the certificate of the person selling." Again at the meeting in January, 1839, these bye-laws were adopted, "that the transfer of stock shall be made on the books as now required, and that when any stockholder sells less than the amount of his whole shares he shall produce his certificate to the Secretary, who shall indorse thereon the number of shares sold, and to whom sold; whereupon the new stockholder shall be entitled to his certificate; that when a stockholder sells out his whole stock, he shall transfer in writing his certificate of stock to the purchaser; whereupon the new purchaser may demand his certificate; that so far as the Company

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*and its interests are concerned, no transfer of stock shall be considered as perfect until the foregoing regulations for transfers, are complied with."

In this state of facts this bill was filed by Maybin on April 18, 1850. In the prayer of the bill and in the argument of his counsel, his claim to be reimbursed for the monies he has paid on account of Clarke is maintained

in various forms and on different grounds of equity.

First, it is said the defendants are personally liable to him. To this it is well answered, that Clarke's estate, represented by defendant Arnold, is utterly insolvent; that there is no privity of contract between the plaintiff and the S. C. M. Co., and that the claim by contract against Kirby and Bobo, if not determined by the Court of Law, is barred by the plea of the statute of limitations, of which these defendants have availed themselves.

Again: It is strongly urged that Maybin's note in the Branch Bank was merely a substitution for the note of Kirby endorsed by Bobo and discounted in the Commercial Bank, and that the latter being negotiated for the purpose of paying a portion of Kilgore's execution, and the proceeds being so actually used, it should represent so much of this execution as it paid, with all its collateral securities; consequently, that the plaintiff, by subrogation or substitution is entitled to the benefit of the 60 shares in the stock of the S. C. M. Co., assigned by Clarke to Kilgore as collateral security, and to 80 of the 100 shares assigned to Kirby and Bobo, as collateral security for the note made and endorsed by them, granting that 20 of these latter shares were assigned to Bobo individually for the Cleveland debt. It is not my purpose to discuss the doubtful doctrines thus presented, inasmuch as after the decision at law in Maybin v. Kirby, comity requires me to determine that there is no foundation in fact for this superstructure of principles. If the Kirby note were discounted for Clarke's accommodation and paid by the money of him as endorser, this contract with all its incidents would seem to be extinguished,

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and *the note in the Branch Bank is a new and independent arrangement.

Finally, the plaintiff rested his claim to be reimbursed for his payments on the note in the Branch Bank upon the deposit with him by Clarke, in January, 1844, of his scrip for shares in the S. C. M. Co.

This scrip was the title of Clarke to his shares of the capital of said Company; and the delivery of it to Maybin, in consideration of the liability he had incurred for the owner, creates a lien in equity upon these shares, to the extent of his liability. Ever since Russel v. Russel, (1 Bro. C. C. 269.) it has been recognized, that a deposit of title deed, upon an advance of money constitutes an equitable mortgage even of lands notwithstanding the provisions of the statute of frauds. See Welsh v. Usher (2 Hill Eq. 170 [29 Am. Dec. 63]) where at the time of the sale of a ship an indorsement was made on her Register that the vessel should not be sold until the notes given for the purchase money were paid; and the Register was left with the vendor. This was held to be an

equitable mortgage of the ship to the vendor, valid against the claims of subsequent attaching creditors. Similar liens have been recognized in *Read v. Simons*, (2 Des. 552) *Menude v. Delaire*, (Id. 565) *Massey v. McIlwain*, (2 Hill, Eq. 421) *Dow v. Ker*, (8 Sp. Eq. 417.)

Such a lien would not prevail against a subsequent purchaser, for valuable consideration without notice. But the defendants cannot bring themselves within the protection of this plea, because they have not formally pleaded the plea, nor actually paid any part of the purchase money, nor acquired the legal title. (*Williams v. Hollingsworth*, 1 Strob. Eq. 113 [47 Am. Dec. 527]; *McBee v. Loftis & Hampton*, 1 Strob. Eq. 95; *Crocker v. Dillard & Kirby*, Sp. Eq. 27; *Shultz v. Carter*, Id. 542; *Bush v. Bush*, 3 Strob. Eq. 135 [51 Am. Dec. 675].) The purchase of a chose in action—and such I consider to be the character of the contract made with the S. C. M. Co. in December, 1847—is not within the rule which protects purchasers for a valuable consideration; and the vendee takes

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only such interest as the assignor has in the subject, and he will be bound by all the equities binding on the latter. Where the equities of persons, claiming under the original holder of a chose in action, are equal, the maxim prior in tempore, potior in jure, will apply. If the first purchaser or assignee be guilty of fraud, or what is equivalent, of such gross negligence in the assertion of his right, as enables the assignor to practice a deceit on a second purchaser, his equity will be postponed to that of the second bona fide purchaser. (2d *White & Tudor's L. C.* pt. 2, 234.) Thus, where a party suffers stock, or other choses in action belonging to him, to stand in the name of another, perhaps his equity may be postponed to that of an innocent purchaser from the latter. It was so decided in *Redfearn v. Ferrier*, (1 Dow, 50,) under the Scotch law, although Sir Samuel Romilly treated the doctrine as unknown to the English law.

It was urged in this case, on the part of the S. C. M. Co., that the plaintiff by neglecting to give notice to the Company of his possession of Clarke's scrip until they had purchased, and by neglecting to comply with the bye-laws of the Company as to transfers of stock had forfeited his prior equity. There would have been much force in this argument as to notice if the plaintiff had allowed Clarke to retain the scrip, which was the evidence of title, and thus hold himself out as unincumbered owner; but in fact the plaintiff kept the scrip, and produced it at the trial. The argument would have had some weight if Clarke had practiced upon the credulity of the Company, by pretending, at any time, that his scrip was lost or mislaid; but there is no evidence that in any of the transactions between Clarke and

the Company, any inquiry or representation was made as to the scrip. If the Company, in taking transfers from Clarke, had pursued the terms of their bye-laws, and of their certificates of stock, by requiring the production of Clarke's certificate, they might have ascertained the plaintiff's mortgage. A plea of purchase for valuable consideration, without notice, is no protection against an adverse claim of which the purchaser might have had notice, by using due diligence in

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*investigating the title. (*Jackson v. Rowe*, 2 Sim. and Stu. 472, 1 C. E. C. C. 550; *Crocker v. Dillard*, Sp. Eq. 27—*Boyce v. Coster's Ex'rs*, MSS. Charleston, 1850 [4 Strob. Eq. 25].) Again: Thomson, one of the stockholders of the Company, had explicit notice of plaintiff's mortgage; and it is manifest from the answer of the President of the Company, that the Company, before the sale, knew the plaintiff's intention to make the Company pay in some mode or other.

It is not clear that the bye-laws of the Company, concerning transfers of stock, extend beyond the case of absolute sales; but it is unnecessary to determine any thing on this point—for if they include conditional sales, as mortgages, the Company has violated them, at least as much as the plaintiff, in neglecting to have Clarke's certificate produced and assigned. It does not appear that the sale of December, 1847, has been entered in the books of the Company. But on what sound principle can it be maintained, that the private regulations of a corporate body, bind other persons than stockholders, who have no notice of such regulations?

I conclude that the plaintiff and the Company have both merely equities as to Clarke's stock, and that there is no circumstance to rebut the prevalence of the plaintiff's equity, according to its date.

In this view, and regarding the liens of Kilgore and Kirby and Bobo as extinguished—the plaintiff's mortgage is anterior to all other liens or assignments, except those to the Company of 100 shares, on September 21, 1843. As to this last, no proof was offered beyond the execution of the assignment; but its validity may be conceded, as the remaining shares are adequate to satisfy, many times over, the plaintiff's claim.

As to the amount for which plaintiff is entitled to reimbursement, there must be a reference to the commissioner. A mortgagee coming into equity for foreclosure, can demand only the debt secured by the mortgage. (*Walling v. Aiken, McMull*, Eq. 1.) The plaintiff here must be limited to his payments on the note in the Branch Bank. It was

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said in the argument, that on the *renewal note in the Bank, something still remained unpaid. But as the plaintiff produced the original note, I conclude that the renewal note of Maybin was accepted by the Bank, in

satisfaction of the original liability, and that the plaintiff is entitled to reimbursement for the whole of the original sum, with interest and legal expenses, except such sums as by his admissions, or other proof, have been paid by Clarke, or other persons for him.

It is ordered and decreed, that it be referred to the commissioner of this Court, to inquire and report as to the sums paid by the plaintiff on the note to the Branch Bank, of January 9, 1844, and the renewals thereof; and that if the South Carolina Manufacturing Company do not pay to the plaintiff the amount of such sums, with interest, when ascertained, the commissioner of this Court proceed to sell so many of the shares held by said William Clarke, in the stock of said Company, not exceeding 165 shares, as will satisfy the amount due to the plaintiff. It is also ordered, that the said S. C. M. Company pay all the costs of this suit.

The South Carolina Manufacturing Company appealed, and moved this Court to reverse the circuit decision, on the grounds:

1. Because the deposit of the scrip with the complainant created no lien upon the stock of Clarke.

2. Because the defendants had the first and only legal lien upon the stock of William Clarke; and having sold the stock under their lien, and being the purchasers thereof without notice of the complainant's claim, they ought, in justice and equity, to hold it.

3. Because, if the complainant ever had any just claim upon the stock, he forfeited it by neglecting to give notice of his claim in a reasonable time.

4. Because the decision was against law and equity, and the usages and practice of this Court.

Bobo, for appellants.

Thomson, contra.

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*PER CURIAM. This Court concurs in the decree of the Chancellor; and it is hereby affirmed and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.
Appeal dismissed.

4 Rich. Eq. 117

A. McMULLEN et al. v. JAMES CATHCART et al.

(Columbia. Nov. and Dec. Term, 1851.)

[Equity 375.]

It would be replete with inconvenience to sanction a practice of hearing a cause piecemeal, or by detached parts. It is the duty of the plaintiff to be fully prepared at the hearing; and if from the death of a party and the want of time to bring new parties before the Court,

the cause cannot be fully heard, leave will be given to postpone.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 785, 786; Dec. Dig. 375.]

[Execution 348.]

A having an execution against B's testator, B borrowed money, giving A as his surety, and paid the money to A on the execution: B died insolvent, and A, as his surety, was compelled to pay the money:—Held, that the execution of A against the testator was satisfied to the amount of the money borrowed by B and paid to A.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1064; Dec. Dig. 348.]

Before Dargan, Ch., at Chester, July, 1850.

Dargan, Ch. Hugh McMullen, late of Chester District, died in December, 1841, testate. He was seized and possessed of a good real and personal estate at the time of his death. By his will, he directed that his estate should be kept together and employed in agricultural operations, to be conducted by his executors until a sufficient fund was raised for the payment of his debts. In aid of the fund thus to be raised for the payment of debts, his executors were authorized to sell certain lands of the testator in Lancaster district, and if both of these sources were insufficient to raise the adequate amount, the executors were authorized to sell any portion of the personal estate. The testator, after the payment of debts, gave his large and valuable plantation on the Catawba river, on which he dwelt, and the whole of his personal estate, consisting of 26 negroes, stock, &c., to his two sons, Joseph J. McMullen and James C. McMullen, for life, and at their

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deaths *respectively, to such lawful issue of their bodies, as may be living at their death; with a power to the said Joseph and James C. McMullen, to sell the said estate, and to reinvest the proceeds of the sale, on the same conditions and limitations.

James Cathcart and Caleb Clark, sen., were nominated executors of the will. They declined the trust, and administration, with the will annexed, was granted to Joseph J. McMullen—James Cathcart, Robert Cathcart, Caleb Clark, and the complainant, James C. McMullen, being the sureties on his administration bond. Joseph J. McMullen having thus qualified, assumed upon himself the execution of the will, and continued to act in the character of administrator, with the will annexed, from the death of testator, in the early part of the year 1842, until his own death, which occurred on the 5th of October, 1845.

Joseph J. McMullen had a sale of some of the personal property, on the 15th of February, 1842, and hired out the negroes, and rented the land for that year and for 1843. His estate is also to account for the rent of land and hire of negroes, for the years 1844 and 1845, and for any choses in action or

assets which may have come into his possession.

On the first day of December, 1843, the said Joseph J. McMullen offered the Catawba plantation, consisting of about 1200 acres, at public sale, and became himself the purchaser thereof, at \$9.90 per acre, he being at that price the highest bidder. This plantation he claimed, cultivated, and used as his own, to the day of his death. He divided the negroes, delivering about one half to his brother and co-legatee, James C. McMullen, one of the complainants. But whether this was intended as a final or provisional partition of the negroes, does not appear.

On the 5th of October, 1845, he died intestate and insolvent, leaving his wife, Mrs. Jemima McMullen, and two children, Alexander and Lucy McMullen, who are infants, and complainants in this bill. No application for letters of administration upon his estate having been made, James Witherspoon, ordinary Lancaster district, where the intestate

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resided, has taken the possession and management of the estate, as a derelict estate, according to the Act of Assembly, in such case made and provided.

After the death of Joseph J. McMullen, in 1845, Caleb Clark and James Cathcart, on 3d November, 1845, obtained letters of administration of the estate of Hugh McMullen, *de bonis non*, and with the will annexed, and assumed upon themselves the execution of that trust.

The next event was the levy and sale by the sheriff of Chester district of the Catawba plantation, and the negroes of the estate that had remained in possession of J. J. McMullen, being eleven in number. The sales were made to satisfy executions in force against the estate of the testator. A very large proportion of the indebtedness, to satisfy which the sales were made, was due to Caleb Clark himself, on an outstanding and old execution that had existed against the testator for years before his death. This was the senior execution. It had, before the sale, been assigned to the Bank for \$4,500, with a guaranty by Clark to the Bank for its ultimate payment. The amount due to the Bank was not equal to the balance remaining due upon the execution. This balance belonged to Clark. After the sale, Clark and James Cathcart paid to the Bank the amount of its claim, and obtained a discharge. There were, at the time of the sale, other executions in the sheriff's office, namely, one in favor of Robert Cathcart, one in favor of John Kennedy, one in favor of James R. Massey, one in favor of Wm. Dunlap, and one in favor of J. N. Smith. This last had been assigned to C. Clark, and belonged to him at the time of the sale.

William A. Rosborough, a former sheriff, testified, that when Clark lodged the execution in the case of C. Clark v. Hugh McMul-

len, in the sheriff's office, he informed him that there were several credits to go on it. He said he did not recollect the amounts, but he had a memorandum of them at home. The witness did not recollect whether this conversation occurred while he was sheriff himself, or while he was acting as the deputy of his predecessor, D. G. Cabeen. It was after the death of H. McMullen.

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*On the 5th of January, 1846, the Catawba plantation, containing about 1200 acres, and the negroes aforesaid, were sold by the sheriff to satisfy the executions aforesaid, then remaining in his office. On the day of sale, a claim was publicly set up to the land, or a part of it, in behalf of the grand-children of Mrs. Charlotte McMullen, wife of the testator, Hugh McMullen. This claim was interposed on the part of the children of her daughters, Mrs. Woodward and Mrs. Clark, both deceased. It seems that a portion of the Catawba plantation, known as the Leonard tract, containing about 200 acres, was the inheritance or real estate of Mrs. C. McMullen. She died in the life-time of her said husband. On her death, Hugh McMullen became seized of one-third, and James C. McMullen, Joseph J. McMullen, Mrs. Woodward and Mrs. Clark, (or their children representing them,) became entitled each to one-fourth of two-thirds. James C. and Jos. McMullen, had, by a deed duly executed, conveyed all their share or interest in their mother's real estate, to their father, Hugh McMullen, in his life time. So that at the time of the sale, the only real claim outstanding against the title of the testator to the whole of the Catawba plantation, was that on the part of the Woodward and Clarks to one-third of the two hundred acres, known as the Leonard tract.

These adverse claims were made to assume a formidable and exaggerated aspect. The sale of the whole plantation was forbid by a written notice served on the sheriff. Neither the character nor extent of the adverse claims was explained. It was not shown how the adverse claimants derived their title. It is charged in the bill, and admitted by C. Clark, that he was fully acquainted with the nature and extent of these adverse claims.

D. G. Stinson, testified, that he was present at a trial in the Court of Common Pleas for Lancaster, when Caleb Clark produced a deed of assignment by James C. and J. J. McMullen, to their father, of all their right in their mother's part of the Leonard tract of land. Yet Clark made no explanations as to the nature and extent of the outstanding and

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adverse claims. He was asked *to consent that the sale should be postponed, in order that the adverse claims might be examined and ascertained. This he refused, and insisted that the sale should go on. His execu-

tion, the oldest in the office, was open for the full amount due upon its face, according to the original confession, though there were large credits that should have been endorsed upon it. At the sale, there was no explanation made as to the actual amount due upon the execution. It was originally for a large sum. It had been drawing interest for a great many years, (from 27th February, 1822,) and the amount apparently due was very large; not less, in fact, than \$9,000. All these circumstances tended in a very considerable degree to damp and injure the sale. They had such an effect upon the sheriff, (James Pagan,) that he thought it best to offer only the right and interest of Hugh McMullen in the land. The land was thus offered—a mode of selling which had a still further tendency to prejudice the title in the estimation of bystanders and bidders, and to cool the ardor of competition. Under these circumstances, C. Clark became the purchaser of the Catawba plantation for the sum of \$3,700, took sheriff's titles, and has been in the possession and use from that time to the day of his death; and his heirs and representatives, since his death, to the present time, have continued to use and cultivate the said plantation for the benefit of his estate. This is a valuable property, and I am satisfied from the evidence, was worth, at the time of the sale, \$10 per acre, or \$12,000.

It is impossible that this sale should stand. The property was worth more than three times the amount it brought at the sale. It was an unconscionable speculation by the administrator, against the estate he represented. If the sale had been fair, under the Act of 1839 C. Clark would have been entitled to hold the property, and the title would have vested in him, on the condition of his being charged with and paying the actual value at the time of the sale. But I do not think that the purchase was fairly made. And this is shown by the circumstances which I have narrated. I am satisfied, if the administrator, C. Clark, had performed his

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*duty on that day, in stating the actual amount due to himself, and in clearing his testator's title of the suspicions and doubts that were cast upon it, the land would have sold for a much larger price. The transaction wears, in my judgment, the appearance of finesse, and there was a concealment of circumstances on the part of the administrator, which prejudiced the estate, and secured to him the benefits of a great bargain.

This being my conclusion, the sale must be set aside, and the sheriff's conveyance delivered up to be cancelled. And it is so ordered and decreed.

It appears from the answer of C. Clark and James Cathcart, that there was another small tract of land of testator's, in Chester district, containing 40 acres, which was sold on the same day by the sheriff. This tract

was bid off by Mrs. Jemima McMullen, (the widow of Jos. J. McMullen,) for what price does not appear. She transferred her bid to Richard Cathcart, by whom it was transferred to Caleb Clark, who took sheriff's titles for the same, and still held it in his possession at the date of his answer. There being no allegations in the bill, impugning the sale of this tract of land, nor in fact any proof that it was not fairly sold, and for full value, it is not my purpose in this decree to disturb that sale.

The negroes of the testator, sold by the sheriff on the first Monday in January, 1846, (eleven in number,) were all bid off by the other administrator, James Cathcart, with the exception of one negro boy named Horace. He was bid off by A. Q. Dunovant, but the boy being anxious to go with his kindred, James Cathcart purchased him from Dunovant, at an advance upon his bid. The answer states, that some of the eleven negroes were old and some young. That they brought the aggregate sum of \$1,414, equal to an average of \$416, and that this price was full and fair. It seems, on the same authority, that after the negroes were bid off by James Cathcart, and without any previous understanding to that effect, he and Caleb Clark agreed to divide the negroes. Under this agreement, the negroes were divided; James Cathcart taking five at \$1,865, and Clark

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taking six at the price of \$2,549. The only evidence on the subject of the price of the negroes, besides the statement of the answer, is that of James Pagan, the sheriff, who made the sale. He says, that "the negroes sold, not for a high price, but for a pretty fair price, considering the time at which they were sold." I see no unfairness in the sale of the negroes. They, as well as the land, were sold under bona fide executions, at the suit of other persons than the administrators. There were no attempts or circumstances to depreciate their value, or to throw doubt and suspicion on the title. The price given was adequate, and though purchased by an administrator, we have seen, that, under the provisions of the Act of 1839, (11 Stat. 62,) an administrator is permitted to purchase the property of his testator or intestate, under whatsoever authority the sale shall be made; provided, he gives the actual value of the property at the time of the sale. I see no reason, therefore, for the Court to interpose in regard to the sale of the negroes; and so much of the bill as prays that the sale of the negroes be set aside, is dismissed.

There were two tracts of land owned by Hugh McMullen, in Lancaster district. Both of these were sold by the sheriff of that district. The complainants charge in their bill, that these lands were purchased at very inadequate prices, for the benefit of the sureties to the administration bond of Jos. J. Mc-

Mullen. There is no evidence before me of the quantity of these two tracts of land, their value, the prices at which they sold, at whose instance, or when they were sold, further than what is to be found in the answer of Clark and James Cathcart. They state, that the tracts contained about 500 acres each, that they were sold by the sheriff of Lancaster, under executions in his office, and that one of the tracts was purchased by Richard Cathcart for \$65, and the other by the same party for \$60. It is denied by Caleb Clark, in his answer, that the sale was made under his execution, or that he knew of the sale until some time afterwards. He says that he has been informed, that the sale was made under the execution of Wm. Dunlap. He further states, that the sale of the Lancaster

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*tracts was long anterior to the Chester sale, in the life-time of Joseph J. McMullen, the late administrator, and before the said Clark represented the estate, or bore any other relations to the estate than those of a creditor. There is no proof to the contrary of this statement, and if it is not to be taken as evidence, there is no evidence at all upon the subject. Richard Cathcart bore no fiduciary relations to the estate of Hugh McMullen, which would forbid his purchasing his lands at sheriff's sale at an inadequate price. I say inadequate, though there is no evidence of inadequacy, besides the simple statement of quantity and price, from which, I presume, that the price was inadequate. I do not know but that the sale was conducted in a manner most perfectly fair. In the absence of proof, I am bound to conclude that it was. I perceive no grounds, therefore, for supposing that Richard Cathcart had not a legal right to take titles for the land that he had purchased at sheriff's sale, on the payment of his bid. Nor do I perceive any impediment, after he had thus acquired by contract of purchase a perfect right to take titles, to his transferring that right to Caleb Clark, on any consideration that might be agreed on between them. It will be remembered, that, at that time, Clark occupied no confidential position towards the estate. And if he had, after the right and title of the estate was gone, without default in the administrator, and before his administration, and had vested in a third person, there is nothing to forbid the administrator, under those circumstances, to purchase for his own benefit. The sale of the Lancaster lands may have been fraudulent; but if so, it has not been made to appear. There is, in the judgment of the Court, no ground for vacating or disturbing the sale of the Lancaster lands, and so much of the complainants' bill as relates thereto is dismissed.

The original bill in this case was filed on the 21st May, 1847, by James C. McMullen, the son and devisee of the testator, and by Alexander and Lucy McMullen, the children

of Jos. J. McMullen, against Caleb Clark, James Cathcart, Robert Cathcart and Richard Cathcart. The prayer of the bill is, that

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the sales of *the lands and negroes should be vacated, and for account and relief. The children of Jos. J. McMullen are interested and claim under the limitations of the will of their grandfather, Hugh McMullen. James Witherspoon is also made a party, because as ordinary he took possession of some portion of the goods of Jos. J. McMullen. He states that Jos. J. McMullen died insolvent; that there were some executions out-standing against him at the time of his death, by virtue of which the sheriff levied upon and sold all his visible property. He further states that the said Jos. J. McMullen, at the time of his death, was a practicing attorney, and that he had possession of various choses in action belonging to his clients, all of which the said Witherspoon has delivered over to their proper owners. He further states that the said Jos. J. McMullen was an attorney in copartnership with Thos. J. Wright, who survived him; and that the said Thos. J. Wright, as the surviving partner, was entitled to the possession and control of the choses in action, fees and costs due to the copartnership; that besides these, there were no choses in action due to the said Jos. J. McMullen; that he has not received, and does not expect to receive, a dollar from the estate of the said Jos. J. McMullen; and that the said Jos. J. McMullen is said to be largely indebted to the said firm of which he was a co-partner.

After the said Caleb Clark and Robert Cathcart had filed their answer to the complainants' bill, and before trial, C. Clark died 10th January, A. D. 1850. The said Robert Cathcart also died, in 1849, intestate, leaving his children, John and Nancy Cathcart, his only distributees. The said Caleb Clark also died intestate, leaving his children and grand-children named in the bill of revivor, as his distributees, and Henry H. Clark has become his administrator. On the 23d March, 1850, the complainants revived their bill against the legal representatives, heirs-at-law and distributees of the said Caleb Clark and Robert Cathcart. On this state of the pleadings, the case came on for trial, all persons in esse with a possible interest, being parties before the Court. It is nowhere stated in the pleadings, nor

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shown in the evidence, *that James C. McMullen has any children who may claim as remainder-men under the will of Hugh McMullen.

Having vacated the sale of the Catawba plantation, I am next to enquire what is best to be done for the relief and satisfaction of creditors, and the adjustment of the conflicting claims of the various parties to the suit. I am impressed that the estate has

been badly managed; but it is premature to express an opinion on this subject. From evidence before me, it appears that the indebtedness is large. The claims of the creditors are of course paramount to those of the devisees and legatees under the will. And I do not think that the debts can be satisfied without a sale of the lands and negroes.

It is therefore ordered and decreed, that the commissioner of this Court do proceed to sell the plantation of the said Hugh McMullen, on which he lived at his death, on a credit of one and two years, with interest from the day of sale; and the negroes that are, or have been in the possession of the said James C. McMullen, on a credit of one year, with interest from the day of sale; and that the said James C. McMullen deliver up said negroes to the said commissioner for this purpose. It is also ordered, that the commissioner take bond and personal security and a mortgage of the property to secure the payment of the purchase money, of both the real and personal estate, hereby ordered to be sold. And in reference to the said plantation, it is ordered, that the commissioner give only a quit-claim title to any part thereof, to which the right may be seriously disputed.

It is further ordered and decreed, that the administrator of Robert Cathcart and the administrator of Caleb Clark, be enjoined from enforcing their executions at law against the estate of the said Hugh McMullen. It is further ordered, that all the other creditors of the said Hugh McMullen, whether by execution, by specialty or simple contract, be also enjoined from proceeding at law against said estate. It is further ordered and decreed, that all the creditors of the said Hugh McMullen do prove and establish their demands in this Court before the

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*Commissioner in Equity, before the next term of the Court; and that the said commissioner give due notice thereof by advertisement in the newspapers; and that the commissioner report thereon at the next term of the Court.

It is also ordered and decreed, that the commissioner enquire and report the balance due on the execution of the said Caleb Clark v. Hugh McMullen, after allowing all proper and legal credits and discounts; and that he also, in the same way, enquire and report the amount due upon the execution of Robert Cathcart and the other executions out-standing against the estate.

It is further ordered and decreed, that the administrator of the said Caleb Clark account before the commissioner of this Court for the rents and profits of the plantation, (the sale of which is herein vacated,) from the time that the said Caleb Clark became a purchaser thereof, to the time of accounting, with interest on the annual balances.

It is further ordered and decreed, that the accounts of Joseph J. McMullen, as administrator with the will annexed of Hugh McMullen, be referred to the commissioner, and that he report thereon; and if any balance shall be found due on the administration accounts of the said Joseph J. McMullen, it is ordered that such balance shall constitute a fund for the payment of the claims of creditors, and that for this object the estate of each of the four sureties on the administration bond of the said Joseph J. McMullen, shall be liable jointly and severally.

It is further ordered and decreed, that the amount that may be found due by Caleb Clark for the rents and profits of the plantation, as well as his aliquot or fourth part of any balance that may be found due on the administration accounts of said Joseph J. McMullen, shall apply as a credit or payment on his execution against the estate of Hugh McMullen, if so much be necessary. If all or a part should not be necessary for this purpose, it shall constitute a general fund for the payment of debts, or of the claims of the devisees or legatees under the will. In like manner, it is ordered, that the aliquot

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or fourth part of the liability *of the said Robert Cathcart for any balance that may be found due upon the administration accounts of the said Joseph J. McMullen, shall apply as a credit or payment on his execution against the estate of the said Hugh McMullen, if so much be necessary; and if not, then it shall constitute a general fund for the payment of the creditors or devisees and legatees under the will, as hereinbefore provided.

It is further ordered and decreed, that it be referred to the commissioner to enquire and report the amount due by the complainant, James C. McMullen, to the estate, for land rent and negro hire, during the administration of Joseph J. McMullen; and also, the hire of the negroes that have been in the possession of the said James C. McMullen, from the time that the same were delivered into his possession to the time of the sale hereby ordered.

All the funds of the estate, from whatsoever source derived, shall be applicable to the payment of the debts, as the Court shall appoint and direct. The residue, if any remains, shall be a fund for division among the persons entitled under the will, whose rights as among each other, are hereby reserved for future adjudication by the Court.

From this decree the complainants appealed, on the grounds:

1. Because the Chancellor erred in refusing to set aside the sale of the slaves belonging to the estate of Hugh McMullen, made by the sheriff, and which were purchased by Caleb Clark, Esq., and James Cathcart, administrators of the said McMullen, as the writs of *fi. fa.*, under which said

slaves were sold, were satisfied before the time of said sale; or if not actually satisfied, they were satisfied in law, the said Caleb Clark and Robert Cathcart, to whom all the executions in the sheriff's office belonged, being large debtors to the estate of the said Hugh McMullen; and their indebtedness at the time of said sale, amounting to more than the balances due on said writs of *fi. fa.*, under which said slaves were sold.

2. Because the Chancellor erred in decid-

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ing that there was no *fraud in said sale, and that the said slaves sold for a fair price, when from the proof in the cause, it is respectfully submitted, that said sale was fraudulent; the time when said sale was made, the large payments made on the executions under which they were sold, not being credited thereon, and other circumstances, show that the said sale was a mere contrivance to secure all the property of said estate to the benefit of said administrators, made below its value, and to the great injury of the estate of which the said Clark and Cathcart were the trustees.

3. Because the said decree is erroneous in ordering a sale of the slaves in the possession of James C. McMullen, until it shall be ascertained whether a sale of the same may be necessary for the payment of debts, and until it shall be ascertained what amount of assets are in the hands of Joseph J. McMullen, as former administrator of said estate, and the proceeds of the sales of the land, ordered to be sold by said decree may be insufficient for that purpose.

4. Because the Chancellor erred in dismissing, without prejudice, so much of the bill as relates to the sale of the lands in Lancaster, inasmuch as the complainants stated at the hearing of the cause, that they were not prepared, and would not go into that part of the case, and would not and did not offer any evidence or argument in that part of the case.

Upon so much of the decree as directed the commissioner to enquire and report the balance due upon the judgment of Caleb Clark, the commissioner reported as follows:

"Mr. Clark's judgment and execution was for \$3,310, with interest thereon from the 27th February, 1822. Mr. Clark had received various sums of money on account of Mr. McMullen, which were not credited on said execution. At the reference, Mr. Clark furnished a statement of a settlement of his claims against Hugh McMullen, made with J. J. McMullen, the administrator, on the 13th March, 1844. In this statement he credits his execution with the following sums received, to wit: June 6, 1838, \$3,310.00; April 6, 1838, 293.00; January 9, 1842, 2,000.00.

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"According to the calculation then made, the balance due at the time of the last payment was \$2,735.75. But to this statement

was added some balances due to Mr. Clark on former settlement, viz: one of \$435.80, Nov. 6, 1835, and one of \$103.00, due March 13, 1830, and other amounts, which with interest thereon and on the above balance of execution, made the amount of \$4,038.87, due to Mr. Clark, on the said 13th March, 1844, the day of the settlement. On the part of the complainants, it is alleged that the balance of the accounts are not allowable, as they are not sustained by evidence of the former settlement referred to, and were barred by the statute of limitations anterior to the testator's death. It appears to the commissioner that these objections are fatal, and that the balance of these accounts cannot be allowed to Mr. Clark. On the other hand, it is urged by the defendant that the sum of \$2,000, acknowledged to have been received on the 19th January, 1842, should not be allowed as a credit, inasmuch as the money was never actually received.

"The administrator, J. J. McMullen, credited himself with the sum of two thousand dollars in his returns to the ordinary, and which Mr. Clark also exhibited as a voucher at the reference. It appears that the payment was made by J. J. McMullen giving his note in Bank for \$2,000, with Clark and Robert Cathcart as his sureties, and that the money drawn on that note was applied to the payment of Mr. Clark's note then in Bank for the same sum. This note was renewed several times with some payments until the 2d April, 1845, when it was protested for \$1,300, which balance with interest and protest, was settled by Mr. Clark giving his own note in Bank for \$1,359.37, on the 19th November, 1845. Mr. Clark insisted that his execution should be credited with only \$640.63, the amount paid by J. J. McMullen on his note, as the other sum of \$1,359.37 was not really paid. The commissioner inclines to this view of the case, and is of opinion, that only \$640.63 should be credited on the execution instead of \$2,000."

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*To the report of the commissioner the complainants and the defendant, James Cathcart, excepted on the ground:

Because the commissioner erred in not crediting the execution of C. Clark with the sum of \$2,000, on January 19, 1842, being the amount of C. Clark's note in the Camden Bank, paid by J. J. McMullen on that day.

The report was heard, upon the exception, before his Honor, Chancellor Wardlaw, at July sittings, 1851. His Honor overruled the exception, and the complainants and James Cathcart appealed.

Gregg & McAliley, for complainants,
Boylston, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. The first ground of appeal is an attempt to urge the principle of Sim-

kins v. Cobb, (2 Bail. 60.) to a case not within that rule of law, or the reason of it. It is true that Caleb Clark and James Cathcart, together with two other persons, were sureties on the administration bond of Joseph J. McMullen, deceased. But at the time of the sheriff's sale in January, 1846, J. J. McMullen had been dead but a few months—no account had been taken of his administration—no default ascertained—nor his inability to discharge his debts established. In this Court all these should appear before any actual indebtedness could be said to exist on the part of his sureties. Their liability to the estate of Hugh McMullen, deceased, was purely contingent, and afforded no ground for the legal inference insisted on, that, in January, 1846, they were in possession of assets belonging to that estate. The distinction is adverted to in *O'Neill v. Herbert, McM.* Eq. 499.

The second ground is answered by the facts detailed in the Chancellor's decree. The sales of the slaves were made under the authority of other executions in the sheriff's office as well as those of Clark and of Cathcart. "There were no attempts," says he, "to depreciate their value, or to throw doubt

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or suspicion on the title. The price given was adequate." This Court concurs in his conclusion that there was no ground to invalidate this sale.

The third ground of appeal is well taken. It is now conceded that the order for the sale of the slaves in the possession of James C. McMullen was premature, and may prove unnecessary. It is, therefore, rescinded.

The Chancellor decreed that, from the evidence before him, he saw no ground to impeach the sale of the lands in Lancaster district. Robert Cathcart was the purchaser of those lands at sheriff's sales, and he was originally a defendant in the suit. He died before the hearing of the cause, to wit, in January, 1850, and though a bill of revivor had been filed against his infant heirs, they had not had an opportunity to answer or defend the cause. The fourth ground is because the Chancellor erred in dismissing the bill as to the sale of the Lancaster lands, "inasmuch as the complainants stated at the hearing of the cause, that they were not prepared, and would not go into that part of the case, and would not and did not offer any evidence or argument on that part of the case."

It may not be amiss to repeat what is said in *Bierdermann v. Seymour*, 17 Eng. Ch. R. 594, that "it is the duty of the complainant to come fully prepared at the hearing to ask the Court for a decree, and if he is not so prepared, and the suit appears defective from his default, it is then a matter of discretion or indulgence to grant him leave to supply the defect." So, if the cause is not

ready for hearing in consequence of such casualty as here occurred, and the want of time to bring the new and necessary parties into Court, leave would be given to postpone the cause. But it would be replete with inconvenience to sanction a practice of hearing a cause piece-meal, or by detached parts. It is manifest, however, that the error in this case originated in a misapprehension on the part of the Solicitor, and, moreover, as the heirs of Robert Cathcart, deceased, were not, in fact, represented, they would not be bound by the decree. So much of the

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*decree, therefore, as dismisses the claim is opened, and the matter ordered to be set down for hearing on the proper parties being represented.

Bush and Massey interposed a claim against the estate of Hugh McMullen, deceased, for moneys which they had paid on account of the Lancaster lands purchased by them from Hugh McMullen, and which had been taken from them for defect of title in their vendor. The Chancellor ordered the claim to be investigated by the commissioner. It is now asked, and it is so decreed, that the commissioner have leave also to report, whether any of the payments, alleged to have been made by Bush and Massey, were received by Joseph J. McMullen as administrator of Hugh McMullen deceased, and not heretofore charged against him, and that he have leave to surcharge him accordingly.

The only remaining ground of appeal is that submitted on the part of James Cathcart. It appears that, at the death of Hugh McMullen, and for some time previously, Caleb Clark held an execution against him to a large amount. On the 2d January, 1842, Caleb Clark having a note of \$2,000 falling due, or then due, in the Bank of Camden, applied to Joseph J. McMullen, who was then the administrator of his father's estate. McMullen put his individual note in the Bank of Camden, with C. Clark and Robt. Cathcart as his sureties, which note was discounted, and the proceeds applied to the payment of Clark's note in that institution. Clark gave to J. J. McMullen, as administrator of Hugh McMullen his receipt for two thousand dollars on account of his execution. In the returns of J. J. McMullen to the ordinary he credited himself with this payment as made on account of the estate, and Mr. Clark exhibited it as a voucher at the reference. He also furnished at the same time a statement of a settlement of his claims against Hugh McMullen, deceased, which he had made with J. J. McMullen, his administrator, on the 13th March, 1844; and in this statement Clark credited on his execution this payment of \$2,000, as made 9th January, 1842. McMullen's note to the Camden Bank was sev-

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eral times renewed with the same *endorssers, and several payments thereon were made by him; but, on the 2d April, 1845, the last renewal of \$1,359.37 was protested for non-payment, and was taken up by Clark's note for that amount. It was insisted, and so the commissioner hesitatingly determined, that Clark's execution against Hugh McMullen should not be credited with the \$2,000, but only with \$640.63, the difference between that sum and \$1,359.37; and the exception in this respect was overruled.

This is not like the case of *Dogan v. Ashbey*, 1 Rich. 36, where a note agreed to be taken in payment on a judgment was held to be payment, although that would be sufficiently decisive of the case. There was no individual indebtedness on the part of J. J. McMullen to Caleb Clark. But the latter holding an execution against Hugh McMullen deceased, J. J. McMullen borrows money from a third person, pays it to Clark on account of his execution, takes his receipt to that effect, and enters it as a credit in his account as administrator, and, two years afterwards, in an adjustment or settlement of the amount due on the execution, the credit is set down and admitted by Mr. Clark. It was no substitution, but an actual payment. Three years after the payment, McMullen fails to pay to the third person the money which he had borrowed and paid on Clark's execution. In reference to the credit on the execution, is it of any importance that Clark was one of the persons who had become security for the loan which McMullen made in 1842 in order to enable him to pay the execution? If, in January, 1842, the amount due on Clark's execution against Hugh McMullen deceased, had been \$2,000, would not his receipt to the administrator for that sum have entitled the administrator, not only to credit in his account, but to have had satisfaction entered on the judgment? In order to raise the money to pay the judgment, J. J. McMullen had not only incurred an individual liability which did not before exist, but he had involved another person besides Mr. Clark as his surety. It appears to the Court that the payment of the \$2,000 on 9th January, 1842, was an extinguish-

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ment of the execution of *Caleb Clark to that extent, and should have been so regarded in taking an account of the amount due.

It is ordered and decreed, that the decrees of the Circuit Court be modified as herein before expressed, and that, in all other respects, the same be affirmed.

JOHNSTON, DARGAN and WARDLAW, CC., concurred.

Decree modified.

4 Rich. Eq. 135

ESTHER A. CUNNINGHAM v. CHARLES J. SHANNON and Others.

(Columbia. Nov. and Dec. Term, 1851.)

[Dower ⇐41.]

By ante-nuptial contract, husband agreed, that, if his wife should survive him, and no provision should be made for her in his will in an amount equal to \$29,000; or, if he should die intestate, and she, as his heir, should not receive from his estate an amount equal to \$29,000; then, he charged his estate with the payment of \$29,000, or such sum as will make up that amount, to be held by the trustee for her use for life, with remainder to the issue of the marriage; provided, that, if she survived, she should have no part of the estate then owned by him, or which should be purchased by him after the first day of January then next ensuing. Husband purchased lands after the first day of January succeeding the date of the marriage contract, and died leaving a will, by which, 'in addition to the provisions made for his wife by the marriage contract,' he devised and bequeathed to her some negroes and other personalty and an interest in some of his real estate:—*Held*, that the wife was entitled to the provisions made for her by the marriage contract, to the devises and bequests in her favor, and to dower in all the lands purchased by the husband after the first day of January succeeding the date of the marriage contract, so far as such claim of dower was consistent with the devises in her favor.

[Ed. Note.—Cited in *Shelton v. Shelton*, 20 S. C. 566; *Hiers v. Gooding*, 43 S. C. 434, 435, 21 S. E. 310.

For other cases, see *Dower*, Cent. Dig. § 114; Dec. Dig. ⇐41.]

[Wills ⇐782.]

Testator devised his plantation and his town house to his daughter for life, for her sole and separate use, with limitations, &c., and provided that his wife should be entitled, for life, to use, occupy and cultivate four hundred acres of the plantation, to cut and haul from the plantation such fire wood and such timber for buildings or repairs as she may desire, and either to use and enjoy his town house, or, to reside on his plantation, as she may choose:—*Held*, that there was nothing in the provisions of the will which excluded the wife from her right of dower in the plantation, except in so much thereof as she elected to take for life under the will; and that she was bound to elect whether she would take the town house for life, or reside on the plantation.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 2022; Dec. Dig. ⇐782.]

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[Wills ⇐525.]

*Every devise which a husband makes of land upon which his wife's right of dower attaches, is presumed to be made subject to the right of dower, unless the contrary appears on the face of the will, in express words, or by the strongest kind of implication.

[Ed. Note.—Cited in *Braxton v. Freeman*, 6 Rich. 36, 57 Am. Dec. 775; *Beaty v. Richardson*, 56 S. C. 191, 34 S. E. 73, 46 L. R. A. 517.

For other cases, see *Wills*, Cent. Dig. § 1130; Dec. Dig. ⇐525.]

[Dower ⇐12.]

A widow is not entitled to take dower in the

same lands in which she takes an estate for life under her husband's will.

[Ed. Note.—Cited in *Braxton v. Freeman*, 6 Rich. 36, 57 Am. Dec. 775; *Bannister v. Bannister*, 37 S. C. 533, 16 S. E. 612.]

For other cases, see Dower, Cent. Dig. §§ 36-43, 48; Dec. Dig. § 12.]

[This case is also cited in *Tibbetts v. Langley Mfg. Co.*, 12 S. C. 480; *Shell v. Duncan*, 31 S. C. 566, 10 S. E. 330, 5 L. R. A. 821; *Elder v. McIntosh*, 88 S. C. 289, 70 S. E. 807; *Brown v. Brown*, 94 S. C. 494, 78 S. E. 447, as to the inchoate right of dower.]

Before Dargan, Ch., at Kershaw, June, 1851.

Dargan, Ch. Joseph Cunningham being about to solemnize a marriage with complainant, Esther Cunningham, on the 20th day of July, 1841, entered into an ante-nuptial marriage contract with the said Esther Cunningham, (then Niles,) and William McWillie, the trustee of the said marriage settlement; by which the said Cunningham, in consideration of the intended marriage, did stipulate and agree, that in case the said intended marriage should take effect, and the said Joseph should thereafter die, (the said Esther then living,) not having made provision by his last will and testament for the said Esther, in a sum of money or an amount of property equal to \$20,000; or in case the said Joseph should die intestate, and the said Esther shall not receive from his estate, as one of his heirs at law, a sum of money, or an amount of property, equal to \$20,000; that then, and in that case, the said Joseph Cunningham charges his estate with the payment to the said William McWillie, trustee as aforesaid, &c., of \$20,000, or such sum of money as will make up the sum of \$20,000, when added to what the said Esther may otherwise receive from the estate of her said intended husband. The deed of settlement then further provides, that the said sum of money shall be held for the sole and separate use of the said Esther, &c., for the term of her natural life; and from and immediately after her death, the said sum of \$20,000, or so much thereof as may be held in trust, shall go to the issue of the intended marriage, share and share alike, to them, their heirs and assigns forever; provided, always, that in case the said Esther shall survive her said intended husband, that then and in that case, the said Esther shall have no part or parcel of the real or personal es-

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tate of the said Joseph, now owned by *him; nor of such as he may purchase before the first day of January next, or of the increase of the negroes now owned by him, by virtue of any right of dower, distribution or otherwise; the said sum of \$20,000 being settled upon and secured to the said Esther in consideration of the said intended marriage, and in further consideration of her hereby relinquishing such claim.

The marriage took place, and the parties lived together until the — day of May,

1850, when Joseph Cunningham departed this life, leaving one child by the aforesaid marriage, and several other children by a former marriage; leaving also a large real and personal estate, all of which was disposed of by his last will and testament.

It will be unnecessary for me to notice any portions of this will, but such as bear upon the issues involved in these pleadings. In the first clause, the testator makes provision for his wife as follows: "In addition to the provisions made for my wife, Esther A. Cunningham, by virtue of a deed of marriage settlement, or antenuptial agreement, dated the 20th day of July, eighteen hundred and forty-one, executed by myself, the said Esther A. (then Esther A. Niles,) and William McWillie, I give and bequeath to my said wife the following named negroes, to wit: Abram, Frankey, Betsey, Lucy, Tom, William, Thomas, Martha, Jim Williams, and Hannah Williams, for and during the term of her natural life; and from and immediately after her death, I give the said negroes to such of my children as may be living at the time of her death," with various limitations over. In the latter part of the same clause he also gives her his library, his two carriages, and a pair of horses; and he says, "she shall be further entitled to the benefits reserved for her, in the clause of this will, devising the plantation called Betty's Neck."

In the second clause of his will, the testator gives to his daughter Elizabeth, during the term of her natural life only, with sundry restrictions and limitations, all that plantation lying on the western side of the Wateree, usually called the Betty's Neck place, purchased by him from William Mc-

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Willie, including all the swamp *and all the high lands purchased from said McWillie, and embracing all the land then owned by him on the west side of said river; also his dwelling house in the town of Camden, on De Kalb street, together with all the premises thereto attached;—and proceeds by the same clause to give to his daughter Elizabeth a large legacy of negroes with limitations over; and to her absolutely, all the live stock, provisions and implements to be found on the said plantation at his decease. The testator concludes the said clause as follows: "It is, however, my will, desire and direction, and the devise in this clause contained, is made subject thereto, that my said wife, Esther A. Cunningham, shall be entitled to use, occupy and cultivate, for and during the term of her natural life, four hundred acres of the Betty's Neck place, to wit: two hundred acres of swamp land, two hundred acres of high land, adjoining the land of Powell McRae; and also for and during the term of her natural life, to cut and haul from the said Betty's Neck place, such fire wood, and such timber for buildings or re-

pairs, for her own use, as she may desire; and also, that my said wife shall have the use and enjoyment, for her natural life, of either my Camden house, in this clause mentioned, or she may reside for life on the Betty's Neck place, as she may choose; and with the house so occupied by my said wife, she shall have the use (without being accountable for the waste) of the household and kitchen furniture found in such house, and on the premises, for her natural life; and from and immediately after her death, I give the same or so much thereof as remains, to my daughter Elizabeth."

By the third clause, the testator gave to his daughter, Mary M. Cureton, with various limitations and remainders, a large real and personal estate, and included in the devise is the testator's "house and premises situate in Kirkwood, lately purchased by him from William McWillie."

By the 11th clause of his will, he gave, *inter alia*, to his grand son, Cunningham B. Cureton, a tract of land, designated therein "as the Stark plantation, situated near Camden, on the Wateree river, and known as the

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Belton place;" and by a codicil to his will, he gave to his daughter Elizabeth, a tract or plantation, designated therein as the Stockton place, and called Red Hill, lately purchased from W. J. Taylor; and also a tract designated in the codicil as the piece or parcel of land situate in Kirkwood, near the town of Camden, lately purchased from William E. Johnson, and a tract of land purchased in January, 1846, by James B. Cureton and Joseph Cunningham, jointly, from Saml. F. Hurst, trustee of W. R. Young and wife, and containing one thousand acres.

All the various portions of the testator's real estate which have been thus particularly noticed, and which have been devised by him as has been stated in my preceding remarks, have been acquired by the testator after the first day of January next succeeding the date of the execution of the deed of marriage settlement, and the solemnization of the marriage, and are therefore not subject to the inhibitions of the deed of marriage settlement, as to the complainant's claim of dower; and she has filed this bill, *inter alia*, for the purpose of having her dower assigned to her in said lands, which she claims as not inconsistent with the provisions of the will.

She prays, that the executors of the said Joseph Cunningham may be decreed to pay the said sum of twenty thousand dollars, and the interest due thereon to a trustee to be substituted in the place of William McWillie, who has left the State, and that her dower may be assigned her in all the lands acquired by the testator, subsequent to the first day of January next succeeding the date of the marriage settlement, and for an account of the rents and profits; and that she may be

permitted to take the same, together with the provisions made for her by the said will, and by the said deed of marriage settlement, &c.

The claim of dower is highly favored in equity, whose duty it is perhaps, above all other jurisdictions of the country, to afford its protection to the weak against the strong.

Dower is not unfrequently the only resource of the unfortunate widow, under the double calamity of the loss of husband and property. And she is sometimes driven to

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resort to it, where an inconsiderate or unkind husband has despoiled her of her legitimate rights in his estate by the provisions of his will.

Dower is a right, which, inchoate during the coverture, becomes absolutely vested in the wife as an estate, on the death of her husband; and is as much beyond his control or power of disposition as her own inheritance. It not being his to give, every devise which he makes of the land upon which the right of dower attaches, is presumed to be given subject to the legal estate, unless the contrary appears on the face of the will, in express words, or by the strongest kind of implication.

In *Park on Dower*, 237, it is said to be "a right attaching by implication of law; which, although it may possibly never be called into effect, (as where the wife dies in the lifetime of the husband,) yet from the moment that the fact of marriage and of seisin have concurred is so fixed on the land, as to become a title paramount to that of any other person claiming under the husband by a subsequent act."

"To exclude a widow from her legal right, (of dower) either there must be an express declaration to that effect, or it must clearly appear from the whole frame of the will, that it was the testator's intention to give her something, wholly inconsistent with her enjoyment in that legal right." See the authorities establishing this principle, collected in 1 *Roper on Husb. and Wife*, 579, et seq.; 2 *Roper on Legacies*, 530, et seq.

"It is to be collected from all the cases, that as the right to dower is of itself a clear legal right, an intent to exclude that right by voluntary gift must be demonstrated, either by express words or by clear and manifest implication. If there be any thing ambiguous or doubtful; if the Court cannot say, that it was clearly the intention to exclude, then, the averment that the gift was made in lieu of dower, cannot be supported; and to make a case of election, that is necessary; for a gift must be taken as pure until a condition appear. This I take to be the ground of all the authorities." Per Lord Redesdale in *Birmingham v. Kirwin*, (2 Sch. and Lef. 452.)

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*It was contended in the argument, that

the English as well as American decisions on this subject are discordant, and that it is difficult to extract from them any settled principle. To me it appears, that there has been little or no difference in the decisions, as to the general principles by which questions of this sort have been adjudged. On the contrary, there has been a remarkable harmony among the Judges in the acknowledgment of the great and leading doctrines upon which they have uniformly, and for several centuries, professed to have been governed. The discord, in any, has arisen from the different and ever varying circumstances of the cases; and the difficulty has always occurred in the practical application of established and acknowledged principles. It is very easy with the charts before us, to define and express the general rules applicable to the subject. But when the task is to construe the will, for the purpose of ascertaining whether the claim of dower be inconsistent with the intention of the testator clearly expressed, or necessarily implied; *hoc opus est, hic labor*. That cases have been erroneously decided none can doubt who will read the reports. But the conflict in the decisions has arisen, for the greater part, in the manner and for the causes that I have stated. Those, too, who preside in Courts, possess, like other men, differently constituted minds. Two strong-minded and learned Judges, basing their judgment upon the same general principles, may rise from the construction of a deed or will with opinions as opposite as the antipodes. It is obvious that these difficulties are inherent in the nature of the human mind, and must continue to exist in the practical enforcement of this, as of all other legal rights, by human tribunals, as long as the intellectual condition of man remains unchanged.

But to recur to the more immediate subject. That the English law has been correctly defined in my preceding remarks, is abundantly proven by the British Statute which alters it, (3 and 4 Will. 4 ch. 105, sec. 9.) By this, it was enacted, that where a husband shall devise any land out of which his widow would be entitled to dower, if the same were not so devised, or any estate or interest therein to

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*and for the benefit of the widow, such widow shall not be entitled to dower out of, or in any such land of the said husband, unless a contrary intention be declared by his will. The statute proceeds upon the assumption, that the law before was the reverse of that which was therein enacted, and contained a clause restricting it to a prospective operation. The statute itself proves that the reverse of the provision therein enacted was the acknowledged principle of the common law.

In South Carolina, there has been no legislation materially affecting the widow's right of dower; and the case before me must be adjudged by the principles of the English

common law, as they have expounded in Westminster Hall. *Gordon v. Stevens*, 2 Hill Eq. 47 [27 Am. Dec. 445], 2 Johns. Ch. 448. I cite these cases for the purpose of shewing the source to which American Courts resort for illumination on this subject.

I have shewn that the rule of the common law is, that the claim of dower will prevail, unless it will defeat the intention of the testator clearly expressed upon the face of the will, or appearing by necessary implication.

There are other cases, (some of which will be hereafter cited,) by which this abstract proposition has been more distinctly and particularly illustrated, and its meaning explained. Aided by the light reflected from these, I will proceed to adjudge the case in hand.

And first, as to the Betty's Neck place lying on the western side of the Wateree river, purchased from William McWillie, the testator gave this place to his daughter Elizabeth Cunningham for life, to her sole and separate use, with remainders, &c., embracing the whole fee, subject to a right on the part of his wife, the complainant, to use, occupy and cultivate, for and during the term of her life four hundred acres of the said place, two hundred acres of the swamp and two hundred acres of the high lands adjoining the land of Powell McRae, with the right to cut firewood, timber for repairs, &c., with also the right to have the use and enjoyment for life of either his Camden House, or to reside for

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*life on the Betty's Neck place, as she may choose. The four hundred acres thus given to the widow for life, constitutes, as I understand, but an inconsiderable proportion of the whole value of the place. The question here is, whether the gift of such a life interest or estate in the Betty's Neck place amounts to a clear and manifest intention on the part of the testator to exclude her right of dower, or, in other words, is the right of dower so inconsistent with the provisions of the will as to put the widow to her election? The gift of the whole fee to a third person without condition or restriction, with gifts of other property to the wife in the same will, is not incompatible with the claim of dower in the land so disposed of in fee to the said third person. And I do not know that this has been doubted within the authentic period of the English Common Law. Does the gift of a subordinate interest to the widow for life in the land given to another in fee, alter the case? Are the two rights incompatible? Does such a provision, according to the authorities, amount to a clear and manifest intention, on the part of the testator, to exclude the widow from her right of dower, or to put her to her election?

The leading case in the reports, where the testamentary disposition to the widow is an estate or interest less than the fee in lands

of which she is dowerable, with a devise to another, of the residue of the estate in said lands, is the case of *Lawrence v. Lawrence*, 2 Vern. 365; S. C. 3 Bro. Par. Ca. 483. The testator gave his wife an estate viduitate durante, in the whole of the premises, with remainder to another on the death or marriage of the widow. He also gave to his wife the whole of his personal estate. She proved the will, possessed herself of the personal estate, and entered upon the lands devised to her during widowhood. She afterwards, by an action at law, recovered her dower in the same lands, which was assigned to her. The remainderman filed a bill to be relieved against the judgment at law, and the case coming before Lord Somers, he decided that the testamentary dispositions in favor of the wife were in satisfaction of her claim of dower. This decree was reversed by Lord

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Keeper *Wright, on the ground, that there was nothing in the will which manifested a sufficiently clear intention that the widow was to be excluded from her dower. The matter rested here. No appeal was taken to the House of Lords. In a question which was res integra, and totally unaffected by antecedent or subsequent authorities, I should have no hesitation in following the opinion of the able and accomplished Somers, in preference to that of Lord Keeper Wright. The latter was a man totally unfit for his high station, and owed his elevation, and his possession of the great seal for five years, to his obscurity, and his utter want of qualification. The seeming paradox may be explained by the fact, that the great men of the day were deterred by the perilous nature of the times, and the instability of the public administration, from accepting this high and responsible office. (a) But the principle does not rest upon the authority of Lord Keeper Wright.

On the death of the plaintiff in the former suit, one A. Lawrence, who was next in remainder, became entitled. He also instituted a suit to be relieved against the judgment in dower. The case came before Lord Cowper, who refused to reverse the judgment of Lord Keeper Wright, and on appeal to the House of Lords, the decree of Lord Cowper was affirmed. This, it must be admitted, was a very solemn and authoritative settlement of the question, and the rule thus established has continued to be the law of England from that day to the third and fourth of William IV, and to the present time, in regard to the wills before the passage of that statute. *Hitchin v. Hitchin*, Pre. Ch. 133; *Brown v. Parry*, 2 Dick. 685; *Birmingham v. Kirwin*, 2 Scho. and Lef. 444; *Lemon v. Lemon*, 8 Vin. Abr. 366; *Holditch v. Holditch*, 2 Young & Col. 18. Of these cases, the last

cited, *Holditch v. Holditch*, as one strongly in point, and of a recent date, I will notice more particularly.

The testator, John Holditch, devised to his wife, Mary Holditch, a house during her widowhood—he also gave her an annuity of £50 for life, which, after death, was to sink

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into and form a part *of his residuary estate. The annuity was charged upon his freehold estate in the Parish of Elton, which was devised, subject to such charge, to the testator's son, John Holditch, in fee.

The bill was filed by Mary Holditch, the widow, against John Holditch, the son and devisee of the testator, claiming dower out of all the testator's freehold estate, the annuity of £50 for life, and the use of the house during her widowhood.

The Vice Chancellor, (Sir Knight Bruce,) said: "I feel bound by the present state of the authorities to say, that a mere gift of an annuity to the testator's widow, although charged on all the testator's property, is not sufficient to put her to her election; and I consider myself equally bound by the authorities to say that a mere gift to the widow so charged, and a gift of the whole of testator's real estate, though specified by name, to some other person, are not together of themselves sufficient to put a widow to her election. And, moreover, a gift of a portion of the real estate, whether for life or during widowhood, is not sufficient as to the residue, to put the widow to her election in respect of dower."

"It is clear, therefore, that the annuity does not bar the wife of her dower. The testator, however, has given her his house, (which is admitted to be freehold,) during her widowhood; and, after her marrying again, he directs that the same, (that is the house,) shall fall into and form a part of his residuary estate. Now, if the testator had pointed to a particular mode of using and enjoying the house as one entire thing, after the widow's second marriage, it might be possibly right to hold, that the will contained a declaration, as in *Roadly v. Dixon*, that she should not marry again and also claim her right of dower; because, by so doing, she would disappoint the intention of the testator, that the property should be used, and enjoyed in a particular manner. The testator has not done this."

"To put the widow to her election, on the ground that her claim of dower is inconsistent with the intention of the testator, as to some other legatee or devisee, there must be something beyond the mere gift to the legatee or devisee. There must be such

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*circumstances attending the gift, as that if dower be admitted, the legatee or devisee will be disappointed in enjoying the property in the mode pointed out by the testator.

(a) 4 Ld. Camp. Lives of the Chan. 236; 3 Burnet Hist. 335.

No such circumstances occur in this case. Therefore, I consider myself bound by the authorities to say, that this will does not exhibit an intention to exclude the wife from dower, to which she is *prima facie* entitled." It was decreed that the widow was entitled to the annuity for life, to the house during widowhood, and to dower out of all the testator's lands of which she was dowable.

Upon the authority of the cases I have cited, to which many others intermediate between *Lawrence v. Lawrence*, and *Holditch v. Holditch*, might be added, I hold that the interest in the Betty's Neck place, devised to the widow, is not inconsistent with her legal claim of dower in the same premises, by metes and bounds, or by assessment, as the case may be.

The devise of the Betty's Neck place presents the strongest case against the claim of dower. And if the widow is not put to her election in reference to the Betty's Neck place, a fortiori, she is not bound to elect in regard to any other of the testator's lands of which he became seized after the 1st January, 1842.

It may not be amiss to notice an objection urged against the claim of dower as to the Betty's Neck, and the house and premises situated in Kirkwood, purchased from William McWillie. The first was given to the testator's daughter, Elizabeth, during her natural life, with remainders over, "for her sole and separate use;" and the second was given to his daughter, Mary M. Cureton, for her life, "to her sole and separate use," with remainders over. It was supposed that the circumstance, that these devises were to the sole and separate use of the devisees, rendered the case, as to these devisees, analogous to the case of *Miall v. Brain*, 4 Madd. 119. In the latter, the testator devised his real and personal estate in trust among other things, to permit his daughter to use and occupy a certain house, (being a part of the estate devised,) for her life. It was held by the Vice Chancellor, (Sir J. Leach,) that the testator intended that his daughter should

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have the personal use and occupation of that house during her life; which would be inconsistent with the right of the widow to be endowed of the same house. There is no analogy in the cases. Here the gift to the devisees, to their sole and separate use, was intended only to exclude the marital rights, and not to secure to them the personal use and occupation of the premises. Lands devised in this mode, if there be no other qualifying circumstances, are as much subject to the claim of dower, as if the legal estate were directly given.

It is ordered and decreed, that the complainant is entitled to retain all the interest and estates given to her in the devises of Joseph Cunningham's will; and also to have

her dower assigned to her in all the lands acquired by the said Joseph Cunningham, after the first day of January succeeding the date of the deed of marriage settlement between him and the complainant. It is further ordered, that a writ for the admeasurement of dower do issue according to the usual forms and practice of this Court.

The next question which I am to consider arises on the claim set up by the complainant for rents and profits. It is not denied, that if she is entitled to dower, she is also entitled to an account for rents and profits. But what is to be the measure of her compensation and the mode by which it is to be ascertained? At common law, no commutation in lieu of dower was allowed; but the widow was only entitled to recover her dower by real action, without damages or costs. The statutes of Merton and Gloucester gave her an action, by which, (where the husband was seized at his death,) she was entitled to recover one-third part of the land for life; with one-third part of the annual value of the land, or mesne profits from her husband's death until she recovered judgment of seisin, together with costs of suit. Her recovery of one-third of the mesne profits was by way of compensation or damages, for the time she was kept out of the possession and enjoyment of her right. 1 *Rop. Husb. and Wife*, 439. For the wife had no right to enter until her judgment of seisin.

Our statutes allow a sum of money to be

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assessed in lieu of dower when, in the judgment of the commissioners, to whom the writ for admeasurement of dower has been directed, partition cannot be made, and dower assigned without injury to some of the parties in interest. But no change has been made in the law in regard to the mode of compensating the widow during the time her right has been withheld, with the exception of the case specifically provided for by the Act of 1824. This Act provides alone for the case, where the husband has alienated in his life and does not die seized. And under these circumstances, in addition to her share of the value of the land, she is entitled to interest thereon from the time of the accrual of her right; that is to say, from the death of the husband. In all other cases she is compensated for the detention of her right by estimating her share of the rents and profits. In a Court of Law this is done by the jury. In Equity, the commissioners appointed to assign dower, though they may, under certain circumstances, assess a sum of money in lieu of dower, have no power or authority to go into the question of mesne profits, or to estimate the damages or compensation to be allowed the widow for the detention of her right. *Gordon v. Stevens*, 2 Hill Eq. 429. That is done in this court, by reference to the master, with directions to take an account of the rents

and profits, and to estimate and report the widow's share thereof. It is accordingly ordered, that the master do take an account of the rents and profits of all the lands of Joseph Cunningham, of which by this decree the complainant is entitled to be endowed, commencing said account from the death of the said Joseph Cunningham; and that he report the one-third part thereof to be due to the complainant for her share thereof. It is further ordered and decreed, that the share of the complainant in said rents and profits, so to be ascertained, be paid to her by the executors of the last will and testament of the said testator.

It is further ordered and decreed, that the said executors do pay to the trustee of the complainant, the sum of twenty thousand dollars, secured to her by the terms of the deed of marriage settlement, with interest thereon from the death of the said Joseph

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*Cunningham; the said sum of \$20,000 and the interest to be held by the said trustee for the uses of the trust.

It is further ordered, that the costs of this suit be paid by the said executors out of the assets of the testator.

Elizabeth Cunningham appealed, on the grounds:

1. Because the complainant is not entitled to dower in the plantation called Betty's Neck, and to the devises and bequests under the will, but must elect.

2. Because, upon a just construction of the marriage contract, complainant (if dower is assigned her) is only entitled to receive under the covenants of the deed, such sum of money as will make up the sum of twenty thousand dollars when added to the value of the dower assigned her.

3. Because the rents and profits of the lands for the year 1850 are, by the Act of 1789, to be first applied to the payment of "taxes, overseer's wages, expenses of physic, food and clothing," and complainant can only take (if at all) one-third of the profits of 1850, after deducting therefrom the expenses so charged thereon.

The executors appealed and moved the Court to modify that part of the decree, which orders the executors to pay to complainant the rents and profits on certain lands, from the death of the testator up to the time the same may be paid to her, in which lands she is declared by the decree to be endowed. Because it is alleged in the answer of the executors and was established at the hearing, that on the first of January, 1851, they had delivered up to the devisees of those lands the possession thereof, who are therefore liable, not the executors.

The executors also moved to add to the decree, an order that complainant be charged with the supplies furnished to her from the plantations in 1850, to be deducted from the

rents and profits ordered to be paid to her by the executors.

Kershaw, for Elizabeth Cunningham.
J. M. DeSaussure, for the executors.
Caston, for complainant.

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*The opinion of the Court was delivered by

DARGAN, Ch. As to the right of the complainant to be endowed of the lands of her deceased husband, Joseph Cunningham, acquired after the first day of January, A. D. 1842, this Court concurs in the circuit decree, and the general reasoning on which it is founded. I will, on the present occasion, add nothing in the way of argument to what has been said in the circuit decree on this branch of the case, though the subject is by no means exhausted. On the complainant's claim of dower, the judgment of the Circuit Court is rendered in the following language: "It is ordered and decreed, that the complainant is entitled to retain all the interests and estates given to her by the devises of Joseph Cunningham's will; and also to have her dower assigned to her in all the lands acquired by the said Joseph Cunningham, after the first day of January succeeding the date of the deed of marriage settlement between him and the complainant." This is perhaps not sufficiently explicit upon one point, and may by construction be made to mean more than was intended, though no such construction of the decree has been contended for on the part of the complainant. It was not intended to say, that she should take under the will the landed estates given to her by that instrument; and also to be endowed of those same estates. It has been settled, that where the testator gives lands to his wife for life by his will, it is repugnant to his intentions manifested by a plain implication, that she should be endowed of those same lands. *Wilson v. Hayne*, (Chev. Eq. 39;) *Caston v. Caston*, (2 Rich. Eq. 1;) *Lord Dorchester v. Earl of Eftingham*, (Coop. Rep. 319.)

The testator gave to the complainant, for life, the use of four hundred acres in the Betty's Neck place. He also gave her the privilege of residing in the mansion house on that place, for life, or in his house and lot, in the town of Camden, for her life, as she might choose. She is, in the first place, of course, to elect, whether she will take the mansion house and the easements, on the Betty's Neck place or the house and lot in

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Camden. To *this election she is put by the will. She is, in the next place, to elect whether, as to the lands given to her by the will, she takes them under the provisions of the will, or by her right of dower in those same lands. To the extent, that she elects to take the real estate given to her for life by the will, she is not to be endowed; and it is so ordered and decreed. It is further order-

ed and decreed, that she make the elections herein designated, by the first day of June next, unless, before that date, she applies for further time, on reasonable cause shown.

As to the question raised in the defendant's third ground of appeal, and also as to that made in the first ground of appeal taken by the executors, it is ordered and decreed, that the case be remanded to the Circuit Court for a trial *de novo*; that the commissioner take the accounts of the rents and profits as ordered by the circuit decree, and that he report thereon, with leave to state any special matter; the equities of all the parties being reserved. It is also ordered and decreed, that the accounts for supplies furnished by the executors to the complainant, mentioned in the executors' second ground of appeal, be referred to the commissioner, and that he report thereon, with any special matter; the equities of the parties to be reserved.

It is further ordered and decreed, that the circuit decree be so modified as to conform to the decree of this Court; and that in all other respects the circuit decree be affirmed and the appeals be dismissed.

JOHNSTON, DUNKIN and WARDLAW,
CC., concurred.

Decree modified.

4 Rich. Eq. *152

*A. J. McQUEEN and Wife v. JOSHUA
FLETCHER and Others.

(Columbia, Nov. and Dec. Term, 1851.)

[Evidence ⇨178.]

The existence of a judgment and other proceedings in partition, in the Common Pleas, established on parol evidence.

[Ed. Note.—Cited in *Brown v. Coney*, 12 S. C. 151.

For other cases, see Evidence, Cent. Dig. §§ 583, 585; Dec. Dig. ⇨178.]

[Partition ⇨116.]

Quere: Where, on proceedings in partition under the Act of 1791, land is allotted to one distributee, and he is required to pay another distributee a sum of money in lieu of his share of the land, does the judgment transfer the title, irrespective of the payment of the purchase money, and establish only a lien on the land, or is the title not vested until payment of the money? (a).

[Ed. Note.—Cited in *Kerngood v. Davis*, 21 S. C. 203; *Simms v. Kearse*, 42 S. C. 48, 49, 20 S. E. 19.

For other cases, see Partition, Cent. Dig. §§ 315, 450-453; Dec. Dig. ⇨116.]

[Payment ⇨66.]

The presumption of payment which arises from the lapse of twenty years, is not a presumption of law, but a strong presumption of fact, which shifts the burden of proof.

[Ed. Note.—Cited in *Wright v. Eaves*, 10 Rich. Eq. 597.

For other cases, see Payment, Cent. Dig. § 176; Dec. Dig. ⇨66.]

(a) *Burris v. Gooch*, 5 Rich. 1.

[Payment ⇨66.]

In considering admissions, relied on to rebut the presumption of payment, the same principles are applicable which apply where admissions are relied on to take a case out of the statute of limitations.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 176-188; Dec. Dig. ⇨66.]

[Evidence ⇨265.]

So long as the lapse of time is less than twenty years, any admissions which oppugn the inference of payment drawn from it, go to the jury along with it, and all are weighed together according to their natural force: but when full twenty years have expired, an admission, that the payment has not in fact been made, cannot, of itself, destroy the effect of the presumption.

[Ed. Note.—Cited in *Dickson v. Gourdin*, 26 S. C. 397, 2 S. E. 303.

For other cases, see Evidence, Cent. Dig. § 1032; Dec. Dig. ⇨265.]

[Infants ⇨105.]

In estimating the time sufficient to raise the presumption that a judgment has been paid, the period during which the plaintiff was under disability from infancy must be deducted: *Semble* (b).

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 322; Dec. Dig. ⇨105.]

[Infants ⇨105.]

A judgment in partition vesting the land in W. A. on his paying C. A. a sum of money in lieu of her share, *held*, as against a purchaser of the land from W. A., not to be satisfied, although twenty-four years had elapsed since the judgment was rendered,—it appearing that C. A. was an infant, about two years old, when the judgment was rendered, and W. A. having admitted the non-payment of the money.

[Ed. Note.—Cited in *Burris v. Gooch*, 5 Rich. 6; *Smith v. Tanner*, 32 S. C. 264, 10 S. E. 1008.

For other cases, see Infants, Cent. Dig. § 322; Dec. Dig. ⇨105.]

[Limitation of Actions ⇨72.]

In 1833, defendant purchased land on which plaintiff, then an infant, had a lien under a judgment in partition: in October, 1845, plaintiff arrived at age, and in September, 1850, filed her bill against defendant. *Held*, that defendant was not protected by the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 392; Dec. Dig. ⇨72.]

[Evidence ⇨178.]

[It was permissible to prove the contents of a record of proceedings and judgment in partition by the testimony of the commissioners appointed in such proceedings, where it was shown that no record could be found, though diligent search had been made therefor.]

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 583; Dec. Dig. ⇨178.]

[Evidence ⇨82.]

[Cited in *Sasportas v. De La Motta*, 10 Rich. Eq. 52; *Boyce v. Lake*, 17 S. C. 488, 43 Am. Rep. 618; *Gardner v. Cheatham*, in concurring opinion, 37 S. C. 80, 16 S. E. 368, to the point that an order of a court of competent jurisdiction is presumptive of the regularity of proceedings leading up thereto.]

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 104; Dec. Dig. ⇨82.]

[This case is also cited in *Roberts v. Smith*, 21 S. C. 456, and distinguished therefrom, and in *Clark v. Smith*, 13 S. C. 600, as to notice of statutory mortgages.]

(b) *Vide Lamb v. Crosland*, 4 Rich. 536.

Before Johnston, Ch., at Marlborough, February, 1851.

This case will be sufficiently understood from the decree of the circuit Chancellor and the opinion delivered in the Court of Appeals. The circuit decree is as follows:

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*Johnston, Ch. I do not deem it necessary to state every particular point or fact brought to my view at the hearing; I shall state only the substance, leaving the rest to appear in the pleadings and notes.

The case is shortly this:

The plaintiff, Mrs. Caroline McQueen, is one of the daughters of Shockley Adams, late of Marlborough district, who died intestate, the 10th of October, 1824. At his death, he left as his distributees, his wife, Isabella, and eight children, of whom it is necessary to mention only three, namely: Wm. L. Adams, (who became his administrator,) Harris R. Adams and Mrs. McQueen.

The intestate was, at his death, the owner, in fee simple, of three tracts of land, lying in Marlborough, and which are the subjects of litigation in this case, viz:

1. The plantation denominated in the pleadings the Home Tract, or House Place, containing two hundred acres, more or less. This tract, the widow, who was in possession of it at the time, and had been from 1825, sold to the defendant, Bethea, in 1836; and he took possession, which he still retains.

2. The tract called the Mill Tract, of six hundred and two acres, more or less. This tract was levied on by the sheriff as the property of Wm. L. Adams, and sold to the defendant, Fletcher, the 20th of December, 1833, at the price of three thousand dollars.

3. A tract called Easterling, containing three hundred acres, more or less. This tract was levied on and sold as the property of Harris R. Adams, and bought by the defendant, Joel Easterling, for six hundred dollars, to whom the sheriff conveyed it the 4th of March, 1836.

It is admitted, that by these purchases, the defendants acquired not only the title of those from whom they bought, but of all the other distributees of the intestate, except Mrs. McQueen. The contest is as to her rights in the land. The plaintiffs contend that she is still entitled to a distributive share of the lands, and to a partition of them with the

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defendants, respectively; and for this *purpose the bill (which was filed the 14th of September, 1850.) is brought. The defendants, on the contrary, maintain that the widow and the two sons, whose title they took, held and were entitled, at the time of their sales, to a full and complete title, in exclusion of Mrs. McQueen, and not subject to a partition with her.

The question in this case is, whether the plaintiffs or the defendants are correct in the positions taken by them.

Mrs. McQueen was once entitled to a distributive share of these lands, and if this right has been defeated, or she has been satisfied for it, it is incumbent on the defendants to shew how this has been effected. Being sensible of this, they have undertaken to make the shewing required.

They allege, that as far back as 1826, a proceeding in partition was had in the Court of Common Pleas, by which the lands bought by them from the widow and the two sons, were allotted to those parties, respectively, who took possession under the judgment in partition and held the property as their own, and it was so bought, and has been so held by the defendants.

The plaintiffs reply to this, that if there was any such proceeding,—which they do not admit,—Mrs. McQueen was no party to it, and was not bound by it; and they demand the production of the record.

Again. They insist she was entitled to have either a portion of the land, or compensation. That no portion was ever assigned to or received by her; and if any compensation was ever adjudged to her, it has never been paid.

Thirdly. They say that Mrs. McQueen was a minor until 1845, (and this is not denied in the answer, though alleged in the bill):—and that, therefore, no presumption can arise against her, of acquiescence, or forfeiture of right, by reason of adverse possession, or any other transaction by which she may be supposed to have affirmed the supposed partition. It was also proved that she intermarried with her co-plaintiff as far back as 1838 or 1841, during her minority.

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*No record in partition has been produced:—and yet I think there is evidence to establish a partition, and that, under the necessary presumptions of law, it must be held conclusive of the rights claimed in the present bill.

The following extract from the proceedings of Spring term, 1826, was given in evidence:

"Isabella Adams and others,	} Writ in partition.
vs.	
W. L. Adams, adm'r. of Shockley Adams,	

The commissioners appointed to divide the real and personal estate in the writ mentioned, having made their return, certifying a partition of said estate:—on motion of Mr. Ervin, attorney for plaintiffs, ordered, that the said return be confirmed; and that they have leave to enter up judgment thereon."

It is true, there is no record of any other part of the proceeding produced; and if we are to know what the proceeding was,—what partition was made, and its terms,—who were parties,—and who are bound,—we must learn it from parol or depend upon legal presumptions and inferences to be drawn from the antiquity of the proceeding.

This is all very lame. It exhibits a wretched state of neglect; and it exhibits to what a most shocking state of precariousness the rights of citizens, that ought to be strictly guarded by public officers, may be reduced by the carelessness and criminal indolence of those officers. But, still, I think the rights of other citizens are equally to be regarded; and that their security demands, that such inferences should be drawn, from what little of the record is preserved, as are material and reasonable.

It has been shown that Mr. Ervin, the attorney in the record, is dead; that his office and papers have been searched, and no other traces of the proceeding found; that the clerk's office at the time, and for years before and after, was negligently kept; that Wm. L. Adams, in whose hands some of the papers might have been, in order to accounts and settlements in the ordinary's office, is out of the State; and that such papers as he

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left behind him *have been searched without effect. The present clerk has made diligent search, and can find no further fragments of the record. The ordinary's office has been searched in vain.

That there was a writ of partition, and that it was returned to the Court, and an order granted upon the reading and inspection of the return, we cannot doubt: for that order is produced. That every thing was regular up to that time, we are bound to presume. The record being lost, we must resort to secondary proof of its purport and contents. One of the commissioners was sworn, and proved that a writ issued, and that he assisted in executing it. Mr. McCollum testified that the Home Tract was allotted to the widow at \$3,300. He does not remember whether a contribution was required of her; but, from other evidence showing the value of the real and personal estate, the subject of division, it would appear that the tract assigned was less than one-third part of the estate. He says the 300 acre tract (Easterling) was assigned to Harris R. Adams; and he was to contribute something under \$1000 for equality of partition. That the Mill Tract was assigned to Wm. L. Adams at about \$4500; but what he was to contribute witness does not remember. The return specified the sums to be paid by the different parties for equality of partition.

It appears, also, that Mrs. McQueen received certain negroes in the division, which are now in her husband's possession; and that in an account stated before the ordinary, by Wm. L. Adams, the administrator, with Dr. Malloy, who either was or assumed to act as her guardian, the administrator was charged with the balance due her of the whole real and personal estate, after deducting the specific property which she received, and the payments that had been made; and the ordinary gave a decree for the balance, (about

\$1000). For this balance, suit was brought by her and her husband, after her marriage. The suit was against a surety to the administration, who showed on the trial that in the sum of \$1000, sued for, was included \$687.05 for her share of the realty, which was accordingly deducted from the surety's liability. This was shown by the testimony

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of Gunter, a husband of one of the intestate's daughters. On that occasion, he also testified to the division, as proved by McCollum.

Now, under this evidence, (throwing out that of Wm. L. Adams,) would it be reasonable to say there was no partition, or that the lands were not assigned as the defendants insist they were?

The fact of partition is still further confirmed by the pregnant circumstance, that, though the parties to whom the property was allotted were in possession, as of their own property, from 1826 until the day of their alienations, no application was made by any one of the numerous distributees for another division; and though the widow alienated her land in 1833, and those of the two sons were publicly sold as their property in 1836, no question was raised by any distributee as to the exclusiveness of their titles, 'till the filing of this bill in 1850.

Was Mrs. McQueen a party? Am I not bound to presume that the Court did its duty, and that it would not have authorized the entering up of judgment without seeing that all proper parties were before it? Is not the presumption of her participation in the proceeding confirmed by the reception and retention of the negroes allotted to her in the division, and by the accounting before the ordinary, especially as suit was brought by her on that accounting?

Assuming that there was a partition,—that concludes her right to have another partition. Her right in the land is gone, and is vested in the parties to whom it was assigned. *Transit in rem judicatam*; and when a judgment has been rendered upon any right or claim, that claim cannot again be stirred or litigated. The remedy is by enforcing the judgment. This is very clear. If by the partition made, any sum was decreed to Mrs. McQueen for equality of partition, that is another matter. Her right was in that case reduced to a mere money claim.

If she claims for money due her, the burden is upon her to shew the decree for it, and the amount decreed. I am not sure that the evidence is sufficiently explicit as to this point.

Suppose it to be so. That judgment should

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be regarded as *having been entered up in 1826; and the legal presumption of satisfaction arose before 1850, when her bill was filed. I am not aware of any authority or principle by which the vigor of this presump-

tion would be impaired, or its currency suspended by her infancy or coverture.

But the statute of 1791 gives a lien for the purchase money of an intestate's land sold for partition; and by a fair construction, I suppose, such lands are liable, also, for sums necessary to produce equality of partition; and I may be told, that, independently of the judgment in partition in this case, this lien still subsists:—but I hold that the same lapse of time which would presume satisfaction of a judgment, a mortgage, or specialty debt, will raise a similar presumption under a statutory lien. A period of twenty-four years had elapsed before the bill was filed; and the claim is stale.

It is ordered that the bill be dismissed.

The complainants appealed, on the following grounds:

1. Because it did not sufficiently appear from the case made by the pleadings and evidence, that any partition of the lands named in the bill, binding upon Caroline McQueen, the complainant, and divesting her title in said lands, was made in 1826, as his Honor has decreed.

2. Because even if there had been a valid partition of the said lands made in 1826, yet as it clearly appeared that no land was allotted to Caroline, but in lieu thereof a sum of money was ordered to be paid her, and it clearly appeared that the said sum of money was never paid, but is still due; his Honor should not have dismissed complainant's bill, but should have ordered a reference to the commissioner, to ascertain and report the sum actually due to the said Caroline, and should have subjected said lands to the payment of said sum of money.

3. Because his Honor was in error in presuming satisfaction and payment of the supposed common pleas judgment of 1826, in favor of the complainant, Caroline, from the

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lapse of time since *it was rendered, although the said Caroline was an infant for nearly the whole of that time.

Thornwell, for appellants.

—, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. This Court is entirely satisfied with the judgment of the Chancellor in relation to the proceedings in partition. The parol testimony was properly received under the circumstances, and very fully established the existence of the record. *Smith v. Smith, Rice*, 232, is an authority for the admissibility of the evidence, and for setting up a judgment in partition on less satisfactory proof.

The Act of 1791, (5 Stat. 164,) provides that, where the land cannot be fairly and equally divided, the commissioners shall make a special return, certifying to the Court their opinion, whether it will be more

for the benefit of the parties to deliver over to one or more of them the property which cannot be fairly divided, upon the payment of a sum of money to be assessed by the commissioners, or to sell the same at public auction; and, if the Court shall be of opinion that it would be for the benefit of the parties, that the same shall be vested in one person or more persons entitled to a portion of the same, on the payment of a sum of money, they shall determine accordingly; and the said person or persons, on the payment of the consideration money, shall be vested with the estate so adjudged to them, as fully and absolutely as the ancestor was vested. But, if it shall appear to the Court to be more for the interest of the parties that the same should be sold, they shall direct a sale on such credit as they shall deem right; and the property so sold shall stand pledged for the payment of the purchase money. In this case, the intestate left a widow and eight children. It appears, that at the time of the partition in 1826, the complainant, Caroline, was about two years of age, and was represented by her brother and guardian ad litem, William L. Adams. The testimony shows that the com-

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missioners executed *the writ by setting off the three tracts of land to three of the parties in interest, to wit, the widow and two of the sons. The evidence, both of William L. Adams himself, and of John McCollum, one of the commissioners, proves that William L. Adams, who took the tract valued at \$4500, was to pay to his sister, the complainant, the sum assessed to her in lieu of her interest in the land. The other evidence shews, with reasonable certainty, that this sum, after deducting her share of the costs, was six hundred and eighty-seven dollars and five cents (\$687.05). By the order of the Court of Common Pleas, at Spring term, 1826, this return of the commissioners was made the judgment of the Court. On the part of the complainants, it is insisted, that by the terms of the Act, no title vested in William L. Adams, until payment of the consideration money. While the defendants urge, and so the Chancellor held, that, by the judgment in partition, the right of the minor in the land was gone, and that her only remedy was by enforcing the judgment, and that although the statute gave a lien upon the land, both the judgment and statutory lien must be presumed to be satisfied from the lapse of time. It is not important in this case to determine whether the judgment transferred the title, irrespective of the payment of the purchase money, and established a lien on the premises, or whether the title was only to be absolute on compliance with the condition. If the Court is satisfied, whether by presumption or positive proof, that the purchase money was paid, the title in William L. Adams, by the

terms of the law, was as full and absolute as his father's had been. And so, if the judgment transferred the title and created a lien, and yet the Court is satisfied, by presumption from lapse of time or otherwise, that the debt has been paid, the judgment is gone, and the lien, which is merely an incident, has ceased to exist.

It is admitted, that there is no positive proof of payment to the complainant, (Caroline,) or to any other person acting for her, of the sum assessed to her and adjudged to be paid to her by William L. Adams. But it is said that more than twenty years have elapsed since the entry of the judgment, and that,

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after this *lapse of time, it must be presumed to be satisfied. The Court of law had occasion to consider this doctrine in the recent case of *Stover v. Duren*, 3 Strobr. 448 [51 Am. Dec. 634]. It is there said, "The presumption of payment, which arises after the lapse of twenty years, is not a presumption of law, but is a presumption of fact, recognized by law, from which a conclusion ought to be deduced by a jury. It is, however, one of those strong presumptions which shift the burden of proof," &c. In that case some twenty-six years had elapsed since the entry of the judgment, and the presiding judge had held that, after the lapse of twenty years, mere acknowledgments were insufficient to rebut the presumption; that if there had been no payment of interest, no promise to pay, no other sufficient rebutting circumstance, then an acknowledgment, in order to suffice for rebutting the presumption, should be a distinct admission of the subsisting legal obligation of the debt, unaccompanied by any conduct or expressions indicative of an unwillingness to pay. The Court say, "We perceive no objection to the rule thus stated to the jury. The presumption is no legal bar, but it was originally admitted in analogy to the statute of limitations, and in considering admissions which rebut it, the same principles are applicable as in considering admissions which take the case out of the statute of limitations." So long as the lapse of time is less than twenty years, any admissions which oppugn the inference of payment drawn from it, go to the jury along with it, and all are weighed together according to their natural force. But when full twenty years have expired, an admission that the payment has not in fact been made, cannot, of itself, destroy the effect of the presumption. Upon a similar analogy it has been held in this Court, that the period during which a plaintiff was under disability from non-age, shall be deducted in estimating the lapse of time sufficient to create a presumption of ouster, &c. In *Gray v. Givens*, 2 Hill Eq. 514, it is said, the time during which the party to be affected was under disability must be deducted in computing the lapse of time, in

analogy to the statute of limitations—otherwise, as Chancellor Harper hypothetically

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stated in that case, and *might very well have happened in this, a party may be barred before he had an opportunity of either asserting or knowing his rights. A judgment entered in favor of an infant twelve months old, and represented only by a guardian ad litem, would be presumed to be paid by lapse of time, before she was of age or had any authority to receive the money, or could execute a valid acquittance.

But apart from this. It has been said that the complainant, (Mrs. McQueen,) was an infant about two years old at the time of the partition in 1826. She became of age in October, 1845. William L. Adams was also administrator of the estate of his father (the intestate.) On the 2d December, 1834, a settlement took place before the ordinary between William L. Adams and John Malloy styling himself guardian of Caroline F. Adams, (the complainant,) on account of her share of the real and personal estate of her father to which she was entitled. After deducting payments a balance was admitted to be due, and a decree entered by the ordinary for \$1,069.50. In September, 1847, suit was instituted by the complainants, in the name of the ordinary, against the surety of William L. Adams as administrator, on the decree made in December, 1834. A verdict was obtained against the surety of the administrator deducting the value of the complainant's interest in the real estate which, (as proved by the defendant's solicitor in this case,) was shown on the trial to be \$687.05. It was proved at the hearing that William L. Adams left the State in February, 1836, and was insolvent at that time. He was examined by commission. Among other things he says that, in the partition of his father's estate, no land was allotted to the complainant; that the witness acted as her guardian ad litem in the proceedings; "that a sum of money was ordered to be paid to her in lieu of the land; does not recollect what her portion came to; it was to have been paid by witness; does not recollect how much was paid; it has all been paid except about eight hundred dollars," &c. The complainants reside in Richmond county, North Carolina. Failing to

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recover under the suit *instituted in September, 1847, from the surety of the administrator, the sum due for her share of her father's real estate, this bill was filed on the 14th September, 1850. The principal prayer is for partition, complainants averring that none was made. But they also charge that, if partition was made, they received no land, and have received no compensation in lieu thereof, and they pray for general relief. The Court is of opinion that the circumstances proved, as well as the admissions of

the debtor, fully rebut the presumption arising from the lapse of twenty years. In 1834, eight years after the entry of the judgment, and less than sixteen years before this bill was filed, the debtor admitted the existence of his indebtedness, and the ordinary decreed a sum to be due by him, including the sum due for the complainant's share of the real estate. There is no proof that Dr. Malloy was the guardian of the complainant, although he assumed to act as such. But still less is there proof of any payment to him of this sum; and up to the time of his examination the debtor admits about eight hundred dollars to have been unpaid when he left the State, insolvent, in 1836, and that he has not since paid any thing on account of it. If this were a proceeding to recover from William L. Adams the amount due on the judgment, it would seem very clear that the presumption of payment, arising from the lapse of time, is fully rebutted, and the lien being coexistent with the debt, this would be conclusive on the defendant, unless, as he submits, he is protected by an adverse possession of ten years. In 1833 he purchased the land at sheriff's sales, under an execution against William L. Adams; and he insists, on the authority of *McRae v. Smith*, 2 Bay, 343, that he is entitled to protection by a possession of ten years after the marriage of the complainant. In *McRae v. Smith*, the defendant was a purchaser from the defendant in the judgment, and his possession was held to be adverse to all the world, except as the Court say, where there are infants, femmes covert or persons beyond the seas. The lien on which the complainants here insist, is a statutory mortgage of which the purchaser would have

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notice in examining his title. In *Thayer v. Cramer*, 1 McC. Eq. 395, it was held that the mortgagor of real estate was a trustee for the mortgagee, and that the purchaser from him was in no better situation, the mortgage being recorded, and could not avail himself of the statute of limitations. I should hesitate to apply the doctrine of *McRae v. Smith* to the case of a purchaser from the mortgagee with notice of the mortgage. But it is unnecessary to express any opinion upon such case. The statute expressly saves the rights of infants. In 1823, when the defendant purchased, Caroline F. Adams was an infant mortgagee, about nine years of age, and did not attain majority until October, 1845, less than five years before filing the bill. It is said, however, that, in the meantime, to wit, at some period between 1838 and 1841, she had become a married woman, and that, from this time, the possession of the defendant was adverse. Without discussing this point it is only necessary to say that, in September, 1840, ten years before the bill filed, the complainant

was not sixteen years of age, and there is no proof that she was then married.

This Court is of opinion that the complainants have a valid subsisting lien on the land set off to William L. Adams by the judgment in partition and subsequently purchased by the defendant, Joshua Fletcher.

It is therefore ordered and decreed, that it be referred to the commissioner for Marlborough District to ascertain and report the amount due to the complainants, calculating interest from the rendition of the judgment in partition, and that the same be paid out of the proceeds of the land in the possession of the defendant, Joshua Fletcher, upon confirmation of the said report, and that the costs, other than those of the defendants, Bethea and Easterling, be paid by the defendant, Joshua Fletcher.

It is finally ordered and decreed, that so much of the Chancellor's decree as dismisses the bill in relation to the defendants, Bethea and Easterling, be affirmed; in other respects the same is reformed as is herein before declared.

JOHNSTON, DARGAN and WARDLAW, CC., concurred.

Decree modified.

4 Rich. Eq. *165

*MARGARET ZIMMERMAN, by Next Friend,
v. JOHN P. HARMON and DAVID
ZIMMERMAN.

(Columbia. Nov. and Dec. Term, 1851.)

[Trusts. \hookrightarrow 198.]

If a trustee purchase the trust property in good faith, and pay for it a full price, it is nevertheless optional with the cestui que trust whether the sale shall stand. A trustee so purchasing a slave, and afterwards selling him at an advanced price, ordered to account for the hire of the slave, and for the advanced price.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 264; Dec. Dig. \hookrightarrow 198.]

Before Wardlaw, J., at Spartanburg, June, 1851.

Wardlaw, Ch. David Zimmerman, then of Orangeburg district, and husband of the plaintiff, in February, 1839, conveyed by deed to Conrad Kennerly, three slaves and their future increase, namely: Henry, about 12 years old; Jenny, about 10 years old; and Lewis, about 8 years old; "in trust for the sole and separate use, benefit and behoof of my (his) wife, Margaret, notwithstanding her coverture, for and during the term of her natural life, and after her death, then for the use, benefit and behoof of her lawful issue, as well that she now has, as those she may hereafter have, share and share alike, or of the survivors or survivor of them." After the execution of this deed, D. Zimmerman, with his family and slaves, removed to Spartanburg district, and he there purchased a tract

of land from one Ralph Smith, and mortgaged the land to secure the purchase money. Smith afterwards obtained judgment at law against Zimmerman, for the price of the land, and in execution of his judgment levied on Lewis, one of the slaves named in the deed. Defendant, Harmon, was substituted as trustee, in said deed, in place of Kennerly, by certain proceedings in equity, in Spartanburg district, at June Term, 1843. Harmon, Zimmerman and wife, September 4, 1843, filed their bill against Smith, to restrain him from enforcing his judgment against the trust estate; and at June Term, 1844, it was decreed, that such injunction should be extended, until the mortgaged land should be sold, and that if the proceeds of sale were insufficient to pay his debt, Smith might proceed for the balance on his levy. The land

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was accordingly sold, but did not bring money enough by about \$400 to satisfy Smith's judgment. Thereupon it was agreed between Harmon and Zimmerman, that the former should take the slave, Henry, at the price of \$400, and pay that sum to Smith; this was done, and a bill of sale executed from Zimmerman to Harmon, July 26, 1844. Harmon retained the slave Henry in his possession until December, 1850, when he sold him to one who has removed him from the State, for the price of \$700. The value of Henry's services, while in Harmon's possession, was about double the interest on the money advanced by Harmon.

Margaret Zimmerman, who sues in this behalf by her next friend, Ransom L. Kirby, files this bill to compel her trustee, Harmon, to account for the profit he has made on the sale of Henry, and for the hire and wages of the slave; and for the substitution of Kirby, as her trustee. The bill alleges that the slave was not sold to Harmon, but was delivered to him as a pledge to secure the repayment of the \$400 advanced to Smith.

The answer of D. Zimmerman, is a mere echo of the bill. The answer of Harmon insists, that he purchased the slave in good faith, for the preservation of the rest of the trust estate, at a full price; and that as he ran all the risks from the death of the slave and other casualties, he should be allowed the advantages which have accrued from his bargain. The answer assents to the change of trustee.

My judgment, from the evidence, is, that Harmon took the slave as a purchase, and not as a pledge,—that he paid a full price for him,—and that his conduct in the transaction was without intentional bad faith.

Nevertheless, according to the rules of Courts of Equity, founded on general policy, and so prescribed to avoid the necessity of scrutiny into the fairness of every particular transaction of the kind, the purchase of this slave, by the trustee, cannot stand. If a

trustee, strictly honest, buy for himself the trust property from his beneficiary, and then sell it for more money, the character of trustee remains fixed upon him, and he must ac-

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count for the profits of his management of the property. It is not indispensable, in order to avoid such purchase, that advantage to the trustee shall be proved. The infirmity of the contract grows out of the fiduciary relation between the parties. To guard against the hazard of abuse, and to keep the trustee from temptation, the rule allows the beneficiary, at his own option, to set aside the sale, whether made bona fide or not: "So a trustee will not be permitted to obtain any profit or advantage to himself in managing the concerns of the cestui que trust, but whatever benefits or profits are obtained, will belong exclusively to the cestui que trust. In short, it may be laid down as a general rule, that a trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which has a tendency to interfere with the discharge of his duty." Story Eq. § 321, 322. So that if the plaintiff here had been sui juris, and had, herself, sold the slave to her trustee, it would be at her option whether the sale should stand; and her title to relief is strengthened by the considerations, that she was under the disability of coverture, and that the sale was effected by the confederacy of her husband and trustee.

It is ordered and decreed, that the defendant, Harmon, account for the hire of the slave Henry, from July 26, 1844, to December, 1850: and for the sum of \$700, with interest from the latter date, and that he be allowed credit for \$400, with interest from the former date.

It is also ordered, that it be referred to the commissioner of this Court, to take the account; and to enquire and report as to the fitness of the trustee proposed to be substituted, and as to the amount and nature of security that should be given.

Also ordered, that defendant, Harmon, pay the costs of this suit, except the costs of David Zimmerman, which must be paid by himself, and the costs of substitution of trustee, which must be paid from the trust estate.

The defendant, J. P. Harmon, appealed and moved this Court to reverse the circuit decree, on the grounds:

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*1. Because, from the case made, the deed to Kennerly was void as to the creditors of D. Zimmerman, who sold the boy in dispute to Harmon at a full, fair price, to save the remainder of the trust property.

2. Because, as the trust property was subject to be sold by the sheriff at a sacrifice, the purchase by defendant was a benefit to the trust estate, and ought to be sustained.

3. Because the decree makes the trustee pay costs out of his own funds, notwithstanding it is most evident that the trust estate is greatly benefitted by the course he pursued, and that he acted in good faith.

4. Because the decree is not sustained by law or the justice and equity of the case.

Bobo, for appellant.

—, contra.

PER CURIAM. This Court concurs in the decree of the Chancellor: which is hereby affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.

4 Rich. Eq. 168

PATSEY GLENN v. D. CALDWELL and Others.

(Columbia. Nov. and Dec. Term, 1851.)

[Bonds \S 119; Limitation of Actions \S 22.]

J. G. and fourteen other persons being about to form a company for certain purposes, agreed to purchase from J. G., for the use of the company, a tract of land, and they all, including J. G., executed to J. G. their joint and several instrument under seal, in the form of a single bill, for \$15,000, the amount of the purchase money of the tract of land: *Held*, that, although J. G., who united in himself the characters of both obligor and obligee, could not maintain an action at law upon the instrument, yet in equity a suit could be maintained upon it; and that, in equity, it should be treated as a single bill, against an action on which the statute of limitations could not be pleaded in bar.

[Ed. Note.—Cited in *Keith v. Executors of Keith*, 11 Rich. Eq. 85.

For other cases, see Bonds, Cent. Dig. \S 133; Dec. Dig. \S 119; Limitation of Actions, Cent. Dig. \S 103; Dec. Dig. \S 22.]

[Bonds \S 53.]

Held, also, that each party was liable for the whole amount due, after deducting J. G.'s aliquot portion: and, per Dargan and Ward-

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law, CC., that J. G. was *rateably liable, with the solvent parties, for the proportions of such as were insolvent.

[Ed. Note.—Cited in *Whitman v. Bowden*, 27 S. C. 60, 2 S. E. 630.

For other cases, see Bonds, Cent. Dig. \S 57, 69; Dec. Dig. \S 53.]

[Bills and Notes \S 435.]

The company was afterwards incorporated, —the obligors, (except one who, by general consent, was released and another substituted in her place,) paid up the amounts of their subscriptions to the company, and J. G. conveyed the land to the corporation, taking from it a mortgage to secure the debt: *Held*, that the obligors were not thereby released.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 1248; Dec. Dig. \S 435.]

Before Dargan, Ch., at Union, June, 1850. Dargan, Ch. The tract of land on which Glenn's Spring is situated, originally belonged to John B. Glenn, complainant's intestate. In 1837, a company was formed for the pur-

chase of the land, and the erection of buildings and various other improvements at the Spring, with the view of establishing it as a watering place, and opening and keeping a hotel for the entertainment of visitors. The company consisted of fifteen persons, of whom John B. Glenn was one. Their names are as follows: D. Caldwell, H. D. Vanlew, R. H. Nott, L. N. Shelton, M. A. Moore, J. G. Wells, R. Mooreman, J. B. Glenn, O. B. Irvine, J. K. B. Sims, W. C. Pearson, Geo. Ashford, R. S. Brown, Ann Sims, J. Winn-smith, B. Ligon and William B. Thorn.^(a) These persons opened a book for subscription of stock, in which each subscribed for stock to the amount of one thousand dollars. The stock book is without date; it contains a brief statement of the purposes of the association, to which each of the members of the company affixed his name, and opposite to the name appended the amount of stock for which he subscribed. About this time, or perhaps a little while before, John B. Glenn had made a parol contract for the sale of the land to this company, for the sum of fifteen thousand dollars.

With the view of securing to Glenn the payment of the purchase money, the company, on the 15th September, 1837, executed and delivered to him an instrument, of which the following is a copy: "We, either of us, prom-

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ise to pay John B. Glenn the *sum of fifteen thousand dollars, viz.: Three thousand dollars on the first day of January next; three thousand dollars, January, 1839; three thousand dollars, January, 1840; three thousand dollars, January, 1841; three thousand dollars, January, 1842, with interest annually for value received, as witness our hands and seals, September 15, 1837." To this instrument each member of the company, including Glenn himself, affixed his hand and seal, and it was attested by John F. Glenn. On this instrument are indorsed credits, as follows: \$2,800 received from M. A. Moore, treasurer, the 1st January, 1838; \$205.85 received from the same, 1st May, 1838; \$1,000 received from P. M. Huson, treasurer, 22d January, 1839; \$1,000 received from P. M. Huson, treasurer, August, 1839.

In December, 1837, the company was incorporated with a capital of \$75,000. On the 6th February, 1838, John B. Glenn, by a deed bearing that date, conveyed the land to the incorporated company. On the 3d October, 1839, the company adopted the following resolution, which is entered on their journal: "Resolved, That the President of the G. S. Company execute a mortgage of the Glenn's Spring tract of land to J. B. Glenn, as additional security to a note of hand given by the stockholders of the said company to the said

(a) Ligon & Thorn were not original signers. They came in afterwards. See Chancellor Wardlaw's decree, infra.

John B. Glenn." In pursuance of this resolution, the President of the company, (O. B. Irvine,) did, on the same day, execute and deliver a mortgage to John B. Glenn of the Glenn's Spring tract of land, to secure the payment of the sum of \$12,840, with interest on \$12,000 from 1st January, 1839. The mortgage recited no note or instrument and referred to none; but stated the consideration of the mortgage to be \$12,000 "as in hand, paid by John B. Glenn," and after conveying the land in the usual form, it proceeds to express the conditions of defeasance, which, in the payment of the \$12,000 in annual instalments, correspond with the four last instalments, as secured in the instrument of 15th September, 1837.

Glenn obtained a judgment at law upon the mortgage for \$12,840, with interest from 1st

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January, 1839, which was signed *24th July, 1841. So that at this time, Glenn held the note, a mortgage and judgment to secure the purchase money of the land.

The original stock of the company was called in or paid, in the manner following:

1837, October 9, \$100 per share.....	\$1,500.00
" November 13, 500 do.	7,500.00
1838, January 8, 300 do.	4,500.00
" March 10, 100 do.	1,500.00
	<hr/>
	\$15,000.00

The whole of this sum, with the exception of \$3,005, was expended upon improvements by the order of the company, and under the supervision of its agents. The company being in want of other funds to carry on its improvements, resolved to negotiate a loan for \$10,000 from the Bank of the State of South Carolina. The preliminary resolutions as to this measure are as follows:

"Resolved, That each member sign a note to the Bank of the State for \$10,000." And again, at another time: "Resolved, That each member sign a bond, binding each member for his proportion of a note given by the company to the Bank of the State for ten thousand dollars." It seems that the loan from the Bank was obtained on the note of O. B. Irvine, the President of the company, payable to P. M. Huson and endorsed by him, R. S. Brown, John B. Glenn, M. A. Moore, D. Caldwell, R. Mooreman and George Ashford. These facts are recited in a resolution, recorded in the journal; and the resolution provides, that the President of the company is authorized to execute a note in the name of the company, as collateral security for the said debt, "signing the same officially directly to the President and Directors of the Bank of the State, for the payment of the said debt, and to confess a judgment therefor, the Bank being permitted to retain the original note, the parties thereto continuing their present liability until the debt is paid."

The company had now become greatly em-

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barrassed, and re*solved to sell the Glenn's

Spring property. And a resolution was adopted to apply to the Bank for its consent that the sale of the property shall be made on the following terms, to wit: \$5,000 to be paid in cash, and \$4,000 on the 1st January of each year, until the whole be paid, with interest on the whole from the date, payable annually, &c. The resolution provides that, of the cash instalment, \$2,000 shall be paid to the Bank, and \$3,000 to J. B. Glenn on the first of January, 1842. The purchaser was to give bond to the Bank with satisfactory personal security for \$4,000 on the 1st January, 1843; \$4,000 on the 1st January, 1844; and the balance on the 1st January, 1845, with interest, and each payment first to extinguish the interest, &c. It was also provided, that the purchaser was to execute to the Bank a mortgage, which was to have the first lien on the property. The same resolution then proceeds to provide for the payment of Glenn's debt out of the sales of the property, but he is postponed to the Bank, to whose debt a preference is given. The purchaser at the sale was to give bond and mortgage to the Bank, which was to have precedence in the way of lien, over that which was to be given to Glenn. It was further "resolved, that John B. Glenn be requested, in assenting to this, to enter satisfaction on his mortgage, as a condition to the foregoing."

A correspondence was opened with F. H. Elmore, the President of the Bank, as to the proposals contained in the resolution of the Glenn's Spring Company. The Bank, by resolution, acceded to the terms proposed; Glenn also assented to the arrangement, by which his debt was postponed to that of the Bank; and in pursuance of the request of the Glenn's Spring Company, as expressed in their resolution, he entered satisfaction on his mortgage, by which he also discharged his judgment. The property was sold by the sheriff, according to the agreement between the parties. The company was greatly disappointed in the amount of the sales.

The sale took place on the 4th of January, 1842. The land sold for \$15,000, and the personal property for \$3,521.23; the total

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*amount of sales was \$18,521.23. The costs were \$224.44. The Bank received \$11,526.34, and the balance \$6,970.53 was applied according to the terms of sale to Glenn's debt. But nothing is intended to be concluded as to the amount of the payments that have been made.

Glenn brought an action of debt upon the instrument of the 15th September, 1837, as upon a sealed note, against Sims, (1 Rich. 39,) one of the obligors. He obtained a verdict in the Circuit Court, which on appeal was set aside, on the ground, that Glenn being one of the obligors, as well as the obligee of the instrument, it was not a note or single bill, and that no action upon it could be maintained at law. He then filed this bill

for the enforcement of the claim against such of the parties to the contract as are solvent and within the jurisdiction of the Court.

To this bill several of the defendants have answered, namely: O. B. Irvine, M. A. Moore, J. Winnsmith, R. Mooreman, Joseph Caldwell, executor of R. S. Brown, J. K. B. Sims and Ann Sims, who has intermarried with J. C. Caldwell, and who has answered jointly with the said J. C. Caldwell, and George Ashford. The execution of the note or instrument is not disputed by any of the defendants; nor is it denied that the debt due to Glenn for the purchase money of the land remains for the greater part unpaid. The grounds assumed in the defence are, that the note or instrument is a nullity, because Glenn was one of the obligors and at the same time the obligee, or payee; that the parties to it never intended to be jointly and severally bound; that if they ever were bound at all, they were not bound each for the whole; that if they were jointly and severally bound, originally, they ceased to be so bound when the company was incorporated, and when the company, through its President, gave a mortgage of the land to secure the payment of the debt; into which said mortgage, it is contended, the liability on the note merged. It was further contended, that when Glenn released his rights under the mortgage and judgment, he released thereby the liability of the drawers or obligors of the said sealed instrument. Some of

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the defendants plead the statute of limitations to the complainant's bill, namely: J. C. Caldwell and wife, J. K. B. Sims, and O. B. Irvine. On the hearing, it was said that the defendants, M. A. Moore, J. Winnsmith, R. Mooreman, and Joseph Caldwell, executor of R. S. Brown, had also pleaded the statute of limitations. This was denied on the part of the complainant. It appeared that the solicitor for the last named defendants, after the filing of their answers, had obtained two orders on different occasions, for leave to file the plea of the statute of limitations. The commissioner said there were no such records in his office, and he did not remember that there ever were. On this state of facts, the solicitor of the last named defendants submitted his own affidavit, stating his belief, that the plea of the statute of limitations had been filed in behalf of each of the said last named defendants. This I considered insufficient to establish the existence of a record. It can only be proved by a profert, or by positive proof of its having once existed; after which, proof of its loss or destruction and of its contents is admissible.

Having thus, at some length, given a history of the transactions of the company that relate to the claim of the complainant, I must now consider the rights of the parties growing out of the facts which I have presented.

Partners may even at law maintain actions against each other on contracts, or for the recovery of debts, where it is obvious that the subject matter of the contract or indebtedness was not intended to constitute a part of the capital or stock in trade. In this case it is clear, that Glenn was a partner to contribute one thousand dollars, and no more to the common fund; that being the amount which by the articles each member of the association was to pay in. The balance of the purchase money of the land, namely, \$14,000, was due to him, as a private individual, was to be his own private property, and not to be subjected to the hazards of the enterprise. This was to be paid to him by the other members of the firm.

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For independently of this contract and conveyance of the land, Glenn contributed and paid in his rateable proportion of the stock.

Though the instrument of the 15th September, 1837, is not a sealed note or single bill, it does not follow that it is a nullity; on the contrary, it is clearly a binding agreement or covenant, which has been expressed in the form of a sealed note. It is not any the less binding on account of its having assumed that form. For being an intelligible contract entered into for valuable consideration, it is to be enforced by courts of justice according to its true and just import. It is certainly not a sealed note or single bill, and an action upon it, as upon a sealed note or single bill, could not be maintained. But I am not satisfied, if an action had been brought at law upon it, as upon a covenant or agreement under seal, with proper averments, that such an action would not have been sustained. At all events, there can be no doubt about the right of the complainant to come into this Court to enforce this agreement according to its true interpretation, if indeed his original rights under it have not been waived or lost. When money has been loaned, or property sold to a partnership by one of its members, the price of which was not designed to be a part of the capital or stock in trade, he is entitled to have it back unconditionally, while the co-partnership is going on. If he waits until after its dissolution or insolvency, his claim would be subject to all the equities against him in favor of the partnership; to any debt, for example, which he as a member might owe the company, or a contribution to pay debts, if there were a deficiency of assets to satisfy the demands of creditors. In the case before me, it was not shown or alleged that Glenn owed any thing to the company, or that there was any outstanding, unsatisfied debt, besides that of Glenn himself. The result of the enterprise is, that the company have got from him his large and valuable property, have speculated upon it; and the speculation having proved disastrous, they refuse to pay for it the stipulated price,

claim to consider the agreement under which

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they acquired it a nullity, and if *they cannot be relieved from it on that or other grounds, they plead the statute of limitations.

Before I proceed to give my views as to the construction of the agreement of the 15th September, 1837, I will premise that however fixed and established the rules by which the liabilities of partners are regarded as to the rest of the world, they may, as among themselves, make whatever contract they please, and such contracts become the law of the case to them. Their contract among themselves, and their mutual liabilities and obligations to each other, may assume all the infinite variety as to form, subject matter or stipulation, which belongs to the contracts of persons acting as individuals.

But to recur to the construction of the note—my opinion is, that the just and legal import is this: The subscribers to the note (of which Glenn was one) agreed to purchase the land at a valuation of fifteen thousand dollars, of which Glenn himself was to pay one thousand dollars. The balance, namely, \$14,000, they all become jointly and severally bound to pay, each in the whole and for the whole. It is in the nature of a contract for mutual insurance, and each signer became a guarantor for the solvency of all the rest. It follows, that those who are solvent and within the jurisdiction are liable for those who are insolvent and removed from the State, or who may hereafter become so. But from the terms of the agreement, and Glenn's having affixed his own signature to it, Glenn himself is an insurer or guarantor for all. And in aid of those who are solvent and within the State, he would, by the terms of the agreement, be bound to contribute his rateable proportion of the deficit of those who are insolvent and out of the State.

Such I think would be the original rights and liabilities of the parties to this contract. Nor do I think that the subsequent incorporation of the company would have the effect of varying those rights and liabilities. Have they been lost or waived?

It was contended that when Glenn took a mortgage from the corporation for the debt,

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the liability of the subscribers of the *contract of 15th September, 1837, was discharged and merged in a debt of the corporation, secured by the mortgage; and one of the witnesses, P. M. Huson, testified that this agreement was to be held until the incorporation of the company; from which it was inferred, that after the incorporation of the company the note was to be given up, and other securities given. If this was the conclusion, I do not perceive that it would help the defendants. The debt of Glenn is confessedly unpaid. To the amount thereof, he is a bona fide creditor of the corporation.

The company was incorporated with a capital stock of \$75,000, of which only \$15,000 has been called in. And the corporation would now be compelled to call in enough of its capital to pay this unsatisfied demand.

But there was evidence of a high character before me that the note was not to be given up; that it was to be detained in Glenn's hands, and that the mortgage was intended as cumulative security. This evidence is derived from the authentic and unequivocal acts and declarations of the corporation itself, as spread upon its journal. On the 3d of October, 1839, the company adopted a resolution, of which I have already spoken, that "the President of the company should execute a mortgage of the Glenn's Spring tract of land to J. B. Glenn as additional security to a note of hand, given by the stockholders of the said company to the said J. B. Glenn." The debt had been reduced by payments. The mortgage was accordingly given for the balance; upon which said mortgage Glenn afterwards recovered a judgment, as has been before stated. How can it be said that the mortgage was a discharge of the pre-existing obligation, when it appears from the resolution which authorized it to be given, that it was intended to be additional or cumulative security?

Then it was urged that Glenn had, in his mortgage and judgment, the first lien on the land, and in this a most ample security of his debt, which he waived by giving the Bank debt a preference, and thus discharged these parties from their original liability on the note. If the doctrine is at all applicable to the case, it will not apply under the particu-

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lar circumstances. The Bank being a *more urgent creditor, Glenn consented to waive his prior lien in favor of the Bank for the special benefit, and at the special instance and request of these parties. See the resolution of the company.

The last question which it is necessary for me to consider is the statute of limitations, which has been pleaded in behalf of some of these defendants. The plea of the statute cannot prevail. In October, 1843, Dr. M. A. Moore and J. Winnsmith offered to pay to the administratrix of J. B. Glenn, the amount of their respective contributions. Before a debt is actually barred, one of several joint obligors can renew it by promise or offer to pay. Pearce v. Zimmerman, Harp. 305. This was the case of two joint makers of a note who were not partners. The doctrine does not apply to co-partners, except during the continuance of the partnership. After a vast deal of discussion and a great contrariety of decisions and of opinions, the doctrine seems now to be well settled; that after the dissolution, one partner cannot bind the firm so as take the contract from the operation of the statute of limitations. So firmly had the contrary doctrine taken root in England,

that the interposition of Parliament was necessary to overturn it. Stat. 9, Geo. 4. The admission of two of these defendants, I conceive insufficient to renew this claim against the others, so as to prevent the statute from running against the others, except from the date of that acknowledgment.

But there is another fact which I think prevents the statute from operating as a bar to the claim. In the year 1841, while the organization of the company still existed, and before any dissolution, the company adopted resolutions for the sale of their property. Among other things, they made arrangements for the payment of Glenn's claim out of the proceeds of these sales, to this effect. He was to have three thousand dollars in cash from the purchase money. The balance of the purchase money, that was to be applied to Glenn's claim, was to be paid in instalments by the purchaser, on the first of January, 1843, on the first of January, 1844, and on the first of January, 1845, with interest. This was the arrangement that was carried

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into effect, and what *Glenn did actually receive from these sales, was paid to him in this way. Thus he has received payments as late as January, 1845, made by authority of and under an arrangement with the company before its dissolution. Though the arrangement was made in 1841, it was not consummated until 1845; payments were made in that year under the authority of the company, which in my judgment, is the same as if the company had at that time itself made the payment. It is from that time only that the statute obtained currency, and the lapse of time has not been long enough to create the statutory bar, the bill having been filed the 27th January, 1847. The plea of the statute is therefore overruled.

Ann Sims, (who has since intermarried with the defendant, J. C. Caldwell,) was one of the original subscribers to the agreement, and one of the stockholders. She paid up one hundred dollars on her stock. But failing to pay the other instalments as they were called in, by one of the regulations of the corporation, her stock was forfeited. The company proceeded to forfeit her stock for their own benefit, and to appropriate it to themselves. Thus Ann Sims was excommunicated and cast off by these parties, (Glenn being one of them,) from all benefit in a connection with the company. Under these circumstances, I cannot perceive that it is equitable that she should contribute. Indeed, it was admitted, on the trial, that she is not liable. The bill as to her and her husband, J. C. Caldwell, is dismissed with costs.

It is declared and decreed, that each of the defendants, with the exception of the said J. C. Caldwell and Ann Caldwell, are liable jointly and severally for the balance due on the aforesaid agreement of the 15th September, 1837, and that the complainant

do contribute a rateable proportion towards the shares of those that are insolvent and beyond the jurisdiction of the Court, and also the share of Ann Sims.

It is further ordered and decreed, that the commissioner inquire and report the balance due to the complainant on the said agreement. And the commissioner is directed to report the balance due on the purchase mon-

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ey for the land, to wit: \$15,000, after *deducting payments made by the funds of the company. From this balance he is directed to deduct one-fifteenth part, on account of the share of the said J. B. Glenn; and considering Glenn as one of the solvent parties, the commissioner is directed to deduct also from said balance, his rateable proportion of the liability of the parties insolvent or out of the State, namely: H. D. Vanlew, R. A. Nott, L. N. Shelton, Wm. C. Pearson, B. Ligon, W. B. Thorn and J. C. Caldwell and wife; after which deductions the balance remaining shall be the debt due to the complainant by the defendants jointly and severally.

The defendants appealed, on the grounds:

1. Because the parties to the agreement of the 15th September, 1837, were released after the Act of incorporation, and the debt then became, by the consent of all parties, the debt of the corporation, and not of the individual members.

2. Because the complainant's intestate released the parties to the agreement, by taking a mortgage from the corporation, executing a deed to the same, and each one of the subscribers having paid the amount of their subscriptions and proportionate part of the agreement, are no further liable.

3. Because if defendants are liable at all, they are only liable for their proportionate amount due on the agreement.

4. Because the complainant's claim is barred by the statute of limitations.

The defendant, J. K. B. Sims, appealed, on the further ground:

5. Because the complainant should have been ordered to pay the costs expended by him in defending himself at law on the agreement now sued on.

The defendants, J. Winnsmith, M. A. Moore, George Ashford, R. Mooreman, and Joseph Caldwell, executor of Brown, appealed, on the further ground, viz:

6. Because the release of Ann Sims, now Mrs. Caldwell, from any liability on the subscription, or on the agreement of the 15th September, 1837, was a release of them.

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*The appeal was heard at November term, 1850, when the cause was remanded generally to the circuit Court, with leave to all the defendants to plead the statute of limitations.

At June term, 1851, the cause was again

heard, in the circuit Court for Union, by Wardlaw, Ch., who pronounced the following decree:

Wardlaw, Ch. This cause was heard first by Chancellor Dargan, in June, 1850, and he delivered a decree for the plaintiff. Upon appeal from this decree, the Court of Appeals, at November term, 1850, gave all the defendants leave to plead the statute of limitations, and remanded the cause generally to the circuit Court. At the present hearing, this plea was found to be pleaded; but in other respects the case made was substantially the same as that presented to Chancellor Dargan, and I refer generally to his statement of the pleadings and evidence. Some remarks, however, explanatory of this statement, must be made.

The agreement in the stock book without date, it is manifest from the internal evidence, and from the direct testimony of P. M. Huson, was subscribed by fifteen persons before the single bill of September 15, 1837, was executed. George Ashford was one of the original subscribers to both instruments. B. Ligon came in afterwards and signed the single bill but never subscribed the stock book. William B. Thorn also came in afterwards, in the place of Ann Sims, and subscribed both instruments.

The company was incorporated December 20, 1837, for fourteen years, in the following terms: "That Dr. Morris Moore and his associates and their successors be, and they are hereby constituted, a body corporate, under the name and style of the Glenn's Spring Company, with power to hold property, real and personal, of the value of seventy-five thousand dollars." 8 Stat. 457.

At the meeting of the company, Aug. 16, 1838, a resolution was adopted, that the President of the company communicate to Ann Sims, that her share, with \$100 paid thereon, was liable to forfeiture, but that she might redeem by paying the \$900 due on her share, by September 10, ensuing, or that the com-

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pany would *release her from all her responsibilities on Capt. Glenn's note, if she would relinquish in writing all her interest in the company. Huson thinks she gave such relinquishment, but the instrument was not produced nor accounted for. At the meeting on the second Monday in November, 1838, resolutions were adopted forfeiting Ann Sims's share to the company, and selling and transferring the same to W. B. Thorn. The said Thorn attended meetings of the company on January 21, 1839, and October 17, 1839. It does not appear what members were present at the meeting of August 16, 1838, although officers were elected at that meeting. At the other meetings named, as well as those which acted concerning the debt to the Bank, and the sale of the assets of the company, Glenn himself attended, with a ma-

jority of the share holders. Ann Sims attended no meeting of the company in person or by proxy. Appended to Thorn's subscription in the stock book, is this memorandum: "It is understood that W. B. Thorn take the share forfeited by Mrs. Sims; on or before the first of November next he is to pay the subscription."

All the credits indorsed on the single bill purport to be received from Moore or Huson, as treasurers of the company.

Other explanations may be made incidentally in considering the rights of the parties.

I concur in the views presented in the former circuit decree, that by the just construction of the single bill of September 15, 1837, the obligors are jointly and severally liable to Glenn and his representatives, for the balance remaining unpaid of the \$15,000, and interest, agreed to be paid by that instrument; and that such of them as are solvent, and within the jurisdiction, are liable for those who are or may be hereafter insolvent or without the limits of this State. Glenn being himself one of these obligors, made himself equally liable with the others, and his representative must abate from any recovery to which she may be entitled a rateable proportion, so as to make her loss and liability equivalent to the liability of each of the solvent obligors within the jurisdiction.

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*I likewise agree that the liability of the obligors of this instrument is not restricted to the terms of the original subscription in the stock book, nor extinguished by any subsequent act of the company. In the absence of all proof of fraud or mistake, or of any reference to another paper, the construction of the single bill must be collected from its own terms. The impression of Huson that this instrument was executed as an arrangement ad interim, until the company might be incorporated, and execute another obligation, is contradicted by the whole proceedings of the company; particularly by their resolution of October 3, 1839, to execute a mortgage as additional security for this single bill, and by their resolution of September 21, 1841, providing for its payment after the debt to the Bank. That Glenn was anxious to obtain a mortgage from the company, evinces only the caution of a shrewd creditor desiring to accumulate securities for his debt. His anxiety about the mortgage, Huson informs us, was fully shared by Dr. Moore, and perhaps by other solvent members of the company, who could have had no anxiety on the subject, except to secure themselves from liability, on account of Pearson and other obligors, the solvency of whom was suspected.

In my judgment, the remedy of the plaintiff depends exclusively on the single bill. The other grounds upon which her right of

recovery are placed in argument, I suppose to be untenable.

It is said that the company was incorporated with a capital of \$75,000, and that as only \$15,000 of this sum had been actually paid in, the plaintiff might compel the stockholders to raise so much of the balance of capital as was necessary for the payment of debts. It seems to me to be a misapprehension of the terms of the charter, to say that this company was incorporated with any such capital. The Legislature in this case, as in many other charters, proceeding upon the impolicy of allowing estates to be held in mortmain, has prescribed a sum as the maximum value of the property which might be owned by the company, but there is no intimation that the company must hold that amount and no less. The disability of the

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company to hold in succession, is removed to a limited extent. A privilege to invest the profits of successful management in certain estate, at the option of the donees, can be converted by torture only into a requirement to make the particular investment. The case is altogether unlike *Haslett v. Wotherspoon*, (2 Rich. Eq. 395.) There the company was incorporated with a present capital of \$60,000, upon the faith of which, as capital invested, the debts were contracted; and the creditors might well insist that the corporators should make good their pledges to the community. Here the creditor was himself a corporator, and no representation as to capital was made calculated to deceive any creditor, even one not cognizant of the transactions of the company. It is hardly necessary to reply to the suggestion, that the charter contains no limitation of the personal responsibility of the members of the company. The main object, and the effect of a charter, are to limit responsibility to the extent of the corporate assets.

It is likewise urged, that this company, by engaging in the business of merchants and bankers, as by the proof it did to some extent, forfeited the charter, and subjected the members individually to the debts of the plaintiff and other creditors. It may be observed that the charter does not indicate the purposes for which the company was incorporated; and if the object to establish a watering place had been distinctly set forth, it would not be clear that the purchase and sale of goods, and the issuing of notes, might not be incidental to the object. But if the charter might be forfeited at the instance of the granting power, for abuse of the privileges conferred, such complaint cannot be heard from the mouth of a corporator who concurred in the abuse of the charter.

I do not perceive the force of another argument that the plaintiff is entitled to be subrogated to the rights of the Bank in this matter. The Bank had no lien by mortgage or judgment, except upon the corporate as-

sets of the company, and these assets have been administered with the consent of the plaintiff's intestate; and the note to the Bank by individual corporators, has been

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extinguished by payment, and if not, is barred by the statute of limitations. The plaintiff, representing the intestate, has no equity to recover from these corporators who have been exonerated by his consent.

The plaintiff must stand upon the obligation of September 15, 1837; and the main question in the case is whether she is barred from her remedy by the operation of the statute of limitations.

The counsel for the plaintiff urges that, granting this single bill to be a mere covenant which would be barred by the statute for non-claim within four years before January 27, 1847, when this bill was filed, the bar has been removed by certain promises, and payments made in that interval of time.

The offer of Drs. Moore and Winnsmith, in the fall of 1843, each to pay one-fifteenth of the single bill if they were discharged from further liability, was rejected by the plaintiff as conditional; and in my opinion, such an offer to buy peace, when rejected, cannot be construed into an acknowledgment of subsisting liability so as to create a new starting point for the statute.

Reliance is placed on the fact, that of the obligations and notes placed in the hands of Glenn for payment of this single bill, on January 4, 1842, when the whole assets of the company were sold, and when the company was in fact dissolved, some of the obligations and notes were not payable nor paid to him until 1845. But I consider this transaction to have no operation upon the statute, as a point of origin for the bar, beyond the date January 4, 1842, when, so far as Glenn and the company were concerned, the payment was made. No acknowledgment or promise on the part of the company or its members then made, is prospective; the subsequent dealings of Glenn with the obligors or makers of these choses, accepted by him in payment, were *res inter alios acta*. Glenn himself, with new associates, purchased the Springs at this sale, and thus united the character of debtor and creditor, but to what extent was not proved.

The question recurs, whether the statute of limitations is at all applicable in this case; or, in other words, whether the instrument

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in question is a covenant or a bond. "The statute of limitations does not apply in terms to proceedings in the Courts of Equity. It applies to particular actions at common law, and limits the time within which they shall be brought according to the nature of those actions, but it does not say there shall be no recovery in any other mode of proceeding." *Bond v. Hopkins*, (1 Sch. & Lef. 428); *Smith v. Smith*, (McMull. Eq. 134). Courts of

Equity, in analogy to the statute of limitations, will regard any legal demand as barred, by the same time in which it would be barred at law. Now, by our Act of limitations, actions of covenant are barred within four years from the accrual of the right to sue, but actions of debt upon specialty are not barred at all, being left to the presumption of satisfaction at common law from non-claim for twenty years. Is the instrument in question one upon which an action of covenant at law could be maintained? I think not. Wherever at law one occupies both sides of the contract, unless exception be made as to certain commercial instruments—when he is at once entitled to demand fulfilment of the contract, and is bound, whether jointly with others or not, to fulfil the contract according to the demand; when he is obligor and obligee, or covenantor and covenantee—the contract is ipso facto extinguished, and no suit whatever can be maintained. Such is the effect of the decision of our Court of Law in *Glenn v. Sims*, (1 Rich. 34 [42 Am. Dec. 405],) upon this very instrument. In the report of the case, the form of the action is not stated, and the defeat of the plaintiff is placed upon general principles, and in no respect upon the pleadings. In *Rambo v. Metz*, (5 Strob. 110 [53 Am. Dec. 694],) the former case is interpreted as deciding that Glenn, or his administrator, “could not have maintained any action on the specialty, because he united in himself the character of both obligor and obligee, so that, if he only did what he promised, the obligation was fulfilled.” I conclude, as well from comity to the Court of Law, as from my own notions of doctrine, that this instrument is not the basis of a legal demand by covenant or other form of action.

The instrument has the form of a single

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bill, except that J. B. *Glenn is the obligee as well as one of the obligors; the plaintiff comes into this Court on account of this legal difficulty, and is confessedly entitled to have substantial performance of the contract according to the intention of the parties. The Court of Law, on the ground, that the remedy there is confined to the written form to which the contract has been reduced, remits her for proper relief to the Court of Equity. Is she to be told here that the mistake of form, of which she complains, shall be corrected only if the whole form is changed? I do not perceive the equity of thus converting a single bill into a covenant, merely for the purpose of bringing the instrument within the bar of the statute. It is incongruous to change a defective instrument into a legal demand so onerous, while we are professing to relieve against the strict rules of the common law. There is no reason why we should not give effect to the intention of the parties, that the creditor might safely indulge his debtors for twenty years.

Courts of equity sometimes interfere to prevent the bar of the statute of limitations when it would be unjust or inequitable; and especially they will not allow it to prevail by mere analogy in suits in equity, where it would be in furtherance of manifest injustice, (*Story Eq. § 1521*); *Bond v. Hopkins*, (1 Sch. & Lef. 413). Here the debt of the plaintiff is unpaid; and the justice, if not the law, of the case, is affected by the facts, that within four years before the filing of this bill the plaintiff has prosecuted her suit at law, and certain promises and payments have been made to her.

The plea of the statute is overruled.

It remains to enquire as to the liability of Ann Sims, now the wife of J. C. Caldwell. There was no appeal from the former decree dismissing the bill as to Caldwell and wife. She never accepted the charter of the company, so far at least as members of the company are concerned. The \$15,000 for which she was liable, have been paid in full, and appropriated without her consent, and with the consent of plaintiff's intestate, to improvement of the corporate estate. William B.

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Thorn was accepted as her *substitute upon the single bill, with the concurrence of the plaintiff's intestate, and of most of the defendants; and with like concurrence she was repudiated as a member of the company as to its profits and liabilities, and another put in her stead. It seems reasonable that she, as well as the other party, should be allowed to avail herself of this arrangement. The proof does not show that all the defendants concurred in this substitution, but it does show that the plaintiff's intestate, and nearly all the defendants so concurred, and that all had agreed, Aug. 16, 1838, that a majority of the whole company should constitute a quorum to do business. In this respect, I concur with the judgment of the former Chancellor.

It is ordered and decreed, that the commissioner of this Court enquire and report as to the balance due upon the single bill in question, after deducting all payments made thereon by the treasurers of the Glenn's Spring Company, or from the funds of the company or otherwise; and that this balance be paid by the solvent defendants within this State, not enumerating J. C. Caldwell and wife, to the plaintiff, after deducting an aliquot portion for the liability of plaintiff's intestate; it being understood that such solvent defendants within the State, (except J. C. Caldwell and wife,) and the plaintiff, are rateably liable for the proportions of such of the obligors as may be eventually insolvent or out of the State; among whom are now named, H. D. Vanlew, R. A. Nott, L. N. Shelton, W. C. Pearson, B. Ligon, and W. B. Thorn.

The defendants appealed, on the following grounds, viz:

1. Because the parties to the agreement of the 15th September, 1837, were released after the Act of incorporation, and the debt then became, by the consent of all parties, the debt of the incorporation and not of the individual members.

2d. Because the complainant's intestate released the parties to the agreement, by taking a mortgage from the corporation, executing a deed to the same, and each one of the subscribers having paid the amount of their subscriptions, and proportionate part of the agreement, are no further liable.

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*3. Because if defendants are liable at all, they are only liable for their proportionate amount due on the agreement.

4. Because the complainant's claim is barred by the statute of limitations.

The defendant J. K. B. Sims, appealed on the further ground:

5. Because the complainant should have been ordered to pay the costs, expended by him in defending himself at law on the agreement now sued on.

The defendants J. Winmsmith, M. A. Moore, George Ashford, R. Mooreman, and Joseph Caldwell, executor of Brown, appealed on the further ground, viz:

6. Because the release of Mrs. Ann Sims, now Mrs. Caldwell, from any liability on the subscription, or on the agreement of the 15th September, 1837, was a release of them.

Herndon, Dawkins, for appellants.
Thomson, Bobo, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. On the questions presented by this appeal, we are content generally with the reasoning and conclusions of the circuit decrees: and none requires additional observations, except that in the fourth ground of appeal, as to the bar of the statute of limitations.

In *Glenn v. Sims*, 1 Rich. 34 [42 Am. Dec. 405], the single bill which is the cause of action in the present suit, came under discussion in our Law Court of Appeals, and it was determined in that case, that as J. B. Glenn united in himself the characters of obligor and obligee, no suit at law could be maintained on the specialty. This imperfection in the form of the instrument, prevents the remedy of the plaintiff, either by debt or covenant, according to the procedure of the Court of Law; but it does not annul the contract, nor hinder the execution of it here, according to the intention of the parties. Judge Richardson, in delivering the opinion of the Court, speaks of the inconsistent relations of Glenn to the obligation, as making a case very like that where a

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testator appoints *his debtor executor of his will. The case thus put, aptly illustrates

the power of this court to afford relief, where the formal inconsistency of being both plaintiff and defendant obstructs a suit at law. The appointment of a debtor to be executor, even if he be one of several joint or joint and several debtors, or one of several executors, operates at law as a release or extinguishment of the debt; and this is on the principle that a debt is merely a right to recover the amount by way of action, and as an executor cannot maintain an action against himself the action is suspended; and a personal action once suspended by the voluntary act of the party, entitled, is forever gone and discharged. 2 Wms. on Ex'ors. 937. But in equity, an executor is accountable for his debt as general assets of the estate. Lord Thurlow, in *Carey v. Goodinge*, (3 Bro. C. C. 111.) and Sir William Grant, in *Berry v. Usher*, (11 Ves. 90.) treat the point as perfectly settled, that the appointment of a debtor to be executor is no more than a parting with the action, and that it shall not operate as a release against creditors or legatees. If an executor should die indebted to his testator by bond, could it be doubted that the debt would be set up in equity as a specialty against the executor's estate? The contract under consideration has in every respect the form of a single bill, except that the name of the obligee is added as one of the obligors. It is an agreement to pay money—a debt by specialty—and is in no other sense a covenant, than as every bond is a covenant. I suppose that the action of covenant might be brought upon a bond for the payment of money, and that if such form of action were adopted, the statute of limitations would be applicable. It is not the usual course of equity to torture into a covenant an instrument susceptible of a different construction, merely for the purpose of defeating the remedy of the party entitled. What other reason is there for denominating this single bill a covenant, than to bring it within the operation of the statute of limitations? It may certainly be construed otherwise. If we should express the contract between these parties by two instruments, we would

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then have in one, the promise *under seal of the other obligors to pay Glenn \$15,000, a mere debt; and in the other the agreement of Glenn to incur a rateable share with the obligors of loss and liability. Or suppose we consider Glenn's name struck out from one of the two sides of the contract, the result would be the same. If his name as an obligor be cancelled, he would still be bound in this Court, on proof of the intention of the parties, while seeking equity to do equity, by assuming his just share of responsibility. It may be urged with much plausibility, and upon good authority, that the effect of Glenn's execution of the instrument as an obligor, is to expunge his

name as obligee. In *Devore v. Mundy*, 4 Strob. 15, the payee of a note, payable to himself or bearer, transferred it to a third person, and intending to bind himself as surety of the original maker, signed his name as a maker. The Court say: "The rule in such cases as this, is to give effect, if possible, to the intention of the parties. The intention of the defendant to bind himself being ascertained, our business, if we legally can, is to give it effect. The note may be very well read under such circumstances, as if the name of the payee were struck out; his signature as maker may very well have that effect; and it would then stand as a naked promise on his part to pay the bearer. This must be so, as is said in *Stoney v. Beaubien*, 2 McM. 313 [39 Am. Dec. 128], because otherwise no legal effect would result from the defendant's signature as maker." The application of this case may be impugned, as being upon a commercial instrument, in relation to which the rules of the Court of law are less stringent than as to obligations. Granting this, it is difficult to perceive any reason why a Court of Equity should not extend such liberal construction to all instruments. The case of *Cockrell v. Milling*, 1 Strob. 444, demonstrates the disposition of our Law Court to give effect to the intention of the parties, at the sacrifice of form, even in sealed instruments. It was held there, that one writing his name on the back of a single bill—which purports of itself to be a mere assignment without guaranty—was liable as surety or indorser of the obligor, upon proof of his intention to be so bound.

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*If we may consider, then, this instrument as being in blank as to the name of the obligee, there is no difficulty in maintaining it as a single bond. In *Gray v. Rumph*, 2 Hill Eq. 6, a bond was set up in this Court, although it was in blank as to the obligee and penalty. This is a mere illustration of the principle that equity will not permit a trust to fail for the lack of a trustee. If this single bill had been drawn payable to some stranger, in trust for Glenn, undoubtedly effect would have been given to it as a debt by specialty, and yet it is the same thing in substance. If a testator should give to a married woman, for her sole and separate use, the note or bond of her husband, it will not be contested that equity would supply a trustee and give effect to the legacy. Lord Hardwicke says, in *Skip v. Huey*, 3 Atk. 93, there are many cases where equity will set up debts extinguished at law against a surety as well as against a principal, as where a bond is burnt or cancelled by mistake, or delivered to the obligor by his fraud.

In *Hill v. Calvert*, 1 Rich. Eq. 56, the ordinary struck out the name of one of the obligors in a guardianship bond, and per-

mitted another to sign as a substitute; yet although the ordinary was the nominal obligee and legal owner, it was held that the first obligor was not discharged, nor the second bound.

The survivor only of several obligors of a bond is liable at law, yet the representative of a deceased obligor may be successfully pursued in equity.

All these cases, and many others might be cited in illustration, establish the general principle, that the intention of parties, safely deduced from the instruments of contract, shall not fail in equity, by reason of defect of form, which might defeat recovery at law. In the present case, my mind forms the conclusion, from the instrument itself, that it was the intention of the parties to create a debt by specialty, not within the statute of limitations, and to be barred only by lapse of time.

The same conclusion may be attained by a different course of reasoning.

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*Courts of Equity will grant relief in cases of mistake in written contracts, not only where the fact of mistake is expressly established, but also where it is fairly implied from the nature of the transaction. Thus, in cases where there has been a joint loan of money to two or more obligors, and they are by the instrument made jointly liable, but not jointly and severally, the Court will reform the bond, and make it joint and several, upon the reasonable presumption from the nature of the transaction, that it was so intended by the parties, and was omitted by want of skill or mistake. 1 Story Eq. § 162.

In *Simpson v. Vaughan*, 2 Atk. 31, where there was an actual loan to partners, and their joint bond was taken, Lord Hardwicke inferred mistake in the form of the bond, without express proof, and said: "The debt arises from the contract itself, and if there is any defect in the bond, the Court will resort to what was the principal intention of the parties, that they should be severally and jointly bound." The cases on this point are well collected and explained by Chancellor Harper, in *Pride v. Boyce*, Rice Eq. 288 [33 Am. Dec. 78]. See also *King v. Aughtry*, 3 Strob. Eq. 156.

Where a bond is executed by one partner in the name of the firm, all the partners intending to be bound by the obligation, the obligee has no remedy at law against the firm, but may charge them in equity on the ground of mistake. *McNaughten v. Partridge*, 11 Ohio, 223. In such case, there would be a merger at law of the original simple contract, and the partner executing the bond would be alone liable. [*Jacobs v. McBee*] 2 McM. 348. *Gardner v. Hust*, 2 Rich. 601.

Where a bond is intended to be executed, but the seal is omitted by accident, relief

will be granted in equity, although the party might proceed at law upon the simple contract, on the ground, that the consideration of the bond cannot be enquired into; and it might be added, because a bond is not within the statute of limitations. *Montville v. Haughton*, 7 Conn. R. 549; *Wadsworth v. Wendell*, 5 John. Ch. 225.

In *Argenbright v. Campbell*, 3 Hen. &

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Munf. 144, a written instrument was declared to be a good bond, with collateral condition for the benefit of the obligee, although the obligor's name was not signed opposite to the seal, but between the penal part and the condition, and the name of the obligee was signed at the foot of the condition, opposite to the seal; both signatures being attested by the same witnesses.

In every case where an imperfect bond is set up in equity, it is established with all the incidents of a specialty.

In the case before us, it is not necessary, in my opinion, to look beyond the instrument itself in order to ascertain the mistake of the parties. But if proof of mistake by extrinsic evidence is needed, I think it is afforded by *Huson*, the witness of defendants; and his testimony is competent to show mistake, but incompetent to give construction to the instrument. He testifies that, after the rejection of several other forms, Dr. Winnsmith objected to the form of obligation finally adopted, as on his construction he was liable for the whole, and that this was the reason that Glenn signed the sealed note—that Glenn was required to sign the note in order to put all on equality, as he retained one share. It is obvious from this testimony, that the only purpose of Glenn's signature to the specialty was to furnish evidence of his rateable liability. The substance of Dr. Winnsmith's objection to the obligation is, not that he was bound for the whole, but that Glenn, a partner in the enterprise, was not also bound. To avoid the inference of mistake, one of the counsel for defendants suggests to us that it was the deliberate purpose of some of the obligors, in requiring Glenn's signature as co-obligor, to render the instrument a nullity, upon which no suit could be brought, but we cannot presume so gross a fraud as this would imply on the part of respectable gentlemen, without some proof.

We are further of opinion, that there is neither need nor propriety to look beyond the single bill itself, and the circumstances connected with its execution, to ascertain the intention of the parties, as the instrument is sufficiently definite in itself, and contains no reference to any other contract.

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*It is ordered and decreed, that the decree be affirmed and the appeal be dismissed.

JOHNSTON, Ch., concurred.

DARGAN, Ch. I concur in the judgment of this Court, that this suit is not barred by the statute of limitations. I do not concur, however, on the ground, that the instrument of the 27th of October, 1837, is a single bill or a specialty. In my view, it has none of the characteristics of such an instrument, except the form. But when examined in reference to the obligations it creates, it is found that the obligee is one of the obligors. He binds himself with the other fourteen obligors, jointly and severally, to pay to himself the sum of fifteen thousand dollars. He binds himself with the others in the whole and for the whole sum. We have put that construction upon it. For we have held, that the representative of the obligee is bound to bear a proportionate share of the loss resulting from the insolvency or absence of some of the joint and several obligors.

This point has been decided at law. In a suit between these same parties, (*Glenn v. Sims*, 1 Rich. 34 [42 Am. Dec. 405],) it was decided, that this instrument was a nullity in that Court. The only ground upon which such a decision could have been rendered, and the plaintiff turned out of that Court, is because it was not a single bill. If it was a single bill, or a sealed note under the Stat. 4 Ann, what was the impediment to a suit upon it at law? It is clear, that the Court of Law did not regard it in that light, or they would not have granted a nonsuit on the ground that it was a nullity at law. I entirely concur in the view which the Law Court has taken as to the legal construction of the instrument. But even if the case had been erroneously decided at law, it is the law of the case as to these parties.

But if it be not a single bill or sealed note, what is it? It is certainly not a nullity in every sense. For the Law Court did not so regard it, and recommended the plaintiff to this Court. The instrument is valid as an

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agreement between the parties, according to the true intent and meaning, deduced from the legal import of the terms. If it does not fall under that classification of contracts called covenants, it is an anomaly for which I am at a loss to find a name. It is not an *assumpsit*, for it is under seal. In order to determine its true character, we are to suppose all the obligations which it creates among the different parties, according to our construction, to be reduced to writing, and executed by the parties under their hands and seals. Then, it would be an agreement in writing under seal, imposing upon the parties to it their several duties and obligations: and such an agreement would be, in my view, a covenant.

But an action at law upon a covenant is subject to the plea of the statute of limitations. And it is a rule in this Court to apply the bar of the statute of limitations, wherever upon the same cause of action, the plea

of the statute would be sustained in a Court of Law. And the plea of the statute of limitations, I think, should have been sustained by the Court of Equity in this case, but for the view which I have taken of some portion of the evidence.

Glenn had a mortgage of the Glenn's Spring property to secure the payment of his debt; and also a judgment for the balance of his demand, which were precedent in the way of lien to all other claims. There was a judgment in favor of the Bank of the State of South Carolina for a large amount that was pressing upon the Glenn's Spring Company for payment. The company desired to make sale of the Glenn's Spring property to meet the exigency arising from demands of the Bank. Glenn, under these circumstances, consented that the property should be sold in part for cash and in part on a credit until the first day of January, A. D. 1845. He consented to release, and did release, his prior liens in favor of the claim of the Bank. He consented that the Bank should receive the cash instalment of the sale, and the balance of that claim out of the credit instalment, and that the whole of his demand should be paid out of the proceeds of the credit instalment falling due on 1st January,

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1845. The company, consisting of the same persons with the obligors of the original agreement, (with the exception of Ann Sims, who had forfeited her stock, and had been released from her liability on the agreement.) passed resolutions for the payment of the Bank debt, and of Glenn's claim in the manner above stated. The resolutions and the agreement which they carried out, modified the agreement of 27th October, 1837, as to the time of payment of the balance due thereon. The original, and this new agreement, are to be construed in *pari materia*, and as forming one whole agreement. By the terms of the new agreement, Glenn agreed to receive the balance due him on the 1st January, 1845. From this agreement to the filing of the bill, the time was not sufficient to create the statutory bar. And on this state of facts, I concur in the decree overruling the plea of the statute, and the general affirmation of the circuit decree.

Appeal dismissed.

4 Rich. Eq. 197

JOHN G. PETTUS v. THOMAS SMITH and Others.

ELIZA SMITH v. JOHN G. PETTUS.

(Columbia. Nov. and Dec. Term, 1851.)

[*Fraudulent Conveyances* ⇨241.]

A plaintiff in a judgment at law, seeking the aid of the Court of Equity, is not bound to show a *fi. fa.* issued on his judgment and returned *nulla bona*—a *ca. sa.* may be as well, if not better, adapted to show that the plaintiff could not have satisfaction by legal process, and

that he needs the assistance of the Court of Equity.

[*Ed. Note.*—Cited in *Attorney General v. Baker*, 9 Rich. Eq. 534; *Eno v. Calder*, 14 Rich. Eq. 155; *Bird & Co. v. Calvert*, 22 S. C. 296; *Austin, Nichols & Co. v. Morris*, 23 S. C. 403; *Miller v. Hughes*, 33 S. C. 539, 12 S. E. 419; *Meinhard Bros. v. Youngblood*, 37 S. C. 238, 15 S. E. 950, 16 S. E. 771.

For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 694, 696-726; Dec. Dig. ⇨241.]

[*Fraudulent Conveyances* ⇨243.]

A plaintiff in a judgment at law having his debtor in custody under a *ca. sa.* may file a bill to have a previous conveyance by the debtor, and a previous judgment confessed by him, set aside for fraud.

[*Ed. Note.*—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 692; Dec. Dig. ⇨243.]

[*Judgment* ⇨617, 678.]

Every defence, such as fraud, &c., bearing upon the validity of a contract, is concluded by a judgment upon the contract—the creditors of the party defrauded have no right, (except where the fraud was perpetrated with an intent to affect creditors,) to question the validity of the contract, and the party defrauded is concluded by the judgment.

[*Ed. Note.*—For other cases, see *Judgment*, Cent. Dig. §§ 1134, 1199; Dec. Dig. ⇨617, 678.]

[*Fraudulent Conveyances* ⇨66.]

A purchase made to enable a debtor to remove his property out of the way of a coming judgment, is fraudulent.

[*Ed. Note.*—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 169; Dec. Dig. ⇨66.]

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[*Fraudulent Conveyances* ⇨66.]

*The assisting a debtor to remove his property from Florida to this State, and taking from him a confession of judgment here—the object being to defeat the lien of the judgment about to be obtained in Florida, and to obtain a preferable lien in this State,—is fraudulent.

[*Ed. Note.*—Cited in *Anderson v. Aiken*, 11 Rich. Eq. 237.

For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 169; Dec. Dig. ⇨66.]

[*Fraudulent Conveyances* ⇨184.]

Where a sale of negroes is set aside for actual fraud upon creditors, an expenditure made, such as paying a previous mortgage, for the purpose of forwarding the fraud, will not be reimbursed to the purchaser when the sale is set aside.

[*Ed. Note.*—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 583; Dec. Dig. ⇨184.]

[*Vendor and Purchaser* ⇨121.]

Where a vendee, discovering a defect in his vendor's title to part of the land, sues at law upon the contract and recovers judgment for, and collects the damages sustained, by reason of the defect, he thereby elects to treat the contract as valid, and cannot afterwards sustain a bill in equity to have it rescinded.

[*Ed. Note.*—Cited in *Godfrey v. E. P. Burton Lumber Co.*, 88 S. C. 141, 70 S. E. 396.

For other cases, see *Vendor and Purchaser*, Cent. Dig. § 219; Dec. Dig. ⇨121.]

[*Judgment* ⇨890.]

[Cited in *Hamilton v. Bredeman*, 12 Rich. 469, to the point that an arrest (under a *ca.*

sa.) is a satisfaction only if it produces payment or the debtor be not released.]

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1689-1701; Dec. Dig. § 890.]

Before Johnston, Ch., at Abbeville, June, 1851.

In November, 1845, John G. Pettus recovered judgment, in Florida, against Thomas Smith, for \$4,278.78, with interest and costs; and in October, 1848, recovered judgment in Abbeville district, in this State, on the Florida judgment. The Florida judgment was recovered on a promissory note, given by Smith to Pettus, for part of the purchase money of a tract of land. Pending the action, of Pettus against Smith in Florida, Smith removed his negroes, about thirty in number, across the line into Georgia, and there executed a bill of sale of the negroes to one Bryan; and Bryan advanced to him \$5,000, out of which sum he satisfied a mortgage, for about \$4,600, to one Bellamy, of part of said negroes. A few days afterwards Charles Smith, a brother of Thomas Smith, received from Bryan a bill of sale of the negroes, and paid him the \$5,000 he had advanced to Thomas Smith, with interest.

The negroes were brought by Charles and Thomas Smith into Abbeville district, in this State, where, on January 5, 1846, the said Thomas confessed to the said Charles a judgment for \$3,121, with interest and costs; and also, in March, 1846, confessed another judgment to his mother, Lucy Smith, for \$3,366.30, with interest and costs. The original indebtedness, on which each of these judgments was founded, was bona fide.

On the South Carolina judgment, of Pettus against Smith, *fi. fa.* was lodged, October

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23, 1848; and *ca. sa.* January 25, 1849. *Under the *ca. sa.* Smith was arrested January 29, 1849—gave bond for the prison bounds, filed a schedule, and gave notice that he would apply, at the next Fall Court for Abbeville, for the benefit of the insolvent debtor's Act. He died two days before the sitting of the said Court.

The first bill, above stated, was filed April 26, 1849; its prayer was, that the sale of the negroes by Thomas Smith be set aside for fraud; also that the judgments confessed by him to Charles and Lucy Smith be set aside for the same cause.

The second bill, above stated, was a cross bill, filed February 21, 1851, by the administratrix of Thomas Smith; its object was to procure a rescission of the contract between Smith and Pettus in Florida, for the purchase of the land.

Johnston, Ch. I shall not attempt to state these cases, but shall proceed immediately to deliver my judgment, leaving the pleadings and the evidence, which is all in writing, or on my notes, to exhibit and explain the details of the litigation.

4 RICH. EQ.—6

In the first of the two cases, it appears that Pettus, on the 20th of November, 1845, obtained a judgment at law against Thomas Smith, in Florida, for \$4,278.78, bearing interest from that date, with costs; but could not obtain payment of it, because his debtor had, *pendente lite*, removed property, necessary for its satisfaction, beyond the jurisdiction of the Court. He followed the debtor to South Carolina, and sued him upon his Florida judgment; and on the 23d of October, 1848, obtained a judgment upon it in the Court of Law for Abbeville district. But here he encountered new difficulties. The property removed was now claimed by Charles Smith, a brother of the debtor, as a purchaser. This was one impediment. If, disregarding the pretended purchase, he proceeded to levy the execution he had obtained here upon the property, he had to encounter another impediment, consisting of two judgments confessed by Thomas Smith, which took legal precedence over his lien, to wit: a judgment confessed to Charles Smith the 6th of January, 1846, for \$3,121 with interest and costs; and a judgment confessed to Lucy Smith, the

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*mother of his debtor, the 2d of March, 1846, for \$3,666.30, with interest and costs.

It is to set aside the pretended purchase of Charles, and to remove out of his way the two judgments of Charles and Lucy, that this bill is filed.

Before we proceed to consider the validity of this purchase, and of the judgments of these parties, it is necessary to dispose of an objection interposed at the hearing. (for it was not taken in the answers,) to his general right to maintain his bill.

Before the bill was filed, Pettus had arrested Thomas Smith, his debtor, by a *ca. sa.* taken out under the judgment recovered by him in South Carolina; and the defendant was in custody at the time the bill was filed. He had not taken out a *fi. fa.*, or, if he had, it was not returned "*nulla bona.*"

The objection is two fold:

1. That a creditor coming here, for aid to enforce a legal demand, for which he has a judgment, properly operating at law, must show that he really needs the assistance of this Court; and that in this case, the plaintiff having omitted to take out a *fi. fa.*, and causing it to be prosecuted and returned, has not shown that there was not a full remedy for him at law.

I have an impression that some of the cases quoted in support of this objection were strained beyond principle. The principle is sound, that a party holding a legal demand, and especially if he hold a legal remedy for it, is not entitled to call on this Court to aid him, unless he can show that he needs its assistance. He must state such a case; and, if required, he must give reasonable proof of its existence. But a party undoubtedly

does need equitable assistance, if his debtor is insolvent, except as to property so covered or encumbered that it cannot be reached without the intervention of this Court. The only question is, whether there is any principle restricting the proof of the insolvency to any particular method. Can it be proved only by the actual issuing and the actual return of process for the seizure and sale of property? Suppose that, before a *fi. fa.* can

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be issued, or after the issue of a *fi. fa.* and before it is returnable, a fraud is discovered, consisting in a combination of third persons with the debtor, by which the property is secreted, and about to be removed out of reach, can no application be made to this Court until the *fi. fa.* is returned, and the fraud actually and perhaps irremediably completed?

The true doctrine, it appears to me, is, that the party asking the aid of equity, in such cases as this, is bound to show that, without fault on his part, and after the exercise by him of reasonable diligence, he has no means of obtaining satisfaction of his claims without the aid of this Court; and, as to the insolvency of his debtor, he is bound to make such proof only as, under the circumstances, is reasonable and satisfactory—such proof of insolvency as, in all other cases, is competent and satisfactory, and no more.

In this case a *ca. sa.* was as well adapted to test whether Thos. Smith was possessed of any property beyond that which he had conveyed away as a *fi. fa.*; and indeed better. Besides the ordinary information as to the existence of such property, as the sheriff or any friend of the plaintiff might happen to possess, it was calculated to draw on the conscience of the debtor for such additional information as he alone could afford. I am therefore of opinion, that the deficiency of the plaintiff's legal remedy, and his need for the interference of this Court, is made out in this case by even better and more satisfactory evidence than would have arisen, if a *fi. fa.* had been issued and returned, as required by the objection.

2. The second branch of the objection is that the plaintiff's legal demand, which is the only just foundation of his application to this forum, was satisfied and extinguished at the time he filed his bill; and therefore he came here without cause.

The argument is, that the debtor being under arrest at the filing of the bill, his debt was at that juncture of time satisfied and extinguished; so that no bill could be exhibited in that posture of affairs to enforce the payment of that debt.

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*This Court looks at the substance of things, and not at mere forms and technicalities. It may be true, that if an action of

debt had been brought, in a Court of Law, upon the judgment, while the debtor was incarcerated by virtue of process issued under it, the suit might have been stayed until the debtor should be released. But such order, or practice, if made or adopted, must be referred rather to the administrative than to the purely judicial functions of the Court.

If the debtor made no objection on account of the arrest to the suit's proceeding, the Court could not notice it, and the suit must proceed until the period of trial upon the merits arrived. Then, for the first time, the question now made before me—whether the arrest was a satisfaction of the debt—could possibly be presented for the decision of the Court.

And I apprehend, a Law Court as well as this Court, must decide that question in the negative.

An arrest is a merely conditional satisfaction. It is a satisfaction if it produces payment, or if the debtor be not released. At common law, if the debtor died in custody—that is to say, if the creditor never released him—the debt was extinguished. But if it were shown that the arrest terminated otherwise than by the death of the debtor in custody, and without a payment of the demand, it was not satisfied or extinguished.

Arrests stand upon the same footing as levies upon property. While a levy is undisposed of, the debt is suspended. There is a qualified or conditional satisfaction; but where it is shown that the levy has not produced satisfaction, the creditor may proceed with his execution, or by suit upon his judgment, for what remains due to him. I have used the words satisfaction and conditional satisfaction in conformity to common usage; but the true view, upon principle, is that neither a levy nor an arrest has any direct influence upon the debt, so as to extinguish or satisfy it, either conditionally or unconditionally. It suspends the remedy, but the debt remains until actually satisfied.

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*I must therefore overrule the objection, and proceed to consider the case before me upon its merits.

And in adjudicating upon Pettus' bill—which is the one I am now considering—I must regard his claim (now in judgment, both in Florida and in this State,) as a good legal demand, and as valid and effectual in law as any other legal claim.

While the contract subsists, it is conclusive in law not only against Thomas Smith, the debtor, but against the other defendants to this suit, even though it should have the effect of diminishing their means of being paid as his creditors.

Nor can either Thomas Smith, (now represented by his administratrix,) or the other defendants, his creditors, under the bill which I am now considering, raise an objection out

of equitable circumstances, connected with the purchase of lands, upon which the plaintiff's demand arose, to prevent the enforcement of the demand itself.

Any fraud that may have existed in the original contract, all oppression or usury, every thing bearing upon the validity of the contract—all these were as available in the Court of Law of Florida, where the contract was sued on, as they could have been in equity; and the judgment of that Court concludes Thomas Smith upon all such points. As for his creditors, they never had the right to raise any objections of the sort. *Pickett v. Pickett*, 2 Hill, Eq. 471.

Creditors of a party defrauded have no right—even though the fraud have the effect to diminish his means of paying them—to look into the fraud or unravel it. It is for him, and for him alone, to do so; and if he chooses to acquiesce in the fraud, or has suffered himself to be concluded of his right to investigate or undo it, his creditors must be content to abide by the legal rights remaining in him, as they happen to stand. In one case, and only one, that now occurs to me, has a creditor a right to ask redress in relation to a fraud upon his debtor; and it is, where the fraud was perpetrated, not only with the view of injuring the debtor, but also with an intent to affect the creditor himself; *i. e.*

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where *the creditor was the object of the fraud. In that case, perhaps, as well as in the familiar case where the debtor colludes with a third person to defraud his creditor, the creditor has a right to claim redress. But with regard to frauds intended to light on the debtor alone, and when his creditors were not within the contemplation of the author of the wrong, and are only affected consequentially by it, society could not move on upon any principle that would allow them to interfere, forensically, in such cases. I ruled this doctrine in a case at Sumter, some years ago, (perhaps 1849,) between the Bank of Camden and Stuckey, and have seen no reason since to change my opinion.

I am, then, no more at liberty, in this Court, where Pettus comes to enforce his judgment, to look behind it into the validity of the contract on which it was founded, than was the Law Court, in this State, when he sued before them upon his Florida judgment.

Then, to take up the purchase set up by Charles Smith. Regarding this transaction in the abstract light of a mere purchase, and not, for the present, as a means afforded to clear out the property from Florida, and beyond the scope of Pettus's approaching judgment, I can have no hesitation, under the evidence, to pronounce it colorable. Independently of the statute of Georgia, where the transaction took place, [See 2 Kelly R. 1,] the circumstances stated by the witnesses, and which I need not recapitulate, impress

that character upon it. The witnesses are not impeached, and I have no official right to disregard their testimony; and, if that testimony be true, there can be but one opinion, it appears to me, upon the subject.

But, if this were doubted, and even if it appeared that a real change of property was intended, still it is very plain, that the purchase was made to enable Thomas Smith to remove his property out of the way of the coming judgment. In such cases, it matters not whether a consideration, and even a full consideration, (*Lowry v. Pinson*, 2 Bailey Rep. 328 [23 Am. Dec. 140].) was paid for the property or not. Where there is *prima facie*

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evidence of bona fides, though *a full consideration be not paid, that circumstance is immaterial, and cannot shake the contract, unless the consideration is so insufficient as to refute the *prima facie* evidence of fairness. (*Ryan v. Bull*, *Jamison v. Keitt*, 3 Strob. Eq. 93.) And so, on the other hand, where there is evidence of intentional fraud, a party cannot rescue the transaction from its true character or its consequences, by paying a full price, though a full price, by itself, be good evidence of fairness.

I held in *Pickett v. Pickett*, (2 Hill Eq. 471,) that the assisting a debtor to remove his property, so as to obtain an advantage out of that property, was a fraud, relievable in this Court; and I held that the party should be deprived of the advantage he had obtained. The advantage acquired in that case was a preferable lien; just as in this case. And, if it be a fraud to remove property out of South Carolina, and subject it to a lien created to take priority of liens existing here, is it less a fraud to bring property from another State into this, with a similar purpose?

If the only wrong consisted in the colorable purchase, a recent decision of the Court of Errors, (*Johnston v. Bank*, 3 Strob. Eq. 330,) says that the only consequence of setting the purchase aside is, that the wrongdoer shall still be allowed to come in, with other creditors, with whatever demands he may have, (of course according to priority of lien,) to be paid out of the property considered as the property of the original owner. I should be bound to apply the doctrine of that case to a similar case; and this would be a similar case, so far as Charles Smith is concerned, if his whole offence consisted in taking a colorable conveyance.

But, in my view, that was not the limit of his offence. It consisted in depriving Pettus of his lien in Florida, and bringing the property clandestinely within the scope of another and preferable lien of his own.

Just as in *Pickett v. Pickett*, this new lien did not exist at the time the property was translated. But the history of the events satisfies me that it was in contemplation. If

the colorable bill of sale would not suffice—if

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that was endangered—if the property *should be challenged as really Thomas Smith's—then, at the worst, it was to be made liable to Charles.

Now, to such a case as that, I imagine the doctrine of the case to which I have referred, was never supposed by any person to be applicable. There is no way of undoing the fraud in such a case but by a decree that the lien, within the scope of which the property was improperly brought, shall be postponed. The very essence of the fraud is in the attempt to subject the property to that lien; and if, while you censure the fraud, your decree gives efficacy to the lien, it confirms and effectuates the wrong.

I suppose, then, that the judgment confessed to Charles Smith should be postponed, until Pettus obtains satisfaction of his debt. And this opinion would not be altered by the admission made at the hearing, that that confession was taken for a debt really due to him.

My decree would be different with respect to the judgment confessed to Lucy Smith. It is not only admitted that this confession was taken for a debt really due, but there is not a shadow of proof calculated to excite even a suspicion that either she or her agent—now her executor—had any connexion with the transfer of the property of Thomas from Florida to South Carolina. Aitken ads. Bird, (Rice Eq. 73.)

I have thus indicated what would be my decree if the bill of Pettus were the only one before me.

But, when I turn to the cross bill, I find a case which, in my judgment, totally supercedes such a decree.

The case which it presents is shortly this: Thomas Smith purchased from Pettus, at the price of \$10,500, a body of land, supposed to lie within the county of Jefferson, in Florida, to only a portion of which Pettus had an existing title. The purchaser paid two thousand dollars of the price in cash, and gave his three notes for the residue, which was \$8,500, due in one, two and three years, and was let into the possession. By the contract, titles were not made, but Pettus was to perfect his title and make a conveyance.

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*The valuable land, which was the object of the purchase, lay towards the Georgia line. It turned out that it lay within the limits of Georgia, and she ran her State line so as to include it. Smith was evicted and lost the land; leaving in his hands a poor and comparatively worthless portion, lying in Florida. Pettus sued him on the notes as they became due. He set up, by way of discount, the land which had been lost, and thus defeated the two first notes. The last note was in suit, when Thomas Smith removed his negroes, (as has been stated,) tendered back

the possession, and abandoned the land. On that note Pettus recovered his Florida judgment. Under it, he sold the land abandoned by Smith, purchased it himself, and is now in possession. It is with that judgment he has followed Smith, and obtained his judgment in Abbeville.

The cross bill is filed for a rescission of the contract. It is filed by the widow and administratrix of Thomas Smith. His other distributees are not parties.

I have hesitated, not whether the contract should be rescinded, but whether the proper parties for a rescision were before the Court. But my impression is, that as the title was never in Thomas Smith, and never descended to his distributees; and as the title for so much as Pettus ever owned, or could have conveyed, is still in him; there is no need for a re-conveyance on the part of the vendee or his heirs; a rescision may be decreed at the instance of the personal representative, who is competent to reclaim so much money as has been paid on the contract of purchase.

On the merits of the application, I do not hesitate. Nothing adverse to the right of rescision is concluded by the judgments. The judgment here only affirms that the judgment in Florida is a good legal judgment; not liable to any defence at law. It cannot be opened or re-examined upon any point of law; nor can any matter, which could have been urged in a Court of Law, or noticed by a court of law, to prevent its being obtained, be now urged against it.

It may be affirmed, in short, that no mat-

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ter or question, of *which Courts of Law have jurisdiction, can be now set up either against the Florida judgment, or that by which it was renewed in this State. All such matters and questions are covered and concluded by those judgments as *res judicata*.

But no matter can be *res judicata*, or concluded as such, of which the Court from which the record comes has not jurisdiction or cognizance. Where there is no jurisdiction there can be no adjudication, express or implied.

And this may be unhesitatingly affirmed of Courts of Law in relation to this question of rescision. The Courts cannot have decided that the circumstances did not authorize a rescision, or that the vendee had no right to one, because the question could not be made before them.

So far from the judgments of the Courts of Law in Florida having prejudiced this right, the right arises in consequence of their decisions, and is confirmed by them.

It is by the solemn judgments of those Courts that we learn that the purchaser has lost, and been evicted from the real objects of his purchase. That is decided, and decid-

ed between these parties, and it is conclusive of the fact, as between them.

This purchaser is not bound to abide by the remnant of his purchase.

It is decreed that the contract of purchase of the said land, referred to in the pleadings, be set aside and rescinded; that John G. Pettus, the vendor, do account for such sums of money as he may have received upon said purchase, (with interest according to the laws of Florida;) and that the administratrix of Thomas Smith do account for the rents of said land while in his occupation; and that these two be set off, one against the other, and the balance struck and reported by the commissioner.

It is ordered that the said John G. Pettus be restrained from enforcing his judgments, mentioned in the pleadings, until the further order of the Court, upon the coming in of the report, when a final decree may be proposed. The question of costs reserved until that decree is made.

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*J. G. Pettus, complainant in the first and defendant in the second of the above cases, appealed from the decree of the Chancellor in said cases, and moved this Court for the reversal of the same and for a decree in his favor, upon the following grounds, to wit:

1. Because the Florida judgment was conclusive as to all matters embraced in complainant, Eliza Smith's bill for relief.

2. Because the agreement or contract between the parties has been executed, or so far executed and adjusted between them, that this Court cannot now consider and review the same for the purpose of rescision, as the parties cannot now be placed in statu quo.

3. Because the agreement or contract has been affirmed by the complainant, Eliza Smith's intestate, and no longer is open and subject to litigation in this Court.

4. Because Thomas Smith, complainant's intestate, by electing his remedy and his forum, and by other circumstances, has waived and lost his right to a rescision of the contract, or to any other relief to be had in this Court.

5. Because by laches and inequitable conduct, Thomas Smith, the intestate, deprived himself of the interposition and aid of this Court.

6. Because complainant's intestate, Thomas Smith, has been guilty of such fraudulent acts in conjunction with Charles Smith, as precludes his administratrix, the complainant, from obtaining relief in this Court by rescision or otherwise.

7. Because Charles Smith, substantially and in fact, being the party asking for the rescision prayed, and who alone will be benefited by it, and who is a fraudulent purchaser, colluding with the said Thomas in the fraud, this Court will not exert its ordinary

or extraordinary powers in his behalf and for his benefit.

8. Because there is no equity in complainant Eliza Smith's bill, and the decree is generally against the principles of law and equity, as well as the testimony of the case.

9. Because the Chancellor, in his decree,

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directs J. G. Pettus *to account for the cash payment he received from Thomas Smith on the contract, with interest, while the administratrix of Thomas Smith is only required to account for the rents of the land while in his, Thomas Smith's, occupation. Whereas, the decree should have directed, in the event of rescision, not only that Pettus should account for the judgments he recovered against Thomas Smith, and the cash he received in payment on the contract, but that Eliza Smith, administratrix, should account for the judgment her intestate recovered from Pettus in the suit on the bond for titles, and also for the full value estimated at the time of purchase of the tract of pine land, containing 280 acres, to which Pettus made Smith good titles, and which was sold by the sheriff of Jefferson county, Florida, in 1846, to pay outstanding and older judgments than Pettus' against the said Thomas Smith.

Noble, Thomson, for appellant.
Perrin, McGowen, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. It appears that I overlooked a fact in my circuit decree, upon which the whole case must turn.

I supposed that T. Smith had defended himself against the actions brought by Pettus upon his two first notes, by setting up the value of the land which he lost, by way of discount. A fuller examination of the evidence shows that this was a mistake. When sued on the notes, he sued Pettus on the bond for titles; and obtained judgment for the value of the land taken off. This judgment exceeded the amount of the notes sued on; and after setting it off against the recovery of the notes, he compelled Pettus to pay the excess, amounting to about \$2,500.

It appears to the Court this was an affirmation of his contract, and he was not at liberty afterwards to rescind it.

It is not necessary to multiply authorities on this point. The doctrine is well expressed in *Brown v. Witter*, (10 Ohio R. 142): "A purchaser, from a vendor, who cannot

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make a title, has his choice of *remedies. He may sue at law to recover damages for the nonperformance of the contract; or, he may seek, in Chancery, a specific performance, as near as the vendor is capable of performing; or he may rescind, by an action at law for the purchase money; or in a

bill in equity. He cannot do both. He must select one of the alternatives, either to enforce or rescind."

It appears to the Court that when the vendee in this case discovered the defect in his vendor's title, and his inability to make a good conveyance of that portion of the land which constituted the great object of his purchase, he was then in a condition which enabled him to elect, and bound him to elect, either to enforce his contract or rescind it. He enforced it by claiming and collecting by process of law, damages in place of the land taken off; and retaining his conveyance of that which had been conveyed to him. By this means he obliged himself to take the vendor's conveyance for such portion of the land not taken off as remained to be conveyed.

Besides, if he were not absolutely concluded by this election, the delay in demanding a rescision even after he was sued in this State, would go very far to impair his right to such a decree.

We are all of opinion that the decree made for a rescision in this case should be set aside; and it is so ordered and decreed.

We are satisfied that the decree which the Chancellor indicated, as the one he would have made upon the bill of Pettus, if no cross-bill had been filed, is the proper one.

It is said, however, that in setting aside Charles Smith's purchase of the negroes, he should be allowed a lien for the amount paid on Bellamy's mortgage. We are of opinion that though the purchase is good, as between Charles and Thomas Smith, and that therefore Charles will be entitled to claim that amount, and indeed the whole balance which may arise from the negroes, after payment of other debts; yet as between himself and the creditors suing him, he is not entitled to any reimbursement of the amount thus expended. This is not a constructive or implied fraud; but actual *dolus malus*. The sum was

expended as a *means of getting the property out of Florida, for the purpose of evading Pettus' claim and obtaining a preferable lien; and certainly an expenditure for the purpose of forwarding a fraud, is not a suitable lien on the fund or property abstracted from the creditors defrauded.

It is ordered that the cross-bill be dismissed.

That the purchase by Charles Smith of the negroes mentioned in the pleadings in the other case, be set aside, as against the creditors of Thomas Smith.

That Charles Smith deliver up such of said negroes, with their increase, as he has not alienated, to be sold by the commissioner; and that he account for their reasonable hire since his said purchase. That he also account for the value of such of the said negroes as he has alienated, with hire up to the time of alienation, and interest afterwards.

That out of said sales, hire and interest, the several judgments subsisting against Thomas Smith, be paid according to their legal priority, excepting that of Charles Smith, which must be postponed until the rest are satisfied.

That said Charles Smith do pay the costs of the parties to the suit instituted by Pettus.

And that, if there remain any of the proceeds of said slaves, hire and interest, the same be paid to said Charles Smith.

Ordered that the matters of account be referred to the commissioner, with leave to report any special matter.

Also, ordered that the parties have leave to apply, at the foot of this decree, for any further orders that are or may become necessary in the case.

DUNKIN, DARGAN and WARDLAW, CC., concurred.

Decree reversed.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT CHARLESTON, S. CAROLINA—JANUARY TERM, 1852.

CHANCELLORS PRESENT.

HON. JOB JOHNSTON,

“ B. F. DUNKIN,

“ G. W. DARGAN,

“ F. H. WARDLAW.

4 Rich. Eq. *213

*R. G. NORTON, Ordinary, v. LEGATEES
AND CREDITORS OF S. R. GILLI-
SON, Deceased, et al.

(Charleston. Jan. Term, 1852.)

[*Executors and Administrators* ⇨ 495.]

Under the 7th section of the ordinary's Act of 1839, the ordinary is entitled “to five per cent. of the value of the estate,” taken charge of by him as derelict, only when he has performed the duties prescribed in that section. Where, instead of selling the whole estate, paying the creditors, and depositing the net balance in bank, he applied to the Court for instructions, and, by order of the Court, sold so much of the estate only as was necessary to pay the debts;—*held*, that he was entitled to five per cent. of so much of the estate as he had sold and no more.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2089–2106, 2108; Dec. Dig. ⇨ 495.]

[*Executors and Administrators* ⇨ 496.]

Where the ordinary takes charge of, and administers the estate of a testator, under the Act of 1846, he is not entitled “to five per cent. of the value of the estate;” he can claim only the commissions of an executor under the Act of 1789.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2111; Dec. Dig. ⇨ 496.]

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*Before Dunkin, Ch., at Beaufort, February, 1851.

Dunkin, Ch. Samuel R. Gillison left a will devising and bequeathing his estate to

his widow and children, in the proportions and with the limitations therein specified. His son, Thomas S. Gillison, and the Hon. W. F. Colcock, were appointed executors, the former of whom qualified and the latter renounced.

Thomas S. Gillison has since died intestate. The ordinary has taken charge of both estates as derelict.

The personalty of Saml. R. Gillison was appraised at one hundred and eight thousand three hundred and ten dollars sixty-six cents. The real estate consisted of several plantations, the value of which does not appear. Among other provisions of the will was the following, viz: “To my son Thomas, I give, devise and bequeath an equal share of my negroes, &c.; also, the sum of five thousand dollars, if so much be necessary, to be raised (if no cash is on hand at my death) by keeping all my estate together, except what is given to my wife, until that sum can be realised from the planting income. To have and to hold the said negroes, other personal property and money, on the following trusts, that is to say:—In trust to invest the said money, if so much be necessary, in the purchase of a plantation, to be held and managed by him, &c., in trust for the sole and separate use of my daughter, Adela, (Mrs. Lartigue,) and the issue of her present or any future marriage.”

The testator died in 1847. At the last

sittings of this Court, it seems that an order was made, that the ordinary should sell so much of the testator's estate as would pay his debts and raise the sum of five thousand dollars bequeathed, in trust, for Mrs. Lartigue. The ordinary has reported a sale of personally amounting to \$27,008, and of realty to the amount of \$785, altogether \$27,793. From this sum he has deducted auctioneer's commissions, amounting to \$694.83, and he claims to deduct a further commission of five per cent on the whole value of the testator's personal estate, \$108,310.66, and also on so

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much of *the real estate as he had sold, this five per cent, amounting, by his statement, to the sum of \$5,447.78. It will thus be perceived, that from the sales made under the order of this Court, amounting to \$27,793, a deduction for commissions is claimed of \$6,144.61, nearly one-fourth of the sales, and the counsel for the ordinary, in his argument, insisted that the claims for commissions had been considerably understated; and if the argument is sound, the Court is of opinion that the deduction is legitimate.

It is said, that the Act of 1839, allows the ordinary, as a compensation, five per cent. of the value of the estate; that the Act of 1846 is only amendatory of the Act of

(a) In the case *EX PARTE NORTON*, the circuit decree is as follows:

DUNKIN, Ch. The petition states that Mary A. Roberts died intestate, on the eighth day of October, 1850; that the intestate owned considerable personal estate, and, among the rest, eighteen slaves, appraised at five thousand six hundred dollars, besides perishable property, appraised at ten hundred and fifty-five dollars; that on the eleventh day of October, the petitioner took possession of the estate as derelict, under the provisions of the Act of 1839; that he has sold the perishable property for eleven hundred and forty dollars—he believes this sum will be more than sufficient to pay all the debts of the intestate. The petitioner further states, that the six months during which he is required by the Act to keep the estate together, will not expire until three days after the sale day in April. The prayer of the petition is, that permission may be granted to sell the estate on the sale day in April, and that the petitioner may be permitted, after due notice, to make distribution of the proceeds of the sale amongst the parties entitled thereto.

The Act of 1839 provides that where any estate shall be left derelict, the ordinary shall collect and take charge of the same for the period of six months, after which time, if administration shall not be sooner applied for, he shall sell the same, after due public notice, either for cash, or upon a credit of six months, and after payment of the debts of the deceased, shall deposit in the Bank of the State of South Carolina, or in some one of the branches, the net proceeds, to the account of the estate to which it belongs, and shall file in the office of the Clerk of the Common Pleas of his district, a certificate of such deposit; and to the end that he may so collect such estate and effects, he shall have power to institute and maintain all necessary legal proceedings; and, for the services aforesaid, he shall be entitled to five per cent. of the value of the estate.

It is quite manifest that the Legislature contemplated that but few estates, and those of in-

1839, and that the same commission should be allowed. In the case of *Ex parte R. G. Norton*, ordinary, in the matter of Mary A.

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Roberts's estate, (a) *to which I refer for my views of these Acts, I have said that the Legislature never contemplated that such estates as this would be derelict. If Samuel R. Gillison had died intestate, the ordinary, by the Act of 1839, would take charge of his estate, sell the whole of it in six months, deposit the proceeds, probably, amounting to one hundred and forty thousand dollars, in bank, and for this service claim a commission of seven thousand dollars, (not to mention the three thousand five hundred dollars which he now insists to deduct for auctioneer's commissions). He has no judgment to exercise, no responsibility to assume. He has not even the trouble to look out for a purchaser. He receives seven thousand dollars for doing what the best broker in

considerable amount would fall under the charge of the ordinary as derelict; it is manifest, among other things, from the small amount of the ordinary's bond, and the liberal amount of commissions allowed. The experience of a very few years, however, has exhibited an entirely different result from that which was anticipated. The ordinary of Beaufort district gives bond in ten thousand dollars, according to the first section of the Act of 1839. A single estate of which he has charge as derelict, was sold for upwards of one hundred and twenty thousand dollars, on which he is supposed to be

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entitled to a commission of *five per cent. In several of the districts, a large portion of the estates are becoming derelict. Mrs. Roberts died intestate on the 8th October. Three days afterwards, her estate was in the hands of the ordinary as derelict.

But the Legislature have vested no authority in the ordinary to make distribution of an intestate's estate. They have prescribed certain duties which he is to perform, and his functions then cease. The Act directs that, after the sale of the estate, he shall deposit the proceeds in bank, and file a certificate of deposit with the Clerk of the Common Pleas.

What authority has the Court of Equity to declare that the Ordinary shall disregard these plain provisions of the Act? Even where a will was left, directing the testator's estate to be divided among his widow and children, and the estate was in charge of the ordinary as derelict, he was obliged, under the Act of 1839, to sell the whole estate and deposit the proceeds in bank. To provide for this evil, the Act of 1846 was passed. The Court had no power to interfere. But the Act of 1846 is restricted to the particular case and it is well known, in the history of the legislation on this subject, that an amendment to extend the provision to cases of intestacy was voted down almost unanimously.

It is very apparent that the legislation, on the subject of derelict estates, requires material revision, but any irregular interference on the part of the Court will only tend to aggravate the evil.

In the petition before the Court, the ordinary requires no direction. The provisions of the Act are plain and simple, and he has only to pursue them. I think the petition must be dismissed; but I recommend that an appeal be taken, in order that the construction of the Act of 1839 may be authoritatively settled.

Charleston would, probably, gladly do for one-seventh the amount.

But I think the Act of 1846 was only intended to apply where the provisions of the will were simple. In order to administer the estate according to the provisions of the will, the ordinary is, by that Act, vested with all the powers, and subject to the same liabilities as an executor.

No provision is made for commissions where

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the bulk of the estate, as in this case, consists of lands and negroes disposed of by the will—no executor was ever supposed entitled to commissions on assenting to the legacies, or on delivering over the negroes, &c. Yet the ordinary claims five per cent. on the appraised value of the entire personal estate. When the provisions of the will are complex, and the ordinary finds it necessary to apply to the Court of Equity, I think, as in the case of an administrator asking aid in the administration of assets, the Court having all the parties before it, should take charge and administer the funds, or cause distribution to be made according to its decree.

But the Act of 1839, in allowing five per cent. on the value of the estate, contemplates that the whole estate will be sold by the ordinary, and after payment of debts, the proceeds be deposited in bank. It is a commission on the sale and payment of the fund. I have not before me the amount of the disbursements in debts, &c., to be made by the ordinary. But I think the five per cent. must be allowed only on the moneys actually received and disbursed by him, and that this must cover all charges for auctioneer's commissions, &c.

The next question relates to the provision for Mrs. Lartigue. It is not a bequest of five thousand dollars, but a direction that the trustee should receive so much of that sum as should be necessary for the purchase of a plantation, to be held "for her use," or that entire sum, "if so much be necessary," and, if no cash is on hand, the testator directs "his estate to be kept together until that sum can be realised from the planting income." If the directions of the testator had been pursued, and at the expiration of two or three years five thousand dollars had been realised from the planting income, and invested by the trustees in a plantation of that value, it would seem that the object was accomplished and the provision satisfied. If the testator had directed that two hundred dollars, if so much be necessary, be invested in the purchase of a gold watch and trinkets for his daughter, this is equivalent to a bequest of a gold watch, &c., of about that value. The testator seems himself to have contemplated that there might be delay in

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*raising the necessary amount. He directs his "estate to be kept together until that sum

can be realised from the planting income." I adopt the conclusion (but not without hesitation) that the exception must be overruled.

It is ordered and decreed, that the debts of the testator, as reported, be paid, and that the account be affirmed or reformed, according to the principles herein stated.

The complainant appealed, on the ground:

Because he says that he is entitled to five per cent. commissions upon the whole personalty of the estates, and to five per cent. upon so much of the real estate of Thomas S. Gillison, as he sold under the order of the Court.

And the defendants, Isadore Lartigue and wife, also appealed:

Because, they say, they are entitled to interest on the legacy of \$5,000 bequeathed to Mrs. Lartigue by the will of Samuel R. Gillison, and his Honor erred in deciding otherwise.

Hutson, for complainant.

Treville, Fickling, for defendants.

The opinion of the Court was delivered by

WARDLAW, Ch. After partial administration of the estate of Samuel R. Gillison, deceased, under his will, the executor, Thomas S. Gillison, died intestate; and the plaintiff, as ordinary, took charge of the estates of testator and executor, as derelict. The appeal on the part of the plaintiff involves the extent of compensation to which an ordinary is entitled, in charge of derelict estates of a testator and of an intestate. It is clear that a public officer can claim no other compensation for the discharge of duties imposed upon him by the Legislature, than such as the Legislature chooses to allow. Admitting this principle, the counsel for the plaintiff insists, in argument, that under our Acts of Assembly, an ordinary in charge of derelict estates is entitled to five per cent. of the value of the whole estates; although, in this particular case, the ordinary may have waived, by the pleadings, his title to five per cent. on the realty not sold.

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*The 7th section of the ordinary's Act of 1839 (11 Stat. 40) provides, that, "In case any estate shall be left derelict, either from partial administration by an executor or administrator, or by reason of no application for letters of administration or letters testamentary, or otherwise, the ordinary of the district, who might be entitled to grant such letters, shall collect and take charge of the same for the period of six months; after which time, if administration be not sooner applied for, he shall sell the same, after due public notice, either for cash or upon a credit of six months, and after payment of the debts of said deceased, shall deposit, in the Bank of the State of South Carolina, or in some one of its Branches, the net proceeds, to the account of the estate to which it be-

longs; and shall file, in the office of the clerk of Common Pleas of his district, a certificate of such deposit; and to the end that he may so collect such estate and effects, he shall have power to institute and maintain all necessary legal proceedings; and for the services aforesaid, he shall be entitled to five per cent. of the value of the estate."

The Act of 1846 (11 Stat. 357) authorizes the ordinary to sell the perishable property and effects of derelict estates, without retaining possession of such perishable property for six months before sale; and further provides, that if the deceased owner of a derelict estate has left a will disposing of his estate, the ordinary in charge of such estate shall administer the same according to the provisions of such will, and for that purpose, that he "shall be invested with all the powers and authorities and be subject to all the liabilities, which may be necessary for carrying such will into effect, in the same manner as if he had been duly nominated and appointed executor thereof."

By the express terms of the Act of 1839, which originally applied to the derelict estates of testators as well as of intestates, the compensation to the ordinary follows the discharge of prescribed functions. He is required to take charge of a derelict estate for six months; then, to sell the same, pay the debts of the deceased, and deposit the balance of

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the proceeds in Bank;" "and for the services aforesaid," he becomes entitled to five per cent. of the value of the estate. The reward cannot be claimed where the services are not rendered. The compensation to the ordinary allowed by the Act, is analogous to the commissions of an executor. For receiving the proceeds of sale and paying the same over to creditors or into the Bank, the ordinary is allowed to claim five per cent. of the estate. In the present case, so far as respects the estate of Thomas S. Gillison, who died intestate, the ordinary, instead of selling the whole estate, paying the creditors, and depositing the net balance in Bank, has filed his bill in this Court, for instructions, making the distributee of the estate a party, and by the order of the Court, he has sold so much of the estate only as was necessary to satisfy creditors. He has relieved himself from responsibility, by voluntarily submitting the administration of the estate to this Court. Under such circumstances, we are of opinion that he is entitled to five per cent. of so much of the estate as he has sold and no more.

The claim of the ordinary, however, is principally connected with the estate of the testator, Samuel R. Gillison. His compensation as to this estate depends upon the construction of the Act of 1846. That Act is substantially a repeal of the Act of 1839, as to the services and compensation of the ordinary, where the deceased owner of the

derelict estate has left a will. The ordinary, instead of pursuing a fixed routine of duties for which a fixed compensation is given, is directed to execute the will of the deceased, with all the powers and liabilities of an executor named by the testator, without any express mention of compensation. His functions must vary according to the caprice of testators in the dispositions of their estates, and it appears reasonable that his reward should vary according to his services. He is to be regarded as a statutory executor, with the responsibilities and emoluments of an ordinary executor. If the estate be small and the provisions of the will be simple, his trouble and his remuneration will be small; if the provisions of the will be complicated, he may apply, as any other executor, to this Court for instruction; and if his commissions

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be *inadequate compensation for extraordinary services, he may make up an issue in the Common Pleas, as other executors, for extraordinary compensation.

We are of opinion, that by the fair intentment of the Act of 1846, the ordinary, when invested with the powers and liabilities of an executor, is entitled to claim the commissions of an executor under the Act of 1789; but that the pretension is groundless for a compensation of five per cent. on the value of the estate, which is not received and disbursed. It was never supposed that an ordinary executor was entitled to commissions on the value of the estate, real or personal, delivered to specific legatees.

There is no appeal from so much of the Chancellor's decree as refuses to allow to the ordinary the auctioneer's commissions which were claimed; but to guard against misconception, it is proper to mention, that the services as auctioneer were rendered by the plaintiff himself, or by some member of a mercantile firm of which he was a partner.

The remaining question in this case is upon the appeal of the defendants, Isadore Lartigue and wife, as to interest upon the legacy of \$5,000 to Mrs. Lartigue.

It is considered safer to reserve the decision upon this point until we have fuller information upon the facts. Granting that the bequest in trust for Mrs. L. is a general, pecuniary legacy, and by the general rule entitled to interest from a year after testator's death, still it is suggested to us, that circumstances controlling the general rule as to interest, may exist as to this legacy, at least as to a portion of the arrears. It is said, that the sum of this legacy was some time ago set aside in the administration of this estate, under the direction of this Court; and that this sum has been since unproductive. This may bear upon the interest for a time. It may also be desirable to know when the devisees of testator entered upon the enjoyment of their lands. Inquiry and report by the commissioner will bring out the facts

necessary to the final decision of the question.

It is ordered and decreed, that the circuit
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decree be affirmed as to the compensation of the ordinary, and that the appeal of the plaintiff be dismissed.

It is further ordered, that the cause be remanded to the circuit Court, so far as the claim of Isadore Lartigue and wife for interest upon the legacy to Mrs. Lartigue is concerned; and that the commissioner of this Court for Beaufort district be directed to inquire and report as to all the facts connected with said legacy: with leave to report any special matter.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

4 Rich. Eq. 222

REBECCA THORNE v. RICHARD FORDHAM.

(Charleston. Jan. Term, 1852.)

[Wills ⇨ 747.]

Testator bequeathed all the rest of his estate unto R. F. "in trust for John, Thomas, Philip, Rebecca, Caroline and Susan Thorne, persons of color, and their heirs, forever." Testator died in 1824; and in 1848 this bill was filed by Rebecca, the black, mother of the legatees, John, Thomas, Philip, Caroline and Susan, who were the natural children of testator, against R. F., claiming that she was entitled to the legacy to the Rebecca, named in the will. Her claim was resisted in behalf of Rebecca, the brown, (daughter of Judy,) who was an infant at the date of the will, and whom the testator also claimed to be his natural child. Upon the evidence given, and principally upon her own acts recognizing the title of Rebecca, the brown, and her long acquiescence, *held*, that plaintiff was not entitled to the legacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1932; Dec. Dig. ⇨ 747.]

Before Dunkin, Ch., at Charleston, July, 1850.

This case will be sufficiently understood from the opinion delivered in the Court of Appeals.

Torre, for appellant, cited *Nourse v. Finch*, 1 Ves. jun. 358; *Careless v. Careless*, 1 Meriv. 384; *Wigram*, 15; 4 *Howard*, 561; 6 *Wheat*, 481; *Hovenden v. Annesly*, 2 Sch. and Lef. 429; 2 *Clark & Fin.* 429; *Pickering v. Stamford*, 2 Ves. jun. 272, 581.

Northrop, Petigru, contra, cited *Fable v.*

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Brown, 2 Hill, Ch. *378; *Lenoir v. Sylvester*, 1 Bail. 632; *Linam v. Johnson*, 2 Bail. 135; Act 1841, 11 Stat. 154.

The opinion of the Court was delivered by

WARDLAW, Ch. John Stocks Thorne, by his last will and testament, executed August 11, 1824, appointed Richard Fordham executor of his will, and after a specific devise dis-

posed of his estate as follows: "All the rest of all my real and personal estate I give unto Richard Fordham, to be held in trust by him for John, Thomas, Philip, Rebecca, Caroline and Susan Thorne, persons of color, and their heirs forever, to be applied to the sole use and benefit of them, the said John, Thomas, Philip, Rebecca, Caroline and Susan." The testator died the next day after the date of his will.

The plaintiff is a black woman, the mother of the legatees, John, Thomas, Philip, Caroline and Susan, who were recognized by the testator as his natural children. She was formerly the slave of the testator; was emancipated by him in 1811, and was afterwards called by the name of Rebecca Thorne.

Her title to the legacy is resisted in behalf of another Rebecca, a brown woman, sometimes called Rebecca Thorne and sometimes Rebecca Fordham. Her mother was Judy; and to be her father seems to have been claimed by both testator and executor. Judy and her child Rebecca were bought as slaves by the testator, November 18, 1817, for \$700; and they were transferred by him, November 27, 1817, to his friend Fordham, on a nominal consideration. Rebecca, the brown, was always practically free; and in 1846 she established her freedom against Fordham in the Court of Law, by process de homine replegiando. It seems that she lived in the family of the plaintiff in early life until March 8, 1825, when she was removed to the house of another woman of color. She was maintained and educated and otherwise treated as the legatee, without any adverse claim, until about the time of filing this bill, which was on April 22, 1848, although the executor has not paid over the principal of this share of the estate.

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*The plaintiff, Rebecca, the black, relies principally upon the facts, that, at the date of the will and of the testator's death, which may be considered for this purpose cotemporaneous, she had acquired by reputation the name of Rebecca Thorne, by which the legatee is described in the will; and that she was then free, and capable of taking on the terms of limitation in the will to her and her heirs; and she urges that the other claimant was not, at the date of the will, known as Rebecca Thorne, and that in fact she was a slave, and incapable of taking to herself and her heirs.

The proof is clear of the title of the plaintiff to freedom and to the name of Thorne; but it is not decisive against the equal claim, in these particulars, of Rebecca, the brown.

The question, whether Rebecca, the brown, was a free person at the death of the testator, is immaterial, except as the fact may operate upon the meaning and application of the terms of the will describing the object of testator's bounty. Granting that she was

then a slave, she might still be the person described in the will as legatee, and until the Act of 1841, might take the legacy, with the assent of the executor; if not for her own use, for the benefit of her master; and the limitation of the estate to heirs, where a slave and free persons are named together, has no appreciable effect in ascertaining the meaning of the terms designating the legatee.

Unfortunately for the plaintiff, she is the strongest witness for her adversary. Independent of her acts and declarations, it would be difficult, probably from the youth and obscurity of the party, to find in the proofs, distinct evidence that Rebecca, the brown, had acquired the name of Thorne at the death of the testator, although she has been so designated for more than twenty years. Immediately after the death of testator, namely, August 14, 1824, plaintiff gave a receipt to Fordham for \$15 for the use of the children of testator, describing therein Fordham as "trustee for my children, John, Thomas, Philip, Rebecca, Caroline and Susan Thorne, as per the will of their father, John S. Thorne." At the same time she signed an

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acknowledgment of having *received from Fordham, "trustee for the children of the late John S. Thorne, for the use of said children," various articles of apparel, a watch, umbrella, &c. On August 24, 1824, she signed a receipt to Fordham, "trustee for the children of the late John S. Thorne, viz: John, Thomas, Philip, Rebecca, Caroline and Susan, as per the will of their father," for \$102.50, "to purchase mourning for the female children." On October 8, 1824, she gave another receipt to Fordham as trustee for the children of \$50 for their support; and from November, 1824, to March, 1825, she gave monthly receipts of \$30 for support of the children. On May 10, 1825, she entered into an agreement with Fordham "as trustee for the children of the late John Stocks Thorne" "to attend to the ease and comfort of said children, viz: John, Thomas, Philip, Rebecca, Caroline and Susan," in consideration of \$20 to be paid to her monthly; and from April, 1825, until September, 1844, inclusive, she gave monthly receipts to the defendant as trustee for Thorne's children, at the rate of \$5 for each of the children who were with her; and also for the greater part of the time gave like receipts of \$5 a month for her wages in attending to the children. On October 1, 1844, she accepted a conveyance for her life of a house and lot in Boundary street in this city, from John, Philip, Rebecca, the brown, Susan and Caroline, (Thomas being then dead,) in and by which conveyance the grantors designate themselves by the name of Thorne, and as children of the testator, and devisees of said house and lot under his will, and convey the premises to their "mother, Rebecca Thorne," as a residence for life.

Rebecca, the black, is unlettered; and the fact, that she is mentioned in this deed of conveyance and in the earliest receipt, as mother of the other Rebecca, is urged as proof of fraud on the part of the defendant. It is more natural, however, to attribute this mistake to the ignorance of the scrivener. Two of the witnesses, Whitney and Addison, seem to have fallen into the same error. An appellate of kindred is often bestowed where there is no consanguinity under such

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circumstances as existed in *this case. These acts of the plaintiff having almost the force of an estoppel, with the additional fact of her acquiescence for twenty-four years, are serious obstacles to her claim. If the terms of the will describing the legatee applied certainly to her alone, we should not hold that the technical trust between executor and legatee was barred by the statute of limitations or by lapse of time, while the executor acknowledges that the legacy is unsatisfied, and that he retains in his hands assets of the estate to the amount of the legacy. But much suspicion is properly thrown on the plaintiff's case by her great delay in the assertion of her claim and by her recognition of another's title. As the evidence now stands, the case may be regarded as one of what Lord Bacon calls "equivocation," where the words describing the legatee apply equally to two persons; and in that state of things parol evidence is admissible of the declarations of the testator, at least at the time of making his will, and of extrinsic facts serving to point the application of the terms of gift. (*Gord v. Needs*, 2 Mees. & W. 149; *Hiscocks v. Hiscocks*, 5 Mees. & W. 363; *Careless v. Careless*, 1 Mer. 384.) But the course of the plaintiff, continued for so long a time, has been calculated to disarm the adverse claimant, and obstruct her proofs. Who can tell, if this pretension of the plaintiff had been set up within reasonable time, while the witnesses who attested the will, and others who were intimately acquainted with the testator's affairs, were in life, that full and explicit proof of the title of Rebecca, the brown, may not have been given? Claimants are not to be encouraged to speculate upon the obscurity which time may produce in stale transactions.

The order in which the name of Rebecca is inserted among the legatees is a circumstance not conclusive, but of some weight against the claim of the plaintiff. It is very unusual, in the enumeration of a mother and her children to set down the name of the mother in the midst of those of her children.

So, too, the description in the will, of Rebecca, and the other legatees, as "persons of color," is a pretty strong circumstance

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against *the plaintiff. It is not according to the use of language in this region to speak of one altogether black as a person of color.

The phrase is almost exclusively applied to one of mixed blood and color.

Every one who makes a claim in Court is bound to establish his title to the satisfaction of the tribunal. In this case we are not satisfied with the showing of the plaintiff.

These views relieve us from the determination of the question as to the effect of the answer, setting forth certain declarations of intention by the testator, before and after making the will.

It is ordered and decreed, that the circuit decree be affirmed, and the appeal be dismissed.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

Appeal dismissed.

4 Rich. Eq. 227

SIMON VERDIER v. WILLIAM B. FOSTER.

(Charleston. Jan. Term, 1852.)

[*Creditors' Suit* Ⓒ16, 39.]

As a debtor, discharged under the prison bounds Act, cannot be afterwards arrested under ca. sa. for the same debt, a bill in equity will, it seems, lie to compel him to satisfy the debt out of such after acquired interests, (choses in action, equities, &c.) as cannot be reached by fi. fa.; but a bill for that purpose must state some specific fund, equity, or chose, in which the debtor has an interest: a general charge that he has been in receipt of a large salary, has acquired property by marriage, has drawn a large prize in a lottery, and is now in the possession or enjoyment of the use of property of considerable value, which cannot be reached at law, is insufficient.

[Ed. Note.—For other cases, see *Creditors' Suit*, Cent. Dig. §§ 76, 158; Dec. Dig. Ⓒ16, 39.]

Before Dargan, Ch., at Charleston, March, 1850.

This case was heard on the bill, and a demurrer thereto filed by the defendant.

The bill is as follows:

Humbly complaining, show unto your Honors, your orator, Simon Verdier, that on or about the first day of June, A. D. 1839, your orator issued a writ of sci. fa. to revive a judgment then of record in the office of the clerk of the City Court of Charleston,

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*against William B. Foster, a resident of the city of Charleston, and subject to the jurisdiction of the City Court of the said city of Charleston, and thereupon afterwards, to wit, on the day of January, A. D. 1840, recovered judgment against the said W. B. Foster for \$457.71, with interest on the principal sum of \$430.71, to be calculated from the 5th of November, A. D. 1819, which will more fully and at large appear, by reference to the records of the said judgment in the office of the clerk of the said Court, which is now wholly unsatisfied. That immediately after the recovery of the said judgment, your orator sued out of the said Court

a writ of fi. fa., directed to the sheriff of said Court to make the money thereon according to law, which was shortly after returned by the said sheriff, and marked nulla bona.

And your orator further sheweth, that the said William B. Foster has been for many years in the receipt of a large salary, and has acquired property by marriage, and in other ways, and especially a large sum of money from a prize in a lottery, drawn some time before the said proceedings in sci. fa. were instituted. And your orator has been informed that the said William is now either in the possession or enjoyment of the use of property of considerable value, which cannot be reached by any process known to the law, but which is justly liable for the debts of the said defendant.

And your orator further sheweth, that he is unable to compel the said defendant to assign his equitable interests in the said property, because many years ago the said defendant was arrested by virtue of a certain execution of ca. sa. to enforce his said original judgment, and was discharged from the said arrest by virtue of certain proceedings, instituted by said defendant, as an applicant for the benefit of the Prison Bounds Act, which were had and concluded before the acquisition of the said property and money, herein before mentioned, whereby your orator is incapable of again arresting the person of the said defendant, to compel an assignment of his equitable interests in satisfaction of his said judgment, and is advised that he is altogether remediless at law in the premises.

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*And your orator further sheweth, that he has repeatedly applied to the said defendant to pay to him his said debt out of his equitable assets, which your orator is unable to discover, with which reasonable requests your orator well hoped the said defendant would have complied, as in justice and equity he ought to have done. But now so it is, may it please your Honors, that the said William B. Foster, combining and confederating, &c., &c., he hath absolutely refused to comply with such requests, under various pretences; all which actings and doings, pretences and refusals, are contrary to equity and good conscience, and tend to the manifest injury and wrong of your orator in the premises. In consideration whereof, and for as much as your orator can only have adequate relief in the premises in a Court of Equity, where matters of this nature are properly cognizable and relieviable. To the end therefore that the said William B. Foster and his confederates, when discovered, may upon their several and respective corporal oaths, to the best and utmost of their several and respective knowledge, &c., full, &c., answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were

here repeated, and they and every of them distinctly interrogated thereto; and more especially that the said confederates may, in manner aforesaid, answer and set forth, whether the said defendant has not the possession of, or the enjoyment of the use of any property, and of what property, and how the same is held, in what manner, and to what uses or trusts the same may be held, in which he has any equitable interest; and more particularly that he discover and set forth all bonds, notes, or other choses in action, bank stock, or shares of bank stock, and shares in the capital stock of any and all incorporated companies of every kind and description, and of private or public securities whatever, from which he derives or can derive any income or profits, or in which he has any equitable interest, in whatsoever condition, or in whatsoever names the same may be, and whether the same, or the increase arising therefrom, has been acquired by marriage, or in whatsoever manner; or in case

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the *said defendant shall have given, or delivered to any person or persons, any property of any description whatsoever, under any conditions, agreements, or reservations whatever, express or implied, by which the said donee or bailee is to return the same to the said defendant, or to hold or use the same in any way for the benefit of said defendant, whether said conditions, agreements, or reservations, can or cannot be enforced at law or equity, or their observance depends on the will and pleasure of the said donee or bailee, that in such case the said defendant shall discover and set forth the same, with the names of the said donee or bailee, and the terms of the said gift or bailment; and that the said use, income, profits, stocks, shares, and private and public securities, and other equitable interests, may be rendered available for the payment and satisfaction of your orator's just claims, as aforesaid. And that the said defendant may be compelled to discover and set forth, and assign all his estate and interests, both in law and in equity, or so much thereof as may be sufficient for that purpose; and that your orator may have such further or other relief in the premises, as the nature and circumstances of the case may require, and to your Honors shall seem meet.

May it please your Honors to grant unto your orator a writ of subpoena, &c.

Dargan, Ch. The discharge of an insolvent debtor under the Prison Bounds Act, (Act of 1788,) has the effect of exempting such debtor from being again arrested by capias on the same case, or under the same judgment, except where the debtor has committed a fraud in the manner of obtaining his discharge. Though his body is exempted from arrest, his subsequently acquired property is still liable for the debt, if the same be not satisfied with the effects assigned. Visible or tangible property thus acquired is liable to be taken

under a fieri facias for the satisfaction of so much of the debt as still subsists; but choses in action and equities cannot be reached by this process; and as they cannot be reached by a capias, on account of the exemption

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*arising from the discharge, it follows that they can only be reached by the intervention of this Court. Where there are choses in action or equities, a resort to this jurisdiction would not only be proper, but would in fact be the only effectual means of relief.

But the complainant must make out a proper case for the interference of the Court. He must make out some specific equity. He must charge that the defendant owns some particular chose, or that he has made some specific disposition of his assets, by way of trust, for the avoidance of his debts; or that he has some interest in a specific fund or estate. He will not be permitted to speculate upon the jurisdiction of the Court on a mere hypothesis. All that the complainant charges in this bill may be true, and yet he may be entitled to no relief. He charges that the defendant has been in the receipt of a large salary, that he has drawn a lottery prize, and that he has acquired property by his marriage. He does not say how large the salary or the prize; nor that any of the money, or the investments thereof, now remain in the hands of the defendant or under his control, nor how they are invested. He does not show what property the defendant has acquired by his wife, of what it consists; whether settled on his wife, or liable for the husband's debts, or whether it is now in his hands. In fine, taking all that he says to be true, he does not show that there is in existence any property or fund which the jurisdiction of this Court can reach for the satisfaction of his debt. Until he makes some such specific allegations, I do not think that the defendant is bound to answer.

It is ordered and decreed, that the demurrer be sustained, and that the bill be dismissed.

The complainant appealed, on the grounds:

1. That it is expressly charged in the bill of complaint that the defendant was in the possession or enjoyment of the use of property of considerable value, which cannot be reached by any process known to the law, but which is justly liable for the debts of the defendant.

2. That the Chancellor erred in consider-

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ing that the right of *the complainant to a discovery would be affected by his charging, more particularly than he has done, what was the amount of the salary, or lottery prize, or the manner in which the property of the defendant, acquired by marriage, was settled; when it is sufficiently shown that there is property, of which the defendant has the use and enjoyment, secured in some way unknown to the complainant, from his

execution, and his interest in which the defendant cannot be compelled to assign at law.

3. That the discovery prayed for by the complainant is not a general discovery by way of speculation upon the jurisdiction of the Court, but is of such property as the defendant is charged as actually deriving income from; and that when the right of the complainant to satisfaction is sufficiently stated, and the inadequacy of his remedy at law is shown, the fact that the defendant has so secured his property, that its situation cannot be discovered by the complainant, except by the aid of this Court, affords sufficient ground for equitable relief; and the dismissing of the bill for such a reason would be an encouragement to the ingenuity of the fraudulent.

4. If a discovery in such cases be refused by the Court, a fraudulent debtor who had been discharged from the liability to arrest under a *capias ad satisfaciendum* in any particular suit, or a female against whom a *capias ad satisfaciendum* cannot be issued, would be able to enjoy any amount of property, the mode of investing which could be concealed from the creditor.

Northrop, for appellant.
Campbell, contra.

PER CURIAM. This Court concurs in the decree of the Chancellor, which is confirmed and the appeal dismissed; and it is so ordered.

JOHNSTON, DUNKIN, DARGAN and
WARDLAW, CC., concurring.
Appeal dismissed.

4 Rich. Eq. *233

*W. M. LAWTON, Executor, v. BENJ. F.
HUNT et al.

(Charleston. Jan. Term, 1852.)

[Wills ⚭572.]

Devise of plantation "and all the slaves usually used, attached and belonging to the said plantation;" to the plantation were attached and belonged a number of slaves used in agricultural operations;—*Held*, that the devise did not embrace some carpenters and boatmen, who had their cabins, families and patches on the plantation, but were generally employed elsewhere.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1245; Dec. Dig. ⚭572.]

[Wills ⚭456.]

Where the context of the will affords no contrary indication, the terms descriptive of the subject of gift, must be understood in their strict and primary sense, if a subject be found to which the words so interpreted apply; and in such a case the terms of gift cannot be made to embrace another subject in a secondary or deflected sense.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 974; Dec. Dig. ⚭456.]

[Wills ⚭52.]

Testator purchased slaves from his son-in-law, which were under mortgage to secure a debt of the son-in-law, for which testator was liable as his surety: Testator afterwards bequeathed the slaves to his daughter, wife of son-in-law, to her sole and separate use, &c:—*Held*, that, as between the daughter and other legatees of testator, the debt for which testator was liable as surety of son-in-law and for which the slaves were under mortgage, was not chargeable specifically upon the slaves, but generally upon the whole estate of testator.

[Ed. Note.—Cited in *Latimer v. Latimer*, 38 S. C. 385, 16 S. E. 995.]

For other cases, see Wills, Cent. Dig. § 2150; Dec. Dig. ⚭52.]

[Equity ⚭383.]

In case of dispute between client and counsel as to the amount of compensation, the Chancellor is not bound, but may order an issue at law; he should not, however, leave to the determination of the law Court the question which party shall be liable for fees that are reasonable.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 187; Dec. Dig. ⚭383.]

Before Dunkin, Ch., at Charleston, June, 1850.

The former branch of this cause is reported 4 Strob. Eq. 1.

The cause came on upon exceptions to the master's report, under the inquiry that was directed. So much of the report of June, 1850, as relates to the questions considered in the Court of Appeals, is as follows:

"By the appeal decree in this case, filed 1st February, 1850, 'the disputed point whether the carpenters, Ben, Hector, Maurice, Paul, Little Ben, and John, and the sloop hands and boatmen, Nat, Phil, Jim, Joe, Steward, and Jack, are part of the negroes devised to Mrs. Colburn or of the residuary estate, is referred back to the master to take further testimony. As to the extent and quantity of land devised to Mrs. Colburn, under the devise of Tibwin, the same is also referred

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back to the master for further information; and it is ordered, that a survey and plat of all the lands claimed as belonging to Tibwin, be made for the information of the Court.' Under this order, I have been attended at several references by the solicitors of Mrs. Hunt and family, and of Mrs. Colburn and child, but no further testimony has been taken, except the examination of Mr. Moisson, which is herewith filed.

"As respects the first point sent down to me, whether the carpenters, sloop hands and boatmen, are part of the devise to Mrs. Colburn, or are residue, I have already reported, and a more careful and minute examination of the testimony has not tended to change my first judgment. To support the position that these negroes are residue, that part of the testimony is chiefly relied on which proves that Mr. Mathewes moved his force of carpenters from place to place, and from

country to town, to suit the exigencies of his different plantations and his town property, and that the sloop hands and boatmen were also indifferently employed in the service of all the plantations: it is therefore contended, that they can in no wise be brought within the words of the will, 'usually used, attached and belonging to the said house and plantations.' I cannot see the force of the argument, and in construing this clause of the will, I think the words of qualification are to be referred to those uncertain and not well defined matters of plantation furniture, which the testator speaks of as 'every other thing.' I do not think that the words of qualification can be made to go further. I attach great importance to the domiciliary arrangements of these negroes,—that they had families at Tibwin—that their garden patches were there—and in the case of the boatmen, that by reason of their frequent absence, Mr. Mathewes had their patches cultivated and kept in order for them. I think it an important point, also, that they were on the allowance list at Tibwin, and I find accordingly, that Ben, Hector, Maurice, Paul, Little Ben, John, Nat, Jim, Phil, Joe, Stewart, and Jack, are not residue, but that they pass under the devise to Mrs. Colburn.

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*"The appeal decree says: 'That the plantation and negroes called Thompson's, are to be considered part of Mrs. Colburn's portion, under the will, and liable to contribution for the debts equally with the rest, and that the money owing for the said property is to be considered the proper debt of the testator, so far as the creditors are concerned. But it is referred to the master to ascertain and report whether, as between Mrs. Hunt and Mrs. Colburn, said debt is chargeable specifically upon said land and negroes or upon testator's whole estate.'

"In this matter I have also had the solicitors of the parties before me at several references, and the deed of August 21, 1847, was submitted. It is insisted, on behalf of Mrs. Hunt and children, that by virtue of this deed, Mr. Colburn received from Mr. Mathewes the proceeds of notes to the amount of \$7,795 for the purpose of paying up in full the bonds known as Broughton's, Huger, Pringle and Ball's, but that he failed so to apply the funds; that Colburn being in this way indebted to Mathewes, in the above amount of \$7,795, as the deed recites, conveyed to him, Mathewes, the negroes Joe, Polly Liddy, Nanny, Caroline, Amy, Die, Chaplin, Caesar, Bella, Paul, Fanny, August, July, Abraham, Sarah, Liddy, Maria, Thompson, Henrietta, and Zacharias, as his, B. P. Colburn's property, when, in fact, they were not, inasmuch as Joe, Polly, Liddy, Nanny, Caroline, Amy, Die, and Chaplin, were under mortgage to E. C. Huger, administratrix of John H. Huger,—Caesar, Bella, Paul, Fanny, August, July, Abraham, Sarah, Liddy, Maria,

Wanetta, (who, Mr. Colburn admits, is the same as Henrietta, mentioned in the deed,) and Thompson, (born after the date of the mortgage,) under mortgage to S. M. Pringle, and Zacharias, under mortgage to the executor of Isaac Ball. Now, therefore, as all the negroes conveyed by the deed of 21st August, 1847, are yet unpaid for, and payment is now sought from the estate of Mathewes, the point raised on behalf of Mrs. Hunt and children is, that the mortgaged property should be first exhausted in relief pro tanto of Mathewes. It is true that these twenty-three negroes, (those mentioned in

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the deed,) have never *been taken into the estate—that the executor declined to take possession of them because of the post-nuptial marriage settlement, and that they have been, and still are, in the possession of Colburn and wife. In the deed, (of August, 1847,) it is set forth that Mathewes is to be the purchaser of the Thompson land and negroes, and to hold them in trust, &c., under the trusts and provisions of the ante-nuptial settlement, and it is contended that the item in Mathewes's will in the matter of the Thompson lands, and negroes, does not purport to dispose of them as a part of his estate, that he had no right to do so—the devise is an anterior clause, and this part of the will is only a declaration of certain conditions precedent in relation to said devise. That the answer of Colburn and wife denies there being any question of election—that the decree of Chancellor Dunkin overrules the answer, and in his decree on circuit, determines that it is a case of election, that Colburn and wife have not elected. In this behalf, I find that both the circuit and appeal decrees determine that Mr. Mathewes did treat the Thompson land and negroes as his property. The words of Chancellor Dunkin, in speaking of this matter on circuit, are: 'Clearly, this is the language of a man expressing his intention to dispose of property as his own, because he had purchased and paid for it, although he admitted the equitable interest to be in others. It is the assertion of a proprietor's will, and acquiescence is secured by a strong sanction.' I find further, that it is manifestly to the interest of Mrs. Colburn and her child, that they elect to take under the will—that Mrs. Colburn does so elect, and that Mr. J. S. Colburn, the trustee under the original deed of marriage settlement, concurs with me in the opinion, that it is to the interest of the infant that she also take under the will, as to the mortgage debts of the Thompson negroes.

"I have but little doubt that when Mr. Mathewes's debt shall have been fully paid, Colburn will be found a debtor to the estate; but I cannot see how his individual debt can be charged against his wife's separate estate. In how far the estate of Mathewes paying these debts will be subrogated to the

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rights under, and the protection of the mortgages, is a question which depends very much upon whether Mr. Mathewes has, or has not, by his own act, made the debt exclusively chargeable on his estate, and that being a naked question of law, is more properly with the Court.

"It only remains now to consider the objection to Yendon & Macbeth's bill for professional services, the exceptions put in to Mr. Rhett's accounts, and the question of costs. The objections urged against the bill of Yendon & Macbeth are so numerous that it will be necessary to consider them seriatim. Before taking up the accounts of Yendon & Macbeth, it may be well, however, to notice, that generally in the matter of the executor's account, the devisees, S. B. Hunt and children, objected to all items not within four years of the testator's death, as being by law inadmissible. They object also to all charges not established by law, and claim that they must be sustained before a jury. They object to all fees for the litigation by Mr. Lawton, as beyond his competency, and not designed for the benefit of the estate. But, as the order of the Chancellor, made this day, directs me to file my report by Monday, in the matter of the two important questions sent down to me by the Appeal Court, I must suspend further consideration of these accounts to another report."

Dunkin, Ch. At an early period of these proceedings, an order had been made requiring the creditors of the estate to establish their demands before the master. On 31st January, 1850, the report of Mr. Laurens was filed, setting forth a statement of the debts and legacies as established. To this report exceptions were filed on the same day by the solicitor in behalf of Mrs. Hunt.

The decree of the Court of Appeals, filed 1st February, 1850, adverts to this report as having been referred to in argument, but which was not produced. In the decretal order, it is declared, "that the creditors who have proved their claims before Mr. Laurens, and against whose claims no exceptions are filed, have a right to immediate payment by sale," &c.

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"Further inquiry was directed as to the carpenters and boat hands, and also as to the extent of Tibwin, and whether the Thompson debt was, as between Mrs. Hunt and Mrs. Colburn, to be charged specially on those lands and negroes or upon testator's whole estate. On these matters the master has now submitted his report, to which exceptions have been filed, and these exceptions it is proposed first to consider. No part of the case has been so embarrassing to me as the inquiry whether the carpenters and sloop hands pass under the devise of Tibwin and its appurtenances. The general scheme of the testator seems to have been, after pro-

viding for the payment of his debts and legacies, to dispose of his estate equally between his two daughters and their families.

To Mrs. Hunt he gave the house in Washington street, Milton Ferry and three plantations, together with the appurtenances of the plantations and ferry. To Mrs. Colburn are given the house in Charlotte street, with the slaves, furniture, &c., used in the said house, and three plantations, with the appurtenances thereof: and by the final disposing clause of his will, he directs the rest and residue of his estate to be equally divided between Mrs. Hunt and Mrs. Colburn, subject to the trusts and limitations therein before declared, of the specific property devised and bequeathed to them respectively. The inquiry is, whether the carpenters and sloop hands pass under the terms of the specific bequest to Mrs. Colburn, or constitute a part of the residue, and are therefore divisible between the daughters in equal proportions. The testator owned a plantation on Santee river, called Pleasant Meadows, four inland plantations, not far from the 32 mile house, in St. James Santee, called Tibwin, Mildam, Springfield and Thompsons, and a farm five miles from the ferry, called Snee farm. These, with Milton ferry and the town houses, were the principal objects of the devise. Tibwin, as the Court understands, was the original country residence of the testator, and so continued till his death. To Mrs. Colburn he devises and bequeaths the Charlotte street house, and his plantations, Mildam and Tibwin, with a tract of land called Flatfield, "and all the slaves,

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cattle, *hogs, horses, mules, sheep and poultry and the tools, utensils, flats, boats, furniture, carts, wagons, and every other thing usually used attached and belonging to the said house and plantations." The devise to Mrs. Hunt is in the same terms. On the part of Mrs. Colburn, it is insisted that the carpenters and sloop hands fall within the foregoing description. There are six carpenters, to wit: Hector, Ben, Paul, Maurice, Little Ben and John; and six sloop hands, to wit: Nat, Cim, Phil, Joe, Stewart and Jack. Several witnesses were examined, and there is no material discrepancy in their testimony. Tibwin was the original settlement, and the carpenters were originally of the Tibwin gang. But they worked at their trade, and they were employed by the testator wherever such work was to be done. In the winter they were employed at his several plantations in the country.

In the spring they came to Snee farm or worked at Milton ferry, and in the summer they were hired out in town, or otherwise employed by the testator. It is impossible to say that they were "slaves usually used" at Tibwin, or especially necessary for that plantation. As to employment, they were attached to no plantation, but, as expressed

by one of the witnesses, they were a gang of mechanics, detached from the workers of the plantation. And so of the sloop hands. The sloop itself is admitted to have been part of the residue, and has been so treated. The sloop and the hands attached to her, were employed during the testator's life time in bringing his crop to market, and perhaps more usually in bringing wood to town for Milton ferry. Although, then, neither the carpenters nor the sloop hands were usually used at Tibwin plantation, do they "belong" to the Tibwin gang? The master has so concluded, and from several considerations which are fully stated in his report, without being entirely satisfied with his conclusions, I am not prepared to sustain the exception. An additional consideration certainly has weight with me. These negroes constituted a very valuable portion of the testator's estate, and could scarcely have escaped his attention. If they were not considered by him among the slaves be-

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longing to the *Tibwin gang, he has made no specific disposition of them. When he was so thoughtful as to provide for the comfort of Capt. Nat and old Patty at Tibwin, and of old Anne, the poultry woman and nurse, at Snee farm, it is difficult to suppose that he should have forgotten the carpenters or boat hands, or having thought of them, should have left their disposition to doubtful interpretation. It is said, however, that to give these slaves to Mrs. Colburn, exclusively, destroys the equality. The master reports otherwise. But the intention to make an equal division, (although it has been assumed by the court as likely,) is not deducible from the instrument itself. It is scarcely warrantable to resort to evidence dehors the will, for the purpose of showing an intention to create equality, and then, by evidence of the same character, to show that the supposed intention would be defeated by the construction adopted. This exception is overruled.

And so in relation to the extent of land devised to Mrs. Colburn, under the designation of Tibwin, and the Thompson debts, so called, the exceptions are overruled. The exceptions to the master's report on the accounts of the executor are overruled, except in relation to the matters now about to be considered.

Among the debts of the testator, which the master, by his report of 31st January, 1850, recommended to be paid, was an amount of \$2,620.87, due to various legal gentlemen for professional services rendered to the testator in his life time. Of these, one is a debt to Messrs. Yeadon & Macbeth, amounting to \$580, and another to J. S. Rhett, Esq., of \$609.12. To this report, the defendant, Mrs. Hunt, through her solicitor, excepted as to the demand of Mr. Rhett, but not as to that of Messrs. Yeadon & Macbeth,

or those of the other gentlemen. It is hardly necessary to say that the subsequent decree precludes all inquiry in relation to many parts of the report to which no exceptions were taken. The testator died in July, 1848. Towards the close of that year, the bill of the executor was filed, and in May, 1849, an order was entered to restrain the creditors from prosecuting their demands at law. A

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bill was filed during that year by some *of the devisees, against the executor. This latter bill was dismissed on the 23d April, 1849. On the 27th March, 1850, the master paid to Yeadon & Macbeth, for their costs, on the bill filed by the executor, the sum of \$311.25, and \$35 costs on what is called the cross bill. In auditing the executor's accounts, the master allows him credit for the sum of \$1,330 paid to Messrs. Yeadon & Macbeth for professional services and advice given and rendered to the executor, between August, 1848, and February, 1850. To the bill of costs of Messrs. Yeadon & Macbeth, \$346.25; to the credit, \$1,330, thus given to the executor; and to the account of Mr. Rhett, the solicitor of Mrs. Hunt objected, as is set forth in the latter part of the master's report of the 28th June, 1850. On the subject of the bill of costs, in the circuit decree of April, 1849, no order was made in relation to the payment of costs. No subsequent order was brought to the notice of the Court. Certainly, the master had no authority to apply any part of the funds in his hands to that effect, without a special order. It is suggested in one of the exceptions, that part of the charge allowed was for maintaining the interests of the executor against those of the devisees. The master has not reported on the objection as to costs, and it must be referred back to him to report on that subject.

In reference to the credit of \$1,330, the defendants, Mrs. Hunt and family, object, and insist on their right to an investigation of the claim before a jury. And they insist on the same course in relation to the claim of Mr. Rhett. In reference to the claim of Mr. Rhett, my opinion has always been, (and I have acted upon that opinion,) that, whenever a controversy arises between a solicitor of the Court and a suitor, in reference to the value of his services, beyond the amount prescribed in the fee bill, the matter should be referred to a jury. The inexpediency of any other course seems to me too obvious to require comment. Although that is not precisely the inquiry, in reference to the credit allowed to the executor, the same principle is, to a great extent, involved.

It is ordered, that an issue be made up in

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the nature of an *action of assumpsit, in which J. S. Rhett, Esq., shall be the plaintiff, and executor of Wm. Mathewes, de-

ceased, defendant, (the defence to be conducted by Mrs. Hunt and family,) in which the inquiry shall be, as to the amount due to the said J. S. Rhett, Esq., on the account filed with the master. And that an issue be also made up, in which the executor of Wm. Mathewes, deceased, shall be plaintiff, and Mrs. Hunt and family defendants, the objects of which issue shall be, to ascertain the amount which was due on account of the estate of the testator to Messrs. Yeadon & Macbeth, on their demand of thirteen hundred and thirty dollars, which is allowed as a credit by the master in passing the executor's account, the nature of the issue being as for money laid out, expended and paid for the use of the estate, that the said issues be tried in the Court of Common Pleas for Charleston district, and that the presiding Judge be respectfully requested to certify the verdict to this Court.

On all other points not specially reserved, the report of the master is confirmed and made the judgment of the Court; and he having reported that it is for the advantage of the infant, Mary Anna Mathewes Colburn, to take the provisions made by the will in her behalf, it is ordered that the said master make the election accordingly.

Mrs. Hunt and the executor appealed.

B. F. Hunt, for Mrs. Hunt.

Yeadon, Rhett, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. One of the questions presented by this appeal is, whether the carpenters and boat hands of the testator pass under the following devise: "I give to my daughter, Ann Ashby Colburn, for and during the term of her natural life, without impeachment of waste, and without being subject or liable in any manner whatsoever, either as to the body or income of said estate, to the debts, contracts, liabilities, control or interference of her present or any future husband, my house and lot in Char-

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lotte *street, where I now reside, and my house servants and furniture used in said house; also my plantations, Mildam and Tibwin, and a tract of land called Flatfield, and all the slaves, cattle, hogs, horses, mules, sheep and poultry, and the tools, utensils flats, boats, furniture, carts, wagons, and every other thing usually used, attached and belonging to the said house and plantations; and, after her death, then to her daughter, Mary Anna Mathewes Colburn, her heirs, executors, administrators and assigns forever; but should the said Mary Anna Mathewes Colburn die before she attains the age of twenty-one or day of marriage, then I give the said property, so given to her, to the children of my daughter Susan, to be equally divided amongst them."

This clause immediately succeeds another, by which the testator gives to his daughter,

Susan B. Hunt, for life, in the same terms as to impeachment for waste and control of any husband, his lot of land, with the buildings thereon, in Washington-street, Mazyekborough; his wharf lot in Mazyekborough; his plantation called Pleasant Meadow, including the high and pine land; his plantation, Springfield; his plantation called Snee Farm; his Ferry place and Ferry; also his tract of land on Wambau creek, "and all the slaves, cattle, hogs, horses, mules, sheep and poultry, and the tools, utensils, flats, boats, carts, wagons, furniture, and every other thing usually used and attached to and belonging to the said plantations and ferry; and after her death then to her children living at her death, the issue of a deceased child or children to represent and take his, her or their parent's share; and should any of her children die without issue living at his or her death, then to the survivor or survivors of them, share and share alike." The will also contains a pecuniary legacy of \$12,000 to the children of Mary Boyd, a deceased daughter of testator; a direction that his estate be kept together until, from the crops and other income, the pecuniary legacy above mentioned, and the debts of testator should be fully paid and satisfied; and a devise of the rest and residue of his estate, in equal shares to his daughters, Mrs. Hunt and Mrs. Colburn, "subject, how-

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ever, to the *trusts and limitations herein declared of the property herein devised and bequeathed to them." Another clause of the will has some bearing as to the question concerning the carpenters and boat hands, certainly so far as Nat, one of the boat hands, is involved: "It is my will that my slave, old Nat, (commonly called Capt. Nat.) and old Patty, the dairy woman, at Tibwin plantation, and old Anne, the poultry woman and nurse at Snee Farm, be allowed to remain and reside on the plantations where they now respectively are and reside; and I request my daughters, in consideration of the faithful services of the said slaves to me, that they will treat them with all the kindness consistent with their state and condition, and pay to each of them the sum of ten dollars annually during their several lives." Of the 370 slaves owned by the testator at the time of his death, none is named in the will except the three mentioned in the last clause, who are severally denominated old, and recommended to the special kindness of the two principal legatees. Of the whole number of slaves, according to the circuit decree, Mrs. Colburn would take 204 and Mrs. Hunt 166. It is likely that the real estate devised to Mrs. Hunt is of greater value than that devised to Mrs. Colburn. There is, however, no distinct expression in the will of the purpose of the testator to make equal donations to these two legatees for life, except as to the residu-

ary estate. The remainders after their life estates severally are quite different.

It is manifest from the testimony, that the six carpenters were not usually, or for the greater portion of their time, employed or 'used' upon any of the plantations devised to Mrs. Colburn, nor 'attached' nor 'belonging' to any of these plantations, except that some of them had their cabins and patches at Tibwin, and some at Mildam. They were as a corps separated from the laborers of the plantation and never engaged in agricultural operations, except for a short time upon some sudden emergency. In the winter, they worked at their trade at the various places of the testator, as the exigencies of these places required their peculiar service; and in the summer, they were usually

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let to hire in the *city of Charleston. The testator mostly resided at Tibwin in the winter, and at Charleston in the summer. Tibwin was the original hive from which the other plantations were chiefly settled. An 'allowance' list, and a 'working' list, were kept by the overseer at Tibwin; and the carpenters were on the former list, but not on the latter; which, however, also omitted the names of such of the negroes as, from being superannuated or immature, were unfit for labor. But it appears that the carpenters drew their rations indifferently from the plantations of the testator, wherever they happened to be employed.

The facts concerning the boat hands are of the same general character. They, too, were detached from the operations of Tibwin. Their ordinary employment was on board the sloop of the testator, in carrying to market the crops from his several plantations, of which Pleasant Meadow, devised to Mrs. Hunt, was most productive; and in carrying wood to the Ferry, devised to Mrs. Hunt, which was navigated by steam.

It is manifest, that the words "usually used, attached and belonging to the said plantations," or some of them, must limit and qualify the bequest of slaves to Mrs. Colburn, as otherwise the description of the subject, "all the slaves," evidently referring to something to be added, would either carry all the slaves of the testator to this legatee, which is inconsistent with the whole scheme of the will, or would be defective and unmeaning. Whether the words "usually used" form part of the description of the slaves bequeathed, or are to be confined to the tools and other inanimate things bequeathed, is too doubtful for the matter to have much effect either way in the present discussion; and it is too unimportant to be closely considered. The remaining words, "attached and belonging to the plantations," are properly conceded to be descriptive of the slaves bequeathed. In a strict sense, slaves 'attached' to a plantation are like some of the ancient villeins of England and some of the modern serfs of Russia,

adscripti glebæ, inseparably connected with the soil: and by the most liberal construction that can be tolerated, slaves 'attached to a

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plantation' *must be connected with the agricultural operations of the place, either as actual laborers, or as those who have been laborers, or are expected to be laborers. The superannuated and the immature, closely connected with the actual operatives, are in the same predicament as laborers. There is scarcely a perceptible shade of difference in meaning between slaves attached to a plantation, and slaves belonging to a plantation.

It is obvious from the whole tenor of this will, that the testator used the term plantation in a sense somewhat strict, as a place where agricultural operations are conducted. In the devise to Mrs. Hunt, he speaks of Pleasant Meadow, Springfield, and Sneer Farm, each as a plantation, and contra-distinguishes them from his Ferry place and his tract of land on Wambau creek; and in the devise to Mrs. Colburn, he speaks of Mildam and Tibwin as plantations, and of Flatfield as a tract of land. To the latter, he also devises a house and lot in Charlotte-street and 'the house servants and furniture used in said house.' To Mrs. Hunt he gives the slaves appurtenant 'to the said plantations and ferry,' and to Mrs. Colburn, he gives the slaves appurtenant 'to the said house and plantations.' Under this bequest to the latter, 165 slaves, answering all the terms or description, pass without dispute, and it is claimed that there pass 12 more, the carpenters and boat hands, who belong to the plantations in some loose and indeterminate sense only.

Where the terms of a gift, describing the subject, refer to extrinsic facts, we necessarily resort to parol evidence to ascertain what is comprehended within the terms of description. In the present case, we must learn from the mouth of witnesses what slaves are attached and belong to the plantations. But where the context of the instrument of gift affords no contrary indication, we must always understand the words of the donor, descriptive of the subject of gift, in their strict and primary sense, if a subject be found to which the words so interpreted apply; and evidence of extrinsic facts, such as the intention of the donor as an independent fact, is inadmissible to apply the words to any other

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sub*ject. If the terms of description, strictly interpreted, apply to one subject, they cannot be made to apply to another subject in a secondary or deflected import. Wigram on Wills, 17. Thus in *Oxenden v. Chichester*, 3 Taunt. 147, 4 Dow, 65, under a devise of testator's 'estate of Ashton,' where an estate situated at Ashton was found by the evidence, other lands of testator not situated at Ashton were not allowed to pass, although testator called the whole by the name of his 'Ashton

estate,' and his steward kept the accounts relating to the same under that name, and conclusive evidence was tendered of the intention of testator to devise the whole estate. The present will affords an illustration. It has been already decided in this case, that, under the bequest of 'flats and boats,' the sloop of testator is not given to Mrs. Colburn. It may be remarked, that the consistency of the construction of this will could be hardly vindicated, by which the sloop did not pass, and the hands, the instruments of navigating it, did pass; both, if one, being appurtenant to the plantation of Tibwin.

Against the conclusion to which this reasoning tends, the master relies upon the fact, that the carpenters and boatmen had their patches and cabins at Tibwin. But this fact has little weight, when we remember that Tibwin was the original place of testator, and when we consider the intermixture of the families of slaves of neighboring plantations. If a negro who has a wife, and a cabin, and a patch on a plantation, is to be regarded as belonging to it, many slaves would be within the description who are owned by others than the proprietor of the plantation.

The Chancellor, who adopted, with much hesitation, the conclusion of the master, was impressed by the consideration that the testator thoughtfully provided for the comfort of three old negroes, and yet left the disposition of his valuable tradesmen to doubtful interpretation of his will. The absence of specific disposition concerning these particular negroes has little influence, for it is the scheme of the will to dispose of testator's slaves by general terms of description, without enumeration; and there is no ground for preference of the special bequests to Mrs.

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Hunt and Mrs. Colburn, *over the residuary clause, in which the testator, by careful provision as to trusts and limitations, manifests his purpose of leaving a valuable residue.

It is argued that the declaration in the will, that old Nat and old Patty 'are and reside' at Tibwin plantation, is as true of all the other slaves in controversy as of Nat, and demonstrates that they are 'attached and belonging' to that plantation. If this declaration be made concerning Nat, which is ambiguous, still mere residence at a plantation does not make a slave appurtenant to it. Besides, the express disposition of Nat by this clause of the will, leads to the conclusion, that the testator had not intended to describe him by the general words of the previous bequest to Mrs. Colburn: and the same application of the general words must be made to all who are in the same category. It seemed to be conceded at the bar that Nat was bequeathed to Mrs. Colburn by the latter clause; and we are content to allow this construction.

The evidence that the slaves in question

were included in the inventory of property at Tibwin—a subsequent arrangement for convenience—if admissible, has no influence on the construction of the will; and, I think, was inadmissible.

In our opinion, the carpenters and boat hands are bequeathed by the residuary clause of the will.

The next matter of appeal relates to what are called the Thompson negroes; and involves the question whether the debt for which the estate is liable on account of these negroes, as between the two principal legatees, constitutes a charge upon the estate generally, or a specific lien upon the negroes themselves.

The slaves denominated the Thompson negroes were, at the time when they were respectively purchased, 19 in number, namely, Zacharias, Caesar, Bella, Paul, Fanny, August, July Abraham, Sarah, Liddy, Wanetta or Henrietta, Joe, Polly, Liddy, Nanny, Caroline, Amy, Die and Chaplin.

Of these slaves, B. P. Colburn, husband of Ann Ashby Colburn, purchased Zacharias from Poyas, executor of Ball, on January 10, 1845, for \$610, and paying a portion of the

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purchase *money in cash, for the balance gave the bond of himself and testator of same date for \$406, with interest from date, payable in three equal annual instalments, the last being on January 10, 1848; and on same day gave a mortgage of the slave to secure the bond. The interest on this debt was paid by Colburn to June 10, 1848.

On February 13, 1845, B. P. Colburn purchased from S. M. Pringle, for \$5,380, Caesar, and the nine following in the order of names above, and paying a part of the purchase money in cash; for the balance gave the bond of himself and testator for \$3,900, with interest from date, payable in three equal annual instalments, the last being due on February 13, 1848; and on same day gave a mortgage of these slaves, (and of another named Frank,) to secure the bond. Interest has been paid to June 8, 1848.

On February 10, 1846, the testator purchased from E. G. Huger, for \$2,500, Joe and the seven following in the order of names above, and on same day gave the bond of himself and B. P. Colburn for \$1,666.67, with interest from date, payable in two instalments on February 10, 1847, and February 10, 1848; and on the same day gave a mortgage of the slaves to secure the bond. Interest has been paid to February 10, 1848.

These three mortgages were duly recorded.

An indenture was executed by the testator and B. P. Colburn, August 21, 1847, by which Colburn in consideration of his indebtedness to testator in the sum of \$7,795 on promissory notes drawn by Colburn and indorsed by testator, conveyed to testator the Thompson land, (which, it seems, by state-

ments at the bar, Colburn had purchased for \$600 in cash,) and the nineteen negroes above named, with four others, Maria and Thomson, children of Liddy (Pringle,) and a child of Amy and a child of Nanny, to testator, in trust, for the separate use of Ann Colburn for life, not liable to the debts of her existing husband; and if she should survive, without issue of the marriage, to her in fee; and upon her death, leaving her husband, B. P. Colburn, and issue of their bodies, for the

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joint *and equal use of such husband and issue, without liability for husband's debts, for the life of B. P. Colburn, and on his death to the issue; and if B. P. Colburn should survive his wife, without issue of the marriage, then the whole to him for life, with power of appointment by will as to one-half, the other half descending to the next of kin of his wife. The notes referred to in the consideration of said deed were drawn and indorsed from October 3 to December 18, 1846, and were payable from January 2 to March 18, 1847.

The will of the testator bearing date January 21, 1848, contains the following clause: "And whereas, in and by a deed bearing date the twenty-first day of August, in the year of our Lord one thousand eight hundred and forty-seven, made by and between myself and B. P. Colburn, the said B. P. Colburn, in consideration of the debt stated in said deed, and my release of the same, conveyed to me a plantation and twenty-three slaves, therein described, for the trusts and purposes set forth in said deed; and whereas the said plantation and negroes were purchased and paid for by me, now I do direct, as a condition precedent to the bequests and devises, by me herein made to my daughter, Ann A. Colburn, and my grand-daughter, Mary A. M. Colburn, that the said plantation and negroes mentioned in said deed, so far as shall lie in the power of the parties interested therein, shall be held, not to the uses, trusts, and limitations declared in the said deed, but to the trusts and purposes declared in this my will of and concerning the property devised and bequeathed to my said daughter, Ann, and her child; and on failure of the parties interested complying with my will in this particular, I revoke and annul all of the devises and bequests herein made to them; and I devise and bequeath the property above devised and bequeathed to them, to my daughter, Susan B. Hunt, and her children, subject to the same trusts, and for the same estates, as the property herein devised and bequeathed to them is subject to."

It has been already decided by the Court of Appeals, that, in this clause, the testator

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did undertake to devise the Thompson *land and negroes, so as to subject the parties interested therein to an election to take under the will or the deed, and so as to subject

this property to rateable liability for the debts and pecuniary legacies of the testator. Mr. and Mrs. Colburn have elected to take under the will, and their infant daughter under the direction of this Court has made the same election.

The argument for the appellants proceeds on the assumptions, that the testator declared in his will, which must be assumed to be true, that he had purchased and paid for the Thompson land and negroes; that in this statement as to payment he referred to his indorsement of the notes of B. P. Colburn, which, as to liability upon the maker, he had released by the deed of August 21, 1847; that these notes were drawn and indorsed to raise money for the discharge of the bonds given for the negroes, and that by subrogation of the representative of the testator to the liens of the mortgagees, or some general equity, the negroes should be subjected to liability for the unpaid purchase money contracted to be given for them.

The foregoing statement of facts shows that there is no basis for this argument. When the testator declared that he had purchased and paid for this property, he manifestly meant that he had been obliged to pay \$7,795, the sum of the notes indorsed by him for his son-in-law; not that he had paid the original purchase money of the slaves. There is no evidence whatever that these notes were drawn and indorsed to raise money for the payment of the bonds given for the original purchase of these negroes, in one of which testator was the principal, and in the other two surety; and all the probabilities of the case are on the other side. The notes are ten in number, for the sum of \$7,795, all payable in the early part of 1847; the bonds are three in number, for the aggregate sum of \$5,912.67, the last instalments of which were payable in the early part of 1848. There is no conformity in date, sum or maturity. The fact that the interest on these bonds was punctually paid, is treated as evidence of fraudulent concealment from the testator that the bonds were outstanding and

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un*paid; but we do not perceive how compliance with legal obligation is evidence of fraud, nor how the testator could have been deceived into the belief that his own bonds, in one of which he was principal debtor, were paid before maturity by an insolvent son-in-law. He had constructive notice of the existence of the mortgages from their being recorded, in all probability actual notice; and there is not a tittle of evidence of any misrepresentation to him. Sufficient reasons, which are set forth in the appeal decree, existed for his change by will of the trusts set forth in the deed of August 21, 1847, which were doubtless satisfactory to him at the date of the deed, as they were in exact conformity to the marriage settlement between Colburn and his daughter in 1834.

It appears to us that this branch of the case is governed by the authority of *Francis v. Lehre*, 1 Rich. Eq. 271, with which we are satisfied. There Ann Lehre purchased a plantation, and for the payment of the purchase money gave her bond secured by a mortgage on the plantation: she afterwards made a voluntary gift of the plantation in trust for Mrs. Baker, and then died leaving the bond unpaid. It was held, that her estate was bound to pay the bond and release the land from the lien of the mortgage. The Court, referring to *Villers v. Beaumont*, 1 Vern. 100, scouts the proposition that one may purchase property, then make a gift of it, and afterwards revoke the gift by compelling the donee to pay the donor's debt. Substantially the testator was the settlor in the deed of August, 1847, as he paid the consideration and directed the trust.

We are of opinion that the present appeal is a naked attempt to make a legacy to a wife and daughter liable for the debt of the husband and father, who takes no interest under the will; and we conclude that the general estate of the testator must pay the testator's debts.

The next subject of appeal is in reference to the executor's accounts. All the objections to the report of the master in this matter were abandoned at the hearing here, except in relation to the account of Messrs. Yeadon

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& Macbeth, the counsel of the *executor; indeed these matters were adjudged by the former appeal decree. In relation to this account of the counsel, the Chancellor directed an issue at law; and the executor appeals from this order. The counsel fee in this case was paid by the executor after the date at which he was directed by the order of this Court to pay over the funds in his hands to the master. We are not disposed to interfere with the order of a Chancellor in a matter of discretion. To guard against misapprehension, it is proper to say that we do not recognize, as a rule of procedure, that a Chancellor must direct an issue at law in case of dispute between client and counsel as to the amount of compensation. The organization of this Court affords the means of trying and determining such a question satisfactorily. Much less are we inclined to abandon to the other Court the determination of the question as to what party shall be liable for fees that are reasonable. The adequacy of the compensation is distinct from the liability of the party to pay for the services. It may be that large compensation is due to counsel for services to a trustee; but that the trustee is litigating for his own benefit and should himself sustain the expense. We are content as to the Chancellor's order in this particular, as a matter of discretion, so far as the quantum meruit is concerned; but we reserve the right of de-

termining who shall pay the reasonable fee.

The appeal brings further into question the extent of land, passing as residue, and ordered, as it is said, to be sold for partition, including, it is said, some land exclusively claimed by Mrs. Hunt. No order for sale of such residue has been produced to us, and we conclude nothing as to the title of the parties. If there be an order for sale, the master should not sell disputed premises, but he should inquire into the facts and report to the Court. This matter is reserved.

It is adjudged and declared, that the carpenters and boat hands, except Nat, are not bequeathed to Mrs. Colburn, but pass under the residuary clause of testator's will; and

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that Nat is specifically *bequeathed to Mrs. Colburn: and it is ordered and decreed that the account be taken by the master accordingly.

It is further ordered and decreed, that the issue at law directed by the Chancellor, as to the account of Yeadon & McBeth, be confined to the reasonableness of the compensation claimed for the services rendered by the counsel.

It is further ordered and decreed, that in all other respects the circuit decree be affirmed and the appeal be dismissed.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

Decree modified.

4 Rich. Eq. 254

ISAAC TELFAIR, Ex'or., v. HOWE et al.

(Charleston. Jan. Term, 1852.)

[Wills \hookrightarrow 734.]

Testatrix by the 9th clause of her will bequeathed to A. C. "one thousand dollars to be placed at interest by my executors for her use, and given to her on her marriage; at her death to be given to her mother;" after several pecuniary bequests she concluded the 12th clause of her will as follows: "All the above legacies must be paid out of the interest of my estate, or bonds, in succession as herein stated above." A. C. having married, *held*, that she was entitled to interest on her legacy from one year after the death of testatrix.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1851; Dec. Dig. \hookrightarrow 734.]

Before Caldwell, Ch., at Charleston, June, 1849.

Caldwell, Ch. Mrs. Ann Timothy made her will on the 3d of June 1837, and among other things, bequeathed by the 9th clause as follows: "I do leave and bequeath to Ann Timothy Cleland, daughter of my friend Maria S. Cleland, one thousand dollars, to be placed at interest by my executors for her use, and given to her on her marriage; at her death to be given to her mother, the said Maria S. Cleland." After bequeathing several other pecuniary legacies, she con-

cludes the 12th clause of her will as follows: "All the above legacies must be paid out of the interest of my estate, or bonds, in succession, as herein stated above." Ann Timothy Cleland has intermarried with Captain M.

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*S. Howe, of the United States Army, and the executors have paid off all the legacies that preceded hers, and have tendered the sum of one thousand dollars to her and her husband, which they refused to receive, unless the executor would pay them the interest thereon, from one year after the testatrix's death; and the question is, are they entitled to the interest?

Interest is allowed on legacies, either from the words used in the will, from the relation of the legatee and testator, or from the necessity of the legatee. This case cannot come within the two last classes, and must therefore turn upon the construction of the will.

When no time is specified for the payment of the legacy, the general rule is that it shall bear interest after one year from the testator's death; this probably arose from the practice of the Ecclesiastical Courts in England.

Within that time, it may be presumed the personal estate has been reduced into possession by the executor. Our Act (1789, P. L., 494) protects administrators and executors from suit, for the nine months succeeding the death of the intestate or testator, and allows his legal representative twelve months to ascertain the debts due to and from the deceased. The phraseology used in the will is peculiar: "one thousand dollars. to be placed at interest by my executors for her use, and given to her on her marriage." If the testatrix had stopped here, it would not admit of doubt that she intended the legatee should enjoy the use of the sum bequeathed to her, either before or at her marriage. If the corpus of the legacy was intended to be given to the legatee at her marriage, and no interest to be allowed on it, why should she have made it the duty of her executor to place the one thousand dollars at interest for her use? But it has been argued, that the concluding sentence of the 12th clause of the will shows that interest was not intended to be given, and that the legatee cannot claim it under the general rule, as the preceding legacies were to be paid in succession before it,

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and the interest of the estate and the bonds were insufficient at that time to permit the means of placing the one thousand dollars at interest.

The impracticability of paying the debts, or of collecting the funds of the estate, cannot change the rule. In *Greening v. Barker*, relied on by Lord Redesdale, in *Pearson v. Pearson*, 1 Sch. and Lef. 12, the fund did not come to be disposable for the payment of legacies, till near forty years after the death

of the testator, and yet they were held to bear interest from the year after his death, and the Chancellor says: "The Court there was of opinion that it was a general settled and fixed rule, that pecuniary legacies bear interest from the expiration of twelve months, if there should at any time be a fund for the payment of them."

In *Gillon v. Turnbull*, 1 McC. Eq. 152, the words of the will were as follows: "to be paid out of the income of my estate, as soon as convenient, after the expiration of one year from the time of my decease," and the executor resisted the demand of interest on the legacy, on the ground that the income of the estate had not been adequate to pay the annuities and legacies, and that it would have been necessary to have sold a part of the principal of the estate to raise the money, which was contrary to the testator's intention; the Court, however, not only recognized the will, but held, that if the different and apparently contradictory expressions of the will left the intention of the testator doubtful, the rule would apply.

The testatrix having separated a specific sum from her general estate, raises a presumption that it was to be an accumulating fund for the use of the legatee, and that interest should accrue before the event upon which it was to be given to her, and the mere designation of the sources from which it was to be derived, ought not to abridge her rights or change the rule.

I am therefore of opinion, that the legatee and her husband are entitled to interest on her legacy of one thousand dollars, from one year after the death of testatrix.

The next question is, as to the bequest to the American Bible Society of New York,

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and to the Missionary Society of New York, under the 25th clause of the will. The executor had not found any Society that answers the description of the Missionary Society of New York, and therefore submits the question, whether the legacy be not lapsed and the distributees of the testatrix entitled to it. I think this question at present is prematurely presented; the mere enquiry on the part of the executor, however diligent, is not of itself sufficient to deprive a legatee of the legacy—it may be a good ground on his not being able to find him to stop the interest, but before the legacy is declared lapsed, or it is deemed there is no such legatee, the facts must be judicially ascertained; this can only be done by evidence, after the motion required by law.

It is therefore ordered and decreed, that Capt. M. S. Howe and Ann T., his wife, are entitled to the interest on the legacy of one thousand dollars, bequeathed to her by the testatrix, from one year after her death; and that it be referred to the master to ascertain and report, after publication of notice there-

of, in some of the New York papers, whether there be any Society answering the description of "The Missionary Society of New York;" and that he have leave to report any special matter.

From so much of Chancellor Caldwell's decree as allowed interest on Mrs. Howe's legacy, the executor appealed.

Memminger, for Mr. and Mrs. Howe,
Porter, contra.

At June Term, 1850, the master having reported that there was no such Society in existence as the Missionary Society of New York, his Honor Chancellor Dunkin decreed that the American Bible Society of New York was entitled to only one-half of the bequest under the 25th clause of Mrs. Timothy's will. From this decree an appeal was also taken.

At January Term, 1851, the cause was heard on both appeals. The appeal from Chancellor Dunkin's decree was dismissed, (see 3 Rich. Eq. 235,) and the appeal from

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Chancellor Caldwell's *decree was suspended, as appears by the following opinion delivered by

DARGAN, Ch. The first appeal that will be considered, is that taken from the decree of Chancellor Caldwell, June Term, 1849. The question made arises under the following circumstances: Ann Timothy, by her will, dated June 3, 1837, in the 9th clause, bequeaths as follows: "I do leave and bequeath to Ann Timothy Cleland, daughter of my friend, Maria S. Cleland, one thousand dollars, to be placed at interest by my executors for her use, and given to her on her marriage; at her death to be given to her mother, the said Maria S. Cleland." After giving eight pecuniary legacies, amounting in the aggregate to \$9,000, she concludes the 12th clause as follows: "All the above legacies must be paid out of the interest of my estate, or bonds, in succession, as herein stated above."

The condition on which Ann Timothy Cleland was to receive her legacy has happened. She has intermarried with Capt. M. S. Howe, who is one of the defendants. The executors have tendered to Capt. and Mrs. Howe the legacy of one thousand dollars, but without interest; and the question of interest is the matter in controversy between these parties.

It is contended, on the part of the executors, that by a proper construction of Ann Timothy's will, the eight first pecuniary legacies were intended to be paid only "out of the interest of the estate or bonds" of the testatrix; that they were to be paid in the order of succession in which they were given in the different clauses of the will; and that therefore each of said legacies was only due and payable, after the expiration of such time, as the interest realized would entitle it to be paid in the order of succession pre-

scribed in the will. Their argument, in other words, is, that this is not an interest bearing demand until it was due, and that it was not due, or demandable, until the executors had come into the possession of assets, arising from interest, to pay both this legacy and those given in the preceding clauses; which last, according to the construction of

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the appellants, are entitled *to priority of payment. They further assert, as a matter of fact, that the funds which, according to their construction of the will, the testatrix has provided for the payment of this legacy, have only been realized at a particular time; from which time they are willing to account for interest. To support the construction contended for by the appellants, it would also be necessary for them to show that the facts on which it rests did actually exist. But on looking into the brief, for the purpose of adjudging the question thus made, we find there are no data as to the facts, by which a judgment could possibly be formed. It was assumed at the bar, that interest enough to pay this legacy could not possibly have been made until a given period, and certain unofficial statements as to the assets and interest bearing demands of the estate and of its debts, were alluded to, and portions of them were read.

But these were admitted to be mere private statements, not judicially before the Court. What was the amount and value of the whole estate, and the amount of the residuary estate, of what it consisted, how much the executors realized annually in the way of interest or otherwise, and what amount of debts and liabilities existed, has not been brought to the view of the Court. Under these circumstances, the Court is not disposed, at the present time, to proceed to a final judgment. Upon all the matters above named information is desired. The judgment of this Court on this appeal will be suspended for the present. And it is ordered, that it be referred to the master to enquire and report as to all the facts above mentioned, as matters on which this Court desires information; each party to have the right of filing exceptions to the master's report, and bringing the same to a hearing before the Circuit Court.

JOHNSTON, DUNKIN and WARDLAW, CC., concurred.

In obedience to the directions contained in the above opinion, the master made his report, in which he stated that Mrs. Ann Timothy died about March 1, 1841; that her

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whole estate consisted of bonds, amounting in the aggregate, at the time of her death, to \$29,629.85, besides interest then due to the amount \$1,802.99; that her debts amounted

to \$829.04; that five pecuniary legacies, amounting to \$7,000, were given by the will before the legacy of \$1,000 to Miss Cleland (Mrs. Howe;) and that if the legacies were payable in their order out of interest realized by the executors, Miss Cleland's legacy was not payable until March 1, 1847.

At this Term, (January Term, 1852,) the Court of Appeals announced its final judgment as follows:

PER CURIAM. The Court has considered the appeal taken from the decree of Chancellor Caldwell in this case, and concurs in the said decree; and it is ordered that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.

4 Rich. Eq. 260

JAMES ROSE and H. A. DeSAUSSURE,
Ex'ors. of Philip Tidyman, v. **ALFRED R.**

DRAYTON and SUSAN TIDYMAN.

(Charleston. Jan. Term, 1852.)

[Wills ⚡199.]

A codicil annexed to a will is a republication thereof:—lands purchased after the date of the will and prior to the execution of the codicil, held to pass under the residuary clause of the will.

[Ed. Note.—Cited in *Drayton v. Rose*, 7 Rich. Eq. 333, 64 Am. Dec. 731.

For other cases, see Wills, Cent. Dig. § 498; Dec. Dig. ⚡199.]

[This case is also cited in *Drayton v. Rose*, 7 Rich. Eq. 332, 64 Am. Dec. 731, as to facts.]

Before Dunkin, Ch., at Charleston, June, 1851.

Doctor Philip Tidyman, of Charleston, died June 11, 1850, leaving of force his last will and testament, bearing date March 20, 1843. He left as his heir at law his daughter, Susan Tidyman. His will contained sundry devises and bequests and the following residuary clause:

"Item. I give and devise all the rest and residue of my estate, of every kind and nature whatsoever, unto my nephew, Alfred Drayton."

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*About September 6, 1848, Dr. Tidyman purchased a farm in Greenville, containing sixty-eight acres; and about March 7, 1850, entered into a written contract to sell to the Greenville and Columbia Rail Road Company about three acres, part of said farm: but, at the time of his death, the purchase money had not been paid, nor had title been executed.

On March 12, 1850, the testator made and executed a codicil, which he annexed to his will, in the following words:

"I declare the following to be a codicil to my will:

"Whereas, in my foregoing will, I gave and bequeathed to my cousin, James Rose and his wife, Mrs. Julia Rose, or the survivor of them, certain house servants after the death of my daughter, and among them, one named Judy; since the date of my will the said Judy has had a child. I now, therefore, give and bequeath the present and future issue and increase of my said servant Judy to the said James Rose and his wife, Mrs. Julia Rose, or the survivor of them, in the same manner as I have heretofore given Judy to them."

One object of the bill was to ascertain whether the farm in Greenville descended, as intestate property, to the testator's daughter, or whether it passed under the residuary clause of the will; and for instructions as to who should make titles to the Rail Road Company for the part of the farm agreed to be sold them, &c.

Dunkin, Ch. The pleadings present the facts of the case and the points submitted for the adjudication of the Court. Whereupon it is declared that the testator's will was re-published by the codicil annexed, and executed on the twelfth day of March, one thousand eight hundred and fifty,^(a) and that the legal estate in the premises contracted to be sold to the Rail Road Company, vested in the defendant, Alfred R. Drayton, and that he is a trustee, as to the premises so contracted to be sold, for the purchaser, and bound to execute a conveyance when required by the

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*purchaser. And that the executors are entitled to receive the purchase money, and are bound to account for the same to the said Alfred R. Drayton as part of the rest and residue of the testator's personal estate bequeathed to him.

The complainants appealed on the ground:—that the testator's will was not re-published by the codicil annexed to it; that the legal estate in the premises contracted to be sold to the Rail Road Company, did not vest in the defendant, Alfred R. Drayton; that the testator died intestate as to the farm in Greenville, and that the same vested in his daughter and heir at law, Susan Tidyman.

DeSaussure, for appellants.

Petigru, T. Y. Simons, jun., for Alfred R. Drayton.

Memminger, for Susan Tidyman.

PER CURIAM. We concur in the decree of the Chancellor: and it is ordered, that it be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.

(a) 1 Rolle Abr. p. 617. Z. No. 8; Richardson v. Richardson, Dud. Eq. 184.

4 Rich. Eq. 262

MARY A. R. LOWRY, Adm'x. of Wm. Brown,
Deceased, v. LEWIS O'BRYAN et al.

(Charleston. Jan. Term, 1852.)

[Wills. *Ⓒ*548.]

Request to testator's four sons "to them and their heirs forever; if either of my sons should die without issue, his part shall be equally divided between the survivors;" G. was the last surviving son and he died without issue—W., another son, having died before him, leaving issue: *Held*, that G.'s estate was a vested fee, defeasible in the event that he died without issue, leaving one or more of his brothers surviving him, and, therefore, in the events which had happened, W. had no interest, under the will, in G.'s share, which his administratrix could claim.

[Ed. Note.—Cited in *Mendenhall v. Mower*, 16 S. C. 314; *McGee v. Hall*, 26 S. C. 183, 1 S. E. 711; *Gordon v. Gordon*, 32 S. C. 580, 11 S. E. 334.

For other cases, see Wills, Cent. Dig. § 1183; Dec. Dig. *Ⓒ*548.]

[This case is also cited in *Gordon v. Gordon*, 32 S. C. 581, 11 S. E. 334, without specific application.]

Before Dunkin, Ch., at Colleton, February, 1851.

Dunkin, Ch. Robert Brown, the father of complainant's intestate, died in 1805. His will has the following residuary clause.

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*viz: "Item—I give and bequeath unto my loving sons, William Brown, George Brown, Robert Brown, and Charles Brown, all the remainder part of my estate, to be equally divided between them, share and share alike, to them and their heirs forever; and I also will and desire that, if either of my sons should die without issue, his part shall be equally divided between the survivors." The estate was equally divided between the four sons. In 1811, George died without issue, and his share was equally divided between the surviving brothers. So in 1813, Robert died without issue, and his share was equally divided between the surviving brothers, William and Charles. In 1815, William, the former husband of the complainant, died, leaving two children, who also died in infancy. Charles Brown, the fourth son of the testator, survived until 1848, and then died without issue, having bequeathed his estate to the children of the defendant, Lewis O'Bryan, jun., whom he appointed executor of his will. As the administratrix of Wm. Brown, deceased, the complainant can have no right which did not belong to her intestate. His interest in the share allotted to his brother Charles, depended on two contingencies, to wit: That he should die without issue, and that he, William, should survive him. But William was in his grave more than thirty years before the death of Charles, and consequently could take nothing in the character of survivor. This is an end of complainant's claim. But as the testator, Robert Brown, manifestly intended to part

with his whole estate; and as Charles was the last survivor, so that no one could take on the happening of the contingency, the Court is of opinion that his interest, under his father's will, became absolute, and might well pass under the bequest to the defendants. It is ordered and decreed that the bill be dismissed.

The complainant appealed, on the grounds:

1. Because she submits, that on the death of William Brown leaving issue, his interest in the share of Charles Brown became transmissible to his representatives.

2. Because, though she might not be able to

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sustain her bill in *the character of administratrix solely, yet, as she alleges herself in her bill to be the sole surviving distributee of William Brown, and she is admitted to be so, her bill for the cause first stated in the decree ought not to be dismissed.

3. Because the decree is otherwise contrary to law and equity.

Rhett, Tracy, for appellant.

Henderson, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. By the will of Robert Brown, it is quite clear that each of his four sons took, not merely a life interest, but an absolute estate in the personality bequeathed to them. It is to be equally divided between them, "share and share alike, to them and their heirs forever." But this absolute estate was defeasible on a contingency, "if either of my sons should die without issue, his part shall be equally divided between the survivors." Charles Brown, defendant's testator, was the last surviving child of his father, Robert Brown. The complainant's intestate had been dead thirty years before his brother Charles died. Complainant's intestate left issue, and his absolute interest in the share bequeathed to him was, therefore, indefeasible. But it is insisted, on the part of the appellant, that her intestate had an interest in Charles's share, which was transmissible to his representatives, and that, on the death of Charles without issue, she, as administratrix of Wm. Brown, deceased, became entitled to the estate, although her intestate died before his brother.

If the position assumed by the complainant be correct, it is obviously fatal to her claim. The gift to the first taker is in the most ample terms, "to him and his heirs forever, but if he should die without issue, his part shall be equally divided between the survivors." The only ground upon which this limitation over can be sustained, as demonstrated in *Massey v. Hudson*, 2 Mer. 130, and *Postell v. Postell*, 1 Bail. Eq. 390, is that "it was intended that the survivor was meant individually and personally to enjoy the legacy,

and not merely to take a vested interest.

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which might, *or might not, be accompanied by actual possession"—otherwise, although there should be no such failure of issue as would enable him personally to take, yet his representatives would be entitled to claim in his right whenever the failure of issue should happen, which might be fifty years after the death of the first taker. "Unless the term survivor has the effect of limiting the generality of the expression, dying without issue;" in other words, if it is not a personal, but a transmissible, interest which is intended, there is no ground to support the limitation over, and the interest of the legatee would be absolute and indefeasible. It may be further remarked, that, if the limitation over were not too remote, but might take effect on the failure of issue at any time, there would be more legitimate ground for argument that the defendant, representing the last surviving brother, was entitled to the share of William Brown, the complainant's intestate, than that the complainant would take Charles's share. For although William died leaving issue, yet the issue became extinct in the life time of Charles, who was then the last survivor. But upon the principle and the authorities before stated, William having left issue at the time of his death, his estate was indefeasible, although the issue might afterwards fail. It is an entire misapprehension to suppose that the vesting of the estate depended upon the legatee having or leaving issue. It vested immediately on the death of Robert Brown, the original testator, and was defeasible only upon the happening of a contingency. If that event occurred, it was limited over to certain persons. None are entitled but those who can bring themselves within the description at the happening of the contingency. Neither the complainant, nor any one else, answered the description at the death of Charles Brown, who was the last surviving brother. Under these circumstances, it was held by the Chancellor, that, as it was the manifest intention of the testator to part with his whole estate, and as at the death of Charles Brown there was no one capable of taking under the description of survivor, his estate was absolute, and such conclusion has the sanction of *Powell v. Brown*, 1 Bail. 100, and the au-

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*thorities there cited. But this is an unimportant inquiry. If the result were otherwise, and it became a case of intestacy, none could claim but the legal representative of the original testator, and that character is not sustained by the complainant.

The appeal is dismissed.

JOHNSTON, DARGAN and WARDLAW, CC. concurred.

Appeal dismissed.

4 Rich. Eq. 266

A. R. and SARAH CHISOLM v. JANE M. CHISOLM and Others.

(Charleston. Jan. Term, 1852.)

[Infants \hookrightarrow 33.]

Infant having an absolute estate of about \$16,000, and also an estate of about twice that amount contingent upon his attaining the age of twenty-one, or marrying: ordered that maintenance be allowed him out of his absolute estate.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 64-66; Dec. Dig. \hookrightarrow 33.]

[Infants \hookrightarrow 33.]

Allowance made for maintenance is subject to the future control of the Court, and may be altered with the varying circumstances of the estate.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 65; Dec. Dig. \hookrightarrow 33.]

Before Wardlaw, Ch., at Charleston, February, 1851.

Wardlaw, Ch. Alexander Robert Chisolm, by his will, dated May 29, 1827, devised a plantation and negroes to his son, Alexander R. Chisolm, for life, and, upon his death, should he die leaving issue at the time of his death, to such issue as should attain the age of twenty-one years, or at the day of marriage, equally and absolutely, with survivorship among them; and should his son die leaving issue, as aforesaid, and also a widow, then that the widow, during widowhood, should receive a reasonable support out of said estate, and he appointed his executors trustees for the children and widow of his said son, for the purpose of carrying this and other provisions of his will in the nature of trusts into full and entire effect; but should his said son die leaving no issue at the time of his death, or leaving issue, they should become extinct before attaining the age of twenty-one years, or before marriage, and also leaving a widow, then that the property given to his said son should revert

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back, and become the property of *his other sons, who should be living at the death of his said son, subject to the same conditions and restrictions imposed on the said property in the devise and bequest of the same to his said son, the said surviving sons paying to the widow of their deceased brother \$5,000 in full discharge of her claims upon the estate. The said testator, by his said will, gave certain lands and negroes to each of his other three sons, John M., Edward N. and Robert, for life, subject to all the provisions and conditions imposed on the property given to their brother, Alexander R., and also gave to each of his four sons one-fourth of the residue of his estate in fee. Of the said will, George Chisolm, Thomas Smith, Alexander R. Chisolm, and John M. Chisolm, were appointed executors. The testator died June, 1827, leaving his said four sons surviving him. Of the executors, Thomas Smith died, without having ever qualified; George Chis-

olm qualified, and soon afterwards died; the other two qualified and administered the estate by paying the debts and delivering the legacies. Soon afterwards the son, Alexander R., died without having been married, whereby his interests devolved upon his surviving brothers.

Edward N. Chisolm and Mary E. Hazard contracted marriage in 1831, and in contemplation thereof conveyed nine negroes to Thomas E. Screven, in trust, for the use of both during their joint lives, then for the use of the survivor for life, and upon the death of the survivor for the issue of the marriage in fee. Edward N. Chisolm died September 1, 1836, leaving the said Mary E., his widow, and the plaintiffs, A. R. and Sarah, his children, and leaving of force his will, dated August 19, 1836, whereby he devised his whole estate, real and personal, to his widow, and whereof the said Thomas E. Screven was the acting executor.

John M. Chisolm, surviving executor of Alexander Robert Chisolm's will and trustee of the estates devised, applied by petition to this Court for instruction as to the extent of the provision which should be made for the reasonable support of the said Mary E. out of the estate given in trust; and at April sittings, 1838, for Beaufort district, it was ordered that the said John M. Chisolm,

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*executor, pay to the said Mary E. Chisolm, out of the trust property of her deceased husband, Edward N. Chisolm, the annual sum of two thousand dollars during her widowhood, for her personal use, and five hundred dollars annually for the maintenance of her two children, until the further order of the Court.

Mary E. Chisolm died in November, 1838, intestate, leaving the plaintiffs the distributees of her estate, the administration of which was committed to the said Thomas E. Screven.

The separate estates of Edward N. Chisolm and Mary E. Chisolm and the estate embraced in their marriage settlement, have all been sold by the orders of the Court, and they are now in the hands of the said Thomas E. Screven, in the form of bonds bearing interest, to the aggregate value, as stated in his answer, of \$33,004.20, to which the plaintiffs are absolutely entitled. The estate to which the plaintiffs will be entitled, under the will of their grand-father, Alexander Robert Chisolm, upon their marriage or attainment of full age, is estimated to be worth about twice as much more. So that the estate of each plaintiff, vested and contingent, is worth about \$50,000.

John M. Chisolm was appointed guardian of the persons of the plaintiffs, at January sittings, 1839, of this Court, for Beaufort district; he was also provisionally appointed guardian of their estates, but did not comply with the condition of the order in this

respect. The plaintiffs, after the death of their mother, went to reside in the family of their maternal aunt, the wife of Horace Waldo, their next friend in this suit, in the city of New York; and they continue to reside there. The sum allowed, or assumed to be allowed, by the order of April, 1838, for the maintenance of the plaintiffs, has been found inadequate, and the said Horace Waldo is in advance for their support. The plaintiff, A. R., is now in his seventeenth year of age, and the plaintiff, Sarah, in her fifteenth year.

John M. Chisolm died intestate, July 5, 1849, leaving a widow, Jane M., who has administered upon his estate, and five chil-

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dren, *who are infants, namely, John M., Alfred, Jane, Susan and Laurens.

The trust estate of Edward N. Chisolm, while under the management of the said John M. Chisolm, yielded little income, inasmuch that he was in advance to the said trust estate at the time of his death.

Robert Chisolm, only surviving son of Alexander Robert Chisolm, was appointed by this Court, sitting in Charleston, February, 1850, manager of the trust estate of Edward N. Chisolm, and in June, 1850, trustee of said estate.

This bill is filed by the two infant children of Edward N. Chisolm against Thomas E. Screven, Robert Chisolm, Jane M. Chisolm, and the children of John M. Chisolm; it prays that the advances made by John M. Chisolm and Horace Waldo may be reimbursed, and that additional sums may be allowed to the plaintiffs for their maintenance, past and future. The master reports that the debt of the trust estate of Edward N. Chisolm to the estate of John M. Chisolm amounts to \$2,007.69. That there are, to the credit of the trust estate, in the hands of James H. Ladson & Co., factors, \$3,102.38, and in the hands of Robert Chisolm, as manager and trustee, \$1,026.57; and the master recommends the increase of maintenance to the plaintiffs hereinafter ordered. All the parties seem agreed that the main purposes of the bill should be effected; and the only question seriously litigated, is, whether the allowance for the maintenance of the plaintiffs should be defrayed out of the estate to which they are absolutely entitled, or out of the trust estate, which will belong to them if they marry or reach maturity. If the latter were the only fund from which the maintenance could be provided, the decision might be embarrassing, but in the actual state of the facts the course of judgment is plain.

A legacy, payable at a future day, does not bear interest before default in the payment, unless the intention of the testator to give interest, as an incident to the legacy can be inferred from the whole will, or unless it be a legacy from a father to an infant child,

who has no other provision, and to whom the

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father *has given nothing in the will for maintenance. In such case of father and child, interest from the death of the testator is given for the maintenance of the child, in the absence of express direction on the subject, or even against direction for the accumulation of interest until the day when the legacy is payable, and whether the legacy be vested or contingent. *Allen v. Crossland*, 2 Rich. Eq. 68. This doctrine is founded on the principle, that as the father is under a legal obligation to provide for the maintenance of his infant child, the Court will not presume him to be inofficious and unnatural, but will infer that by such legacy he intends, in fulfillment of his duty, to afford to his child the means of support. *Heath v. Perry*, 3 Atk., 101. The same rule of construction might be applied to the case of a grandfather's legacy, if by the death of the father and the destitution of the grandchildren, he should be bound to provide for their maintenance, or to the case of any testator, who, by the terms of his will, puts himself in loco parentis towards the objects of his bounty. But, in the absence of such circumstance, the rule does not extend to adult children. *Lowndes v. Lowndes*, 15 Ves. 301; *Raven v. Waite*, 1 Swan. 553; nor to a natural child, *Id.*; nor to a wife; *Stent v. Robinson*, 12 Ves. 461; nor to nephews; *Crickett v. Dolby*, 3 Ves. 10; nor to grandchildren; *Houghton v. Harrison*, 2 Atk. 329; *Butler v. Freeman*, 3 Atk. 58; *Palmer v. Mason*, 1 Atk. 505; *Descrambes v. Tomkins*, 1 Cox, 233; *Ellis v. Ellis*, 1 Sch. and Lef. 5; *Lupton v. Lupton*, 2 John. Ch. 628; nor even to infant children, if the father has provided in his will any other maintenance, however small, and however large may be the ultimate legacy. *Ellis v. Ellis*. Maintenance out of the interest of a legacy, payable at a future day, by a testator, not in loco parentis, to a class of children not otherwise provided for, if there was equality in the portion of the children, and in their chance of taking by survivorship the whole, has been sometimes ordered by a Court of Equity, where the Court could have before it all the persons entitled to the fund, so as to make to each a compensation in imme-

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diately maintenance for *the diminution of the fund to which he may be ultimately entitled; but this relief cannot be afforded if there be a gift over, or any other interest, that upon any other contingency would take effect, at least, without the consent of the remainder-men.

This would be in effect giving the property of one person for the maintenance of another. In *ex parte Keble*, 11 Ves. 604, Lord Eldon refused maintenance, where the estate was bequeathed to infants, with survivorship among them in case of the death

of any of them under twenty-one; but there was a limitation over to others in case of the death of all the infants under twenty-one. In *Marshall v. Holloway*, 2 Swan. 436, the same eminent Judge, discussing this doctrine of maintenance on the principle of compensation, says: "if the will contains successive limitations under which persons not in being may become entitled, it is not sufficient that all the parties then living presumptively entitled are before the Court, for none of the living may be the parties eventually entitled to the enjoyments of the property." Again, in *Errat v. Barlow*, 14 Ves. 202, where the property was given to children at twenty-one, and limited to others if the children should die under twenty-one, Lord Eldon says: "the result is that if the chance of surviving is equal among all, and no other interest, that upon any contingency would take effect, will be defeated, maintenance shall be allowed out of the interest; but it is impossible to give it where in any event under the operation and construction of the will that interest may possibly belong to others." In *Lomax v. Lomax*, 11 Ves. 48, maintenance out of the interest of a legacy to the children of testator's living daughter was refused because an unborn child might eventually take the whole. In *Errington v. Chapman*, 12 Ves. 20, legacies were given to two grandchildren at twenty-one, with interest from the end of a year after testator's death, and with survivorship amongst them, but because there was a gift over, in case both died under twenty-one without issue, Sir Wm. Grant refused maintenance, although the father was not of ability to maintain the infants. *V. C. Shadwell*, in *Turner v. Turner*, 4 Sim. 430, 6

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E. C. C. R. 198, *pursued the same course, because the children of such of the grandchildren as might die under twenty-one had a contingent interest. The decisions are not altogether uniform as to the necessity of calling before the Court all the persons who may be beneficially interested in such legacies, but the great weight of authority is against the allowance of maintenance, where this cannot be done.

In the case before us, we cannot regard the testator, Alexander Robert Chisolm, as putting himself in loco parentis towards grandchildren who might never come into existence, especially when he made ample provision, by absolute bequests, for their living father. The only direction of the will from which the parental anxiety of the testator towards grandchildren is inferred, is the appointment of trustees for them; but that arrangement was adopted only to preserve the contingent remainders, in case the father died during the infancy of their children. One cannot be under parental obligation to posterity which is possible only, and not actual.

It seems equally impracticable here to

give maintenance to the plaintiffs out of the trust estate, on the principle of compensation. The plaintiffs have other estates from which they may be maintained. The children of John M. Chisolm are infants, and incapable of bartering away their contingent interest in the fund. Unborn children of Robert Chisolm, who cannot be called before the Court, may be eventually entitled to the whole estate; and the Court cannot give away their property to others.

In opposition to this conclusion, it is urged that the point was adjudged by the order of April, 1838. But that order provided only for the reasonable support of the mother of the plaintiffs during her widowhood, in conformity to the will; and the fact that she had two children was properly taken into consideration in fixing the amount of her allowance. I am not disposed to scan curiously the provisions of that order, so far as it may have been acted upon by the parties; but it would be difficult to maintain that it had any legal operation after the death of Mary E. Chisolm. At all events, when that

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order was made, the plaintiffs were not *entitled to the enjoyment of any estate whatsoever; and it is pushing the argument ad vericundiam extremely, to urge me to enlarge and apply an order of my predecessors under a very different state of facts.

It is ordered and decreed, that the report of Master Gray be confirmed, and that the defendant, Jane M. Chisolm, administratrix of John M. Chisolm, be paid the sum of \$2,007.69, with interest from June 19, 1848, for the advances of her intestate to the trust estate of E. N. Chisolm, out of the balance in the hands of the factors, James H. Ladson & Co.

It is further ordered and decreed, that the advances of Horace Waldo to the plaintiffs be repaid to him, so far as they may be covered by an additional allowance of \$500 a year hereby made for the maintenance of plaintiffs, from the death of John M. Chisolm to the first of January last, out of the estate of the plaintiffs in the hands of the defendant, Thomas E. Screven.

It is further ordered and decreed, that for this year commencing first of January last, and hereafter, so long as the plaintiffs reside with H. Waldo, their next friend, and until otherwise ordered, the said H. Waldo do receive for the maintenance of plaintiffs, at the rate of one thousand dollars a year for each of them, payable semi-annually in advance, the allowance for the first half of this year immediately after this decree, and subsequent allowances in July and January, out of the estate of plaintiffs in the hands of Thomas E. Screven, defendant, who is hereby ordered to pay the same.

It is further ordered and decreed, that the defendant, Robert Chisolm, proceed to invest, conformably to the standing order of the

Court of Appeals, any balances in his hands, or in the hands of James H. Ladson & Co., belonging to the trust estate of E. N. Chisolm, or which may hereafter accrue, to await the further order of this Court.

As there is no proof in the cause that guardians have been appointed for the persons or estates of the plaintiffs since the death of John M. Chisolm, the cause is re-

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tained with leave to any of the *parties, upon proper notice to the solicitors of the other parties, to move for a reference on that subject, or to take such other proceedings in the matter as they may advise.

The costs and expenses of the plaintiffs, as between solicitor and client, and the costs of all the defendants, except Thomas E. Screven, to be paid out of any funds in the hands of Robert Chisolm, as manager or trustee. The costs of the defendant, Thomas E. Screven, to be paid out of the estates of the plaintiffs in his hands.

The defendant, Thomas E. Screven, appealed, on the grounds:

1. Because his Honor decreed, that an allowance of "one thousand dollars for each, payable semi-annually, in advance, for the maintenance in future of the plaintiffs, A. R. and Sarah Chisolm, during their minority, should be paid out of the estate in his hands." Whereas, it is respectfully submitted, that the estate in his hands is the estate of their deceased mother, Mary E. Chisolm, safely and securely invested in bonds, bearing interest, payable annually, not semi-annually; and it is impracticable and inequitable to collect and re-invest the corpus of said estate to provide for the exigency of the decree in this respect, and to require the payment of interest, semi-annually, contrary to the usage of the country, which would occasion frequent and serious losses to the said estate, by detention of its funds from time to time, to secure suitable investments, and the punctual payment of the allowance ordered.

2. Because the last will and testament of the grandfather of the said plaintiffs, Alexander R. Chisolm, deceased, charges the estate, consisting of lands on Coosaw Island; and the negro slaves, after the decease of the life-tenant, his son, Edward Neufville Chisolm, deceased, with the maintenance and education of the said plaintiffs, the remaindermen, during their minority, which provision of the said testator, this honorable Court has hitherto adopted as its guide, and this defendant respectfully submits that no sufficient cause is assigned why the said entailed estate should not continue the sum decreed for the maintenance annually of the said plaintiffs, as heretofore charged.

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*3. Because the defendant, Thomas E. Screven, has no funds in his hands to pay the balances decreed to be due and owing to the said Horace Waldo, unless he is permit-

ted to encroach upon the corpus of the estate, already invested; whereas it is submitted, that such encroachment is contrary to the practice and policy of the Court.

4. Because the smaller estate in the hands of defendant is charged with the payment of a sum annually, which, under the most favorable circumstances, it could not fully pay; whereas the larger and more profitable estate is not charged at all, and its proceeds suffered to accumulate in the hands of Robert Chisolm, without giving security for said estate or its proceeds.

5. Because this defendant received no notice of any reference before the master in Charleston, at which he would have been represented; therefore the decree of his Honor occasions surprise and injustice to this defendant.

Screven, Martin, for appellant.
Memminger, Petigru, contra.

PER CURIAM. We concur in the decree. It is a mistake to suppose that the allowance made for maintenance is permanent or unalterable. Upon a proper showing, in a proper proceeding, it may be altered with the varying circumstances of the estate. It is subject therefore to the future control of the Court. It is ordered that the decree be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and
WARDLAW, CC., concurring.
Appeal dismissed.

4 Rich. Eq. *276

*W. II. RIVERS, Adm'r. W. M. Edings, v.
JOHN A. FRIPP et al.

(Charleston. Jan. Term, 1852.)

[Wills ⚡634.]

Devise of property, real and personal, to testator's wife, for life, and after her death to his son, for life; "and from and immediately after the death of my wife and son, unto the issue of my said son living at the time of his death, who shall live to attain the full age of twenty-one years, or who, dying before that time, shall leave issue to live until the time at which the parent or parents, if alive, would have reached the full age of twenty-one years;" and, in default of such issue, then, over,—held, to give a vested, but defeasible, interest, with immediate right to the rents and profits, to a child of the son who survived both the wife and son, although such child died under twenty-one years of age, leaving no issue which lived until the time at which the parent, if alive, would have been twenty-one years of age.

[Ed. Note.—Cited in *Seabrook v. Gregg*, 2 S. C. 77; *Leroy v. City Council of Charleston*, 20 S. C. 75, 77; *Boykin v. Boykin*, 21 S. C. 530; *Charleston & W. C. Ry. Co. v. Reynolds*, 69 S. C. 503, 48 S. E. 476; *Walker v. Alverson*, 87 S. C. 61, 62, 68 S. E. 966, 30 L. R. A. (N. S.) 115.

For other cases, see Wills, Cent. Dig. § 1503; Dec. Dig. ⚡634.]

Before Dunkin, Ch., at Charleston, June, 1851.

Dunkin, Ch. The questions presented by the pleadings arise on the will of William Edings, deceased, and the codicil thereto. The former bears date 23d May, 1834, and the latter on the 27th March, 1836, and both were admitted to probate on the 11th April following. An extract of so much as is necessary is annexed to this decree.

It appears that, at the time of the execution of these instruments, and at the decease of the testator, he had one son, John Evans Edings, who was himself married and had two sons, to wit: William M. Edings and John Evans Edings, jr., one of the defendants. The testator left also, besides his widow, Sarah Edings, two daughters, Sarah Chisolm and Mary Fripp, and the children of a deceased daughter Eliza Whaley.

By the principal clause of the will, which it is important to consider, the plantation on Edisto Island therein described, and the slaves attached thereto, are devised and bequeathed to his wife during her natural life, and, subject to her life estate, the same property is devised and bequeathed to his son, John Evans Edings, during his natural life; but it is specially provided that, in the event of the bankruptcy of his son, or of any act on his part that would deprive him of the

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use, annual profits or income arising from said property, then, and in any such case, the devise and bequest to his son are absolutely revoked and annulled, and the testator devises and bequeaths the said property, subject to his wife's life estate, &c., "unto the wife and children of his said son, or the survivor or survivors of them, for and during the remainder of the life of his said son, to and for their, and each of their sole and separate use, benefit, and behoof, and without being in any manner subject to the debts, contracts or control of his said son." "From and immediately after the death of his wife and son," his mansion house, &c., and the three tracts of land, his dwelling house on Eding's Bay, &c., and all the slaves, &c., on his three tracts of land on Edisto Island, the testator gives, devises, and bequeaths "unto the lawfully begotten issue of his said son living at the time of his death, who shall live to attain the full age of twenty-one years, or who dying before that time, shall leave lawfully begotten issue to live until the time at which the parent or parents, if alive, would have reached the full age of twenty-one years: if more than one, then to them, their heirs and assigns, absolutely and forever; and if only one of them, then to that one, his or her heirs and assigns absolutely and forever, the issue of any deceased issue of my said son, and whether the said issue died before or after my said son, taking and receiving the same share and proportion as the

parent or parents, if alive, would have taken and received. And should my said son die without leaving lawfully begotten issue living at the time of his death, who shall live to attain the full age of twenty-one years, or who, dying before that time, shall leave lawfully begotten issue to live until the time at which the parent or parents, if alive, would have attained twenty-one years of age, then I give, devise and bequeath all the said real and personal property mentioned and contained in this clause of my will, unto the right heirs then living of me, the said William Edings, to be equally divided among them, share and share alike, according to the laws of this State for the distribution of intestates' estates."

John Evans Edings died two years after

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the death of the testator, his father, leaving surviving him his two sons, William M. Edings and John Evans Edings. His mother, Sarah Edings, died in 1844. William M. Edings lived until 29th September, 1850, when he departed this life at the age of twenty years. He left surviving him a son, who died three months after his father, and before his father would have attained the full age of twenty-one years. John Evans Edings, the defendant, was eighteen years and six months old in May, 1851. The bill is filed by the personal representative of Wm. M. Edings, praying, among other things, an account of the rents and profits of the estate above devised and bequeathed, from the death of the life tenant in 1844 until the close of the year 1850, and that a moiety thereof may be paid to him. The success of the complainant depends upon the inquiry whether William M. Edings had a vested or contingent interest under the will of his grand-father.

The authorities concur that this inquiry must be determined by the sense in which the testator intended the devisees interest in the property to depend upon his attaining the specified age. Thus a devise to a person, if he shall live to attain a particular age, standing alone, would be contingent; yet if it be followed by a limitation over in case he die under such age, the devise over is considered as explanatory of the sense in which the term is used, to wit: that, at that age, the estate should become absolute and indefeasible: the interest in question, therefore, is construed to vest instantaneously. 1 Jarman on Wills, 738. The principle is sustained by many cases, and among others by Doe v. Nowell, which was first determined in the King's Bench, 1 M. & Selw. 326, and the judgment afterwards affirmed by the House of Lords, 5 Dow P. C. 202. The devise was to the testator's nephew for life, and, on his decease, to and among his children lawfully begotten equally, at the age of twenty-one, and their heirs as tenants in common. But, if only one child should

live to attain such age, to him or her and his or her heirs, at his or her age of twenty-one; and in case the nephew should die without lawful issue, or such lawful issue should die before twenty-one, then

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to and *amongst the testator's nephews and nieces there named, or such of them as should be then living, and their heirs and assigns forever. The father, during the infancy of two of the children, and before the birth of others, levied a fine and afterwards suffered a recovery, and conveyed the estate to a purchaser, and died leaving his children under age. It was held that the children, at their birth, took vested remainders, and they recovered against the purchaser. The case was decided on the authority of Bromfield v. Crowder, 1 New Rep. (B. and P.) 313. Testator devised a life estate to his widow, and, on her death, to Joshua Rose for life, and at the decease of the longest liver of them, he devised all his real estate to the plaintiff, if he should live to attain twenty-one years of age; but in case he die before he attains that age, and his brother Charles survive him, "in that case I give my real estate to Charles, if he lives to attain the age of twenty-one years, but not otherwise; but in case both the above mentioned boys die before either of them attain the age of twenty-one years, then I give my real estate to John Tale, my god-son, and his heirs forever." After the decease of the widow and Joshua, and before the plaintiff attained the age of twenty-one years, he filed a bill to have his rights declared. On the part of the heir at law, it was insisted, that the remainder was contingent, and the tenant for life having died before the plaintiff attained twenty-one years of age, such remainder consequently could not take effect, and the estate descended to the heir at law. On a case made for the opinion of the Judges, it was certified "that the plaintiff took a vested estate in fee simple in the freehold and copyhold estates of the testator, determinable upon the contingency of his dying under the age of twenty-one years." The Chief Justice says: "This is an immediate devise to the plaintiff, to take place on the death of the two preceding devisees. If so, we must either break in upon the terms of the will or give them effect. In the latter case, there is an end of all argument about the word if." "There is nothing in the will to prove that the testator meant the plaintiff not to take a vested estate unless he

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survived twenty-one. Indeed, *the true sense of the thing is, that the testator meant him to take it as an immediate devise in himself, but that it was to go over in the event of his dying under twenty-one." "Words must be construed according to the intention of the parties." "The apparent intention, as

collected from the whole will, must always control particular expressions." "The fairest construction is, that the plaintiff took an immediate vested estate on the death of the preceding devisees, with a condition subsequent." *Doe v. Moore*, 14 East, 601, was a direct devise to A. when he attains the age of twenty-one years: but in case he should die before he attains the age of twenty-one years, then over. It was held by Lord Ellenborough, on the authority of the preceding cases, as well as *Edwards v. Hammond*, 3 Lev. 132, that this did not make the devisee's attaining twenty-one a condition precedent to the vesting of the interest in him: but that the dying under twenty-one is a condition subsequent, on which the estate is to be divested. The rule, and the reason of it, are very clearly stated by Sir E. Sugden, in the argument of *Phipps v. Williams*, 5 Sim. 44. "Whether the estate be in possession or remainder, if it be devised to a man on the happening of an event, as, for instance, his attaining twenty-one years, and if there be a devise over in case the party does not arrive at that age, the devisee will take a vested estate before he attains the specified age, and the estate will go over if he does not attain that age: because it is considered that the words are introduced for the sole purpose of limiting the period when he is to take an indefeasible estate, and not for the purpose of showing an intention of keeping him out of the enjoyment of the property till that particular event happens."

This class of cases was at one time the subject of much observation, and particularly the case of *Doe v. Moore* was supposed to carry the doctrine too far. But the whole subject was recently considered, and the decisions reviewed in *Phipps v. Ackers*, 9 Clarke and Fin. 583. The cause was twice argued in the House of Lords, and once in the presence of the twelve Judges. The question submitted to the Judges was, "What

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estate George Hol*land Ackers took in the Wheelock estate? Testator gave these estates to G. H. A. when and so soon as he should attain the age of twenty-one years: but in case he should die under the age of twenty-one years without leaving issue, in that case the estates should form part of the residuary estate of the testator, which he gave over to another person." Chief Justice Tindal delivered the unanimous opinion of the Judges, that G. H. A., on the decease of the testator, took an estate in fee simple in the lands and hereditaments of W., subject to be divested in the event of his dying under twenty-one and without issue. He says that, "Whatever may be the true meaning of a devise to A. and his heirs, when or if he shall attain twenty-one, without any concomitant provisions, yet there is ample authority for say-

ing that such words may, from the context, be taken not to indicate the time when the estate is to vest, but to point out an event, on the happening of which, an estate already vested is to be divested, in favor of some other person." He instances two classes of cases. The second class of cases, continues he, "goes on the principle that the subsequent gift over in the event of the devisee dying under twenty-one, sufficiently shews the meaning of the testator to have been that, the first devisee should take whatever interest the party claiming under the devise over is not entitled to, which, of course, gives him the immediate interest, subject only to the chance of its being divested on a future contingency. Whether the doctrine on which this second class of cases has rested was originally altogether satisfactory, is a point which we need not discuss. It is sufficient to say, that it clearly has been established and recognized as a settled rule of construction, not only in the Courts below, but also in the House of Lords." In *Phipps v. Ackers*, the devise was to trustees, in trust to convey to G. H. A., when and so soon as he should attain twenty-one years, &c., Lord Lyndhurst said, that this made no difference in the disposition of the property. Referring to the course which the case had taken, he says, "the object which the House of Lords had in view was, that the learned Judges should review the cases of *Doe v. Moore* and *Brom-*

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field *v. Crowder, and other cases of that class. The Judges, after consideration, unanimously pronounced the opinion, that G. H. A. took a vested estate in fee, liable to be divested in the event of his dying under twenty-one, without leaving lawful issue. I am perfectly satisfied with that decision of the Judges." Lord Campbell said, he thought "it could not admit of any reasonable doubt that, if it had been a legal limitation, it would have vested in George Holland Ackers immediately upon the death of the testator, liable to be divested on his dying before twenty-one without issue." Lord Brougham thought that "*Doe v. Moore* was an extreme application of the doctrine, but that the principle sanctioned by the cases had been for so many years adopted by acquiescence, that no course ought to be taken which could break in upon it." "It is," says he, "of the most essential consequence that the doctrines which have been long received for law, and acted upon by the Courts in their decisions, and by parties and their professional advisers in the disposition of property, should not be shaken." The bill had been filed by the heiress at law for an account of the rents and profits, George Holland Ackers was only twelve years of age at the testator's death. His demurrer was sustained by the Vice Chancellor, (*Phipps v. Williams*, 5 Sim. 44,) and,

on appeal, the judgment of the Vice Chancellor was affirmed by the House of Lords.

Regarding the doctrine then as well established, it may be proper, before considering the application of it to this will, to advert to the distinction between a devise and a bequest of personalty. It is true the rules in relation to the latter are chiefly derived from the civil law. But, in both, the ascertained intention of the testator will control the construction. In this will, the real and personal estate are included in the same clause, and made subject to the same provisions. On reference to the authorities, it will be perceived, that the principle stated applies as well to personal as to real estate. Thus, Mr. Jarman (vol. 1, p. 771) says, when a bequest is to the children, who shall attain, or to such children as shall attain the age of twenty-one years, there being in such

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case *no gift, except to the persons who answer the qualification which the testator has annexed to the enjoyment of his bounty, the vesting of the legacy is postponed. But even these expressions may be explained and neutralized by the context, "as if the testator, after giving to the children who attain a certain age, goes on to dispose of the property in case there is no child who does attain the prescribed age, he affords a plausible ground for the argument on which *Edwards v. Hammond*, and that class of cases, is founded, to wit: that the subsequent words explain the sense in which he intended the prior words to be understood, namely, that the interest of the legatees was merely liable to be divested on the event described; in other words, was to become absolute at (not to be postponed until) the prescribed age."

William Edings, the testator, had but one son. To that son he devises and bequeaths (subject to a life interest in his widow) the homestead, and the valuable property, real and personal, attached thereto, during his life, subject to certain restrictions. "From and immediately after the death of his wife and son," he devises and bequeaths the same property (describing it) unto the lawfully begotten issue of his said son, living at the time of his death, who should live to attain twenty-one years of age, or who, dying before that time, should leave issue to live until the parent would have attained twenty-one years of age. But should his son die without leaving issue living at the time of his death, who shall live to attain twenty-one years of age, &c., then the testator devises and bequeaths "the said real and personal property mentioned and contained in that clause of his will," unto the right heirs of him (the testator) then living, to be equally divided, &c. The context explains the meaning of the testator. The gift is to the issue of his son, to whom he had previously given a life estate. The usufruct and en-

joyment of the estate was to continue in them as it had been in their father, but the estate was not to become absolute and indefeasible until attaining the full age of twenty-one years. The language of the annotator on Mr. Fearne, seems very applicable. Commenting on *Edwards v. Ham-*

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mond, he says: "The event in that case, namely, the attainment of twenty-one, is one which is often considered as a quasi certain event, so that it is not required that the vesting of an estate should be suspended till the happening of such an event: it is sufficient if the estate be divested in case it should not happen, especially as that event is not of such a character as to constitute the indispensable pre-requisite to the attaching of any sort of interest in the party. On the contrary, it is rather to be supposed that the testator, considering it most probable that the party would attain twenty-one, should be maintained in a suitable manner out of the rents and profits, as he would be if he should take a vested interest, instead of allowing those rents and profits to go to his heir at law, whom he has shown no intention to benefit." 2 Fearne, sec. 351, a. And so Mr. Jarman on this point says that, although it would not perhaps be warrantable to lay down any general position to that effect, yet several of the cases point to the conclusion that, in bequests of this character, the construction should be, that "the absolute ownership only is suspended until the prescribed age: and that, in the meantime, the legatees should take vested interests, with a liability to be divested on the happening of the prescribed event."

These remarks derive force from the consideration, that the testator seems to have placed himself in the relation of a parent to his son's offspring, or, at least, to have intended so to provide for them. He contemplated his son's improvidence, or, perhaps, his insolvency. In that event, the life estate given to him is revoked, and, for the remainder of his life, the estate is given "to the wife and children of his said son, or the survivor of them, without being in any manner subject to the debts, contracts or control of his said son." From and immediately after the termination of the life interest, the estate is devised to the issue, as before recited. It is true that the codicil of 1836 gives to his two grand-sons the crop of the preceding year, but payment is expressly postponed until twenty-one years of age, with directions to invest for their use.

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Assuming that their father might live *Insolvent, the testator had carefully and liberally provided for his grand-children during their father's life time: can it be presumed that he intended this enjoyment to be interrupted and suspended from the death of

the father until his issue had attained the prescribed age?

It has been often said that where the will is capable of that construction, an interest shall, if possible, be considered as vested rather than contingent: and for obvious reasons. It is not less true, that the leaning of the Courts is to sustain the will of a testator, rather than to give such construction as would defeat it. It is not too much to assume that the testator, in this case, intended to make a full and final disposition of his whole estate. He not only executed a will which was to be the law of his property, but he established a tribunal for declaring this law. The instrument was made upon advisement, with manifest reference to the rules of law, and an intention to adhere to them. The most prominent object in his will was the disposition of the Edisto Island estate, on which he himself resided. After securing this to his widow for life, his manifest purpose was to secure it to his only son and his immediate family, so long as he was permitted to secure it by the rules of law. Construing the devise as a vested interest, subject to be defeated on the happening of the prescribed event, the object of the testator is completely attained. But if it be regarded as a contingent remainder, not to take effect until the issue attained the prescribed age, not only is his intention defeated, but the testator contemplated the state of things, and so framed his will that his purpose would be certainly and obviously frustrated. "Every remainder must vest, either during the particular estate, or else at the very instant of its determination." From this rule it follows that where the event, "on which a contingent remainder is limited to take effect, does not happen by the time at which the preceding estate determined, it never can arise or take effect at all." *Fearne*, 308. The testator here particularly contemplates the probable determination of the particular estate, and, according to the hypothesis, postpones the

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vesting *(it may be) for twenty years thereafter. The devise over to the testator's right heirs, is only on the happening of the contingency. The result would be, that the fee descended to his heirs at law as in case of intestacy, or that it passed under the residuary clause of his will; in which latter case the offspring of his son, although they might afterwards attain the age of twenty-one years, would find themselves effectually excluded from any participation in the estate, in consequence of the very measures adopted to secure their absolute right in it.

The subsequent clauses of the will, and particularly the devise to the children of his deceased daughter, *Eliza Whaley*, confirm the conviction that the intention of the testator was that the issue should take a vested, though defeasible interest. The

Court is of opinion that *William M. Edings* took a vested interest under the will of his grand-father, which was not divested or defeated until the death of his child, prior to the period at which his father would have attained the age of twenty-one years, and that his personal representative is entitled to an account of a moiety of the interim rents and profits, from the decease of *Sarah Edings*, the life tenant.

As to the proceeds of the crop of 1835, the language of the codicil seems sufficiently explicit. The gift is direct to the two grandsons, to be equally divided between them, each receiving his respective share as he comes to the lawful age of twenty-one years, and his executors are authorized to convert the same into any valuable property for their use. This vests an immediate interest in each of the legatees, transmissible to his personal representative. The event never having occurred on which the right of survivorship would attach, the complainant is entitled to an account and payment of the intestate's interest in this fund.

The complainant is also entitled to an inquiry and account as to the estate of *Mrs. Sarah Edings*, deceased, the grand-mother of the intestate, *William M. Edings*, deceased.

It is ordered and decreed, that it be referred to one of the masters to state an account between the parties upon the princi-

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*ples herein declared, and that he have leave to report any special matter, parties being at liberty to apply for such further orders, at the foot of this decree, as may be necessary to carry the same into effect.

Extract from Will.

"Item. I give and bequeath unto my beloved wife, *Sarah Edings*, for and during her natural life, the use and occupation of my principal mansion-house, yard and garden, on *Edisto Island*, of my dwelling-house on *Eding's Bay*, and of all my three tracts of land on *Edisto Island*, containing in the whole about twelve hundred acres. And I further give and bequeath unto my said wife, also for and during her natural life, the use, occupation, interest and income of all the slaves, and of the stock and plantation implements and utensils on my said three tracts of land on *Edisto Island*, to be delivered to her from the time of my death. And I give and bequeath absolutely to my said wife, my wench *Sylvia*, and carriage and horses, my boats, and household furniture. And I will, order and direct that the provision hereby made by me for my dear wife shall be in lieu and bar of dower or thirds, and of all other claims which she may or can in any manner have against my estate, real or personal.

"Item. I give, devise and bequeath unto my dear son, *John Evans Edings*, for and

during his natural life, and subject to the conditions, limitations and provisions herein-after expressed and declared, all my said three tracts of land on Edisto Island, containing in the whole, as aforesaid, twelve hundred acres, together with my Sea Bays on the said Island, subject to the life estate of my dear wife in my principal mansion-house, yard and garden, in my dwelling-house on Eding's Bay, and in my said three tracts of land, and reserving to my sister, Mary Chisolm, and to each of my daughters, the right of having each a lot of land for a residence on any of my Sea Bays, at their election, for and during their respective natural lives, and no longer; and which said right I do hereby give and bequeath to them respectively. And also I further give and bequeath to my said son, for and during his

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natural life, and subject to the said conditions, limitations and provisos herein-after expressed and declared, the use, occupation, interest and income of all the slaves, and of the stock, plantation implements and utensils on my said three tracts of land, subject to the life estate therein of his mother, my dear wife as aforesaid. And I do hereby will, order and direct, that if at any time or times hereafter, during the life of my said son, the operation of any bankrupt or insolvent law, or any act, matter or thing in law or in equity, without or with the will or consent of my said son, would deprive him of the use, annual rents, issues, services, profits and income arising from the devise and bequest herein and hereby made to him, as the same shall annually and from time to time accrue after the death of his said mother; or if he, my said son, shall sign or execute any instrument, or enter into any contract or agreement, by which he shall contract or agree to sell, assign or otherwise part with the said use, annual rents, issues, services, profits and income, or any part thereof, as a security for any sum or sums of money due and owing by him, or to be lent and advanced by him, to any person or persons whomsoever, or in any manner charge or dispose of the said use, annual rents, issues, services, profits and income, or any part thereof, by way of anticipation, or whereby or in which he should authorize and empower, or intend to authorize and empower, any person or persons whomsoever to receive the same, or any part thereof, otherwise than for his, my said son's, own and direct and immediate use, then, and in any or either of these cases, I from thenceforth revoke and annul the said devise of my said three tracts of land and my Sea Bays on Edisto Island, to my said son for life, subject to the life estate of my dear wife therein, and in my principal mansion-house, yard, garden, and in my dwelling-house on Edisto Bay, and the reservations to my sister and daughters respectively, as aforesaid; and I

thenceforth also revoke and annul the said bequest to my said son for his life of the said slaves, stock and plantation implements and utensils, on my said three tracts of land on Edisto Island, subject to the life estate

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therein of his *mother, as aforesaid; and I thenceforth give, devise and bequeath the said three tracts of land, and my principal mansion-house, yard, garden and dwelling-house on Eding's Bay, and my Sea Bays on Edisto Island, as aforesaid, and the said slaves, stock and plantation implements and utensils, on my said three tracts of land on Edisto Island, as aforesaid, subject to the life estate therein of my wife, and to the restrictions as aforesaid unto the wife and children of my said son, or the survivor or survivors of them, for and during the remainder of the life of my said son, to and for their and each of their sole and separate use, benefit and behoof, and without being in any manner subject to the debts, contracts or control of my said son. And from and immediately after the death of my said wife and son, I give, devise and bequeath all my said three tracts of land, my said mansion-house, yard and garden, my dwelling house on Eding's Bay, and my Sea Bays on Edisto Island, as aforesaid, subject to the reservations in favor of my sister and my two daughters, as aforesaid; and all my slaves, stock, and plantation implements and utensils, on my said three tracts of land on Edisto Island, as aforesaid, unto the lawfully begotten issue of my said son, living at the time of his death, who, to wit, the said issue, shall live to attain the full age of twenty-one years, or who, dying before that time, shall leave lawfully begotten issue to live until the time at which the parent or parents, if alive, would have reached the full age of twenty-one years; if more than one, then to them, their heirs and assigns, absolutely and forever; and if one, then to that one, his or her heirs and assigns, absolutely and forever, the issue of any deceased issue of my said son, and whether the said issue died before or after my said son, taking and receiving the same share and proportion as the parent or parents, if alive, would have taken and received. And should my said son die without leaving lawfully begotten issue, living at the time of his death, who, to wit, the said issue, shall live to attain the full age of twenty-one years, or who, dying before that time, shall leave lawfully begotten issue to live until the time at which the parent or

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parents, if alive, would *have attained twenty-one years of age, then I give, devise and bequeath all the said real and personal property mentioned and contained in this clause of my will, unto the right heirs then living of me, the said Wm. Edings, to be equally divided among them, share and share alike,

according to the laws of this State for the distribution of intestate's estates.

"Item. I give, devise, and bequeath unto my two grand-sons, William James Whaley and Benjamin Seabrook Whaley, the children of my dear deceased daughter, Eliza Whaley, for and during their respective natural lives, all my plantation or tract of land on Slann's Island, commonly called Glover's tract, and also that plantation or tract of land on Cheshaw, together with all the slaves, stock, plantation implements and utensils on the said two plantations, belonging to me at the time of my death, and the sum of twenty thousand dollars. And upon the death of my said grand-sons respectively, then I give, devise, and bequeath their respective shares in the said lands and negroes, stock, plantation implements and utensils, and twenty thousand dollars, unto their respective lawfully begotten issue living at the time of the respective deaths of my said grand-sons, who, to wit, the said issue, who shall attain the full age of twenty-one years, or who, dying before that time, or before the death of my grand-son or grand-sons, as aforesaid, leave lawfully begotten issue to live until the time at which the parent or parents, if alive, would have attained the full age of twenty-one years, to be equally divided among them; if more than one, then to them, their heirs and assigns, absolutely and forever, the issue of any deceased issue then only taking and receiving the share or proportion to which the parent or parents, if alive, would have been entitled. And should either of my said grand-sons die without leaving lawfully begotten issue living at his, my said grand-son's death, who, to wit, the said issue, who shall live to attain the full age of twenty-one years, or dying before that age, leave lawfully begotten issue living at the time at which the parent or parents, if alive, would have reached the full age of twenty-one years, then the part of the one so dying shall go

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*to the survivor of my said grand-sons, or to the issue of him of my said grand-sons, who may have previously died, leaving issue living at the time of his death, who, to wit, the said issue, who shall live to attain the full age of twenty-one years, or dying before that time, leave lawfully begotten issue living at the time at which the parent or parents, if alive, would have reached the full age of twenty-one years; if one, then to that one, his or her heirs and assigns, absolutely and forever; and if more than one, then to them, their heirs and assigns, absolutely and forever, the issue of any deceased issue only taking and receiving the share or proportion which the parent or parents, if alive, would have taken and received. And should both of my said grand-sons die without leaving lawfully begotten issue living, at the death of the survivor of them, my said grand-sons, who, to wit, the said issue, who shall live to

attain the full age of twenty-one years, or who, dying before that age, leave lawfully begotten issue living at the time at which the parent or parents, if alive, would have reached the full age of twenty-one years, then, and in either of those cases, I give, devise, and bequeath the said two plantations and negro slaves, with the stock, plantation implements and utensils, and the said sum of twenty thousand dollars, unto the right heirs then living of me, the said William Edings, to be equally divided among them, according to the law of this State for the distribution of intestate's estate.

"Item. I give, devise, and bequeath all my plantation called Indian Field, purchased of the executors of Henry Calder, together with all the slaves, stock, plantation implements and utensils, and personal property, belonging to me thereon, at the time of my death, and also my wench named Katy, with her issue and increase, unto my dear daughter, Sarah Chisolm, the wife of George Chisolm, junior, for and during her natural life, to and for her sole and separate use, and without being in any manner subject to the debts, contracts, or control of any husband whom she may have; and from and immediately after the death of my said daughter, Sarah Chisolm, then I give, devise, and be-

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queath *the said plantation called Indian Field, and the slaves, stock, plantation utensils and personal property thereon belonging to me, unto the lawfully begotten issue of my said daughter, Sarah, living at the time of her death, who, to wit, the said issue, who shall live to attain the full age of twenty-one years, or who, dying before that time, shall leave lawfully begotten issue to live until the time at which the parent or parents, if alive, would have attained the full age of twenty-one years; if more than one, then to them, their heirs and assigns, absolutely and forever; and if one, then to that one, his or her heirs and assigns, absolutely and forever, the issue of any deceased issue of my said daughter, and whether the said issue died before or after my said daughter, taking and receiving the same share and proportion as the parent or parents, if alive, would have taken and received; and should my said daughter, Sarah, die without leaving lawfully begotten issue living at the time of her death, who, to wit, the said issue, who shall live to attain the full age of twenty-one years, or who, dying before that age, leave lawfully begotten issue to live until the time at which the parent or parents, if alive, would have attained the full age of twenty-one years, but leaving her husband surviving her, then, and in that case, I thenceforth give, devise, and bequeath the use, occupation, and enjoyment of the said real and personal estate, mentioned and contained in this clause of my will, unto her said husband, for and during his natural

life, and then from and after the death of her said husband, I give, devise, and bequeath all the said real and personal property mentioned and contained in this clause of my will, unto the right heirs then living of me, the said William Edings, to be equally divided among them, according to the laws of this State for the distribution of intestate's estates. And should my said daughter, Sarah, die without leaving lawfully begotten issue living at the time of her death, who, to wit, the said issue, who shall attain the full age of twenty-one years, or who, dying before that age, leave lawfully begotten issue to live until the time at which the parent or parents, if alive, would have reach-

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ed the full age of twenty-one years, and without leaving her, my said daughter's husband, surviving her, then from and immediately after the death of my said daughter, I give, devise, and bequeath all the said real and personal property mentioned and contained in this clause of my will, unto the right heirs then living of me, the said William Edings, to be equally divided among them, according to the laws of this State for the distribution of intestate's estates.

"Item. In like manner, I give, devise, and bequeath all my plantation on John's Island, purchased of Commodore Campbell, together with all the slaves, stock, plantation utensils, and personal property belonging to me thereon, at the time of my death, and also all my plantation called Archfield, situate in Saint Paul's Parish, and purchased by me of Mrs. Harriet Crafts, with all the slaves, stock, plantation utensils, and personal property thereon belonging to me at the time of my death, and also my wench Hagar, with her issue and increase, unto my dear daughter, Mary Fripp, the wife of John A. Fripp, for and during her natural life, and to and for her own sole and separate use, and without being in any manner subject to the debts, contracts, or control of any husband whom she may have; and from and immediately after the death of my said daughter, Mary Fripp, then I give, devise, and bequeath the said plantation on John's Island, and the said plantation called Archfield, and the slaves, stock, plantation utensils, and personal property belonging to me on the said two plantations at the time of my death, unto the lawfully begotten issue of my said daughter, Mary, living at the time of her death, who, to wit, the said issue, who shall live to attain the full age of twenty-one years, or who, dying before that time, shall leave lawfully begotten issue to live until the time at which the parent or parents, if alive, would have attained the full age of twenty-one years; if more than one, then to them, their heirs and assigns, absolutely and forever; and if one, then to that one, his or her heirs and assigns, absolutely and forever, the issue of any deceased issue of my said

daughter, and whether the said issue die before, or after her, my said daughter, taking and receiving the same share and proportion

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as the parent *or parents, if alive, would have taken and received. And should my said daughter, Mary, die without leaving lawfully begotten issue living at the time of her death, who, to wit, the said issue, shall live to attain the full age of twenty-one years, or who, dying before that age, leave lawfully begotten issue to live until the time at which the parent or parents, if alive, would have attained the full age of twenty-one years, but leaving her husband surviving her, then, and in that case, I thenceforth give, devise, and bequeath, the use, occupation, and enjoyment of the said real and personal property, mentioned and contained in this clause of my will, unto her said husband, for and during his natural life; and then from and immediately after the death of her said husband, I give, devise and bequeath all the said real and personal property, mentioned and contained in this clause of my will, unto the right heirs then living of me, the said William Edings, to be equally divided among them, according to the laws of this State for the distribution of intestate's estates; and should my said daughter, Mary, die without leaving lawfully begotten issue living at the time of her death, who, to wit, the said issue, who shall attain the full age of twenty-one years, or who, dying before that age, leave lawfully begotten issue to live until the time at which the parent or parents, if alive, would have reached the full age of twenty-one years, and without leaving her, my said daughter's husband, surviving her, then from and immediately after the death of my said daughter, I give, devise, and bequeath all the said real and personal property, mentioned and contained in this clause of my will, unto the right heirs then living of me, the said William Edings, to be equally divided among them, according to the laws of this State for the distribution of intestate's estates.

"Item. I give and bequeath my slave Daphne, with all her issue and increase, unto my grand-son, William Edings, his executors, administrators, and assigns forever.

"Item. I give, devise, and bequeath all the rest, residue, and remainder of my estate, real and personal, whatsoever and wheresoever, unto my dear wife, the issue of my de-

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ceased daughter, *Eliza Whaley, and my two daughters, Sarah Chisolm and Mary Fripp, to be equally divided among them, share and share alike, the issue of my daughter, Eliza Whaley, receiving only one share; and I will order and direct that the issue of any of my said residuary devisees and legatees who may die before me, shall take and receive the same share and proportion in my said residuary estate, real and personal, as the par-

ent or parents, if alive, would have taken and received."

Codicil.

"Item. I farther more give and bequeath unto my grand-sons, William Edings and John Evans Edings, the children of John E. Edings, the proceeds of the crop of cotton made on my plantation on Edisto Island, in the year eighteen hundred and thirty-five, to be equally divided between them, each receiving his respective share as he comes to the lawful age of one and twenty years.

"My executors named in my will are authorized to convert the same into any valuable property for their use.

"Item. It is likewise my will, that should either of the above named children die before he attains the age of one and twenty years, leaving no lawful issue, then, in that case, the survivor shall be heir to the whole amount."

The defendant, John Evans Edings, appealed from so much of the foregoing decree, as declares that William M. Edings took a vested estate in a moiety of the Edisto Island property, on the following grounds:

1. Because the attainment of the age of twenty-one years formed a part of the original description of the devise and legatee, and the interest was necessarily contingent on account of the person; and that William M. Edings not having attained that age, never answered the description of the person who was to take.

2. Because the attainment of the specified age was a condition precedent to the vesting of any interest in William M. Edings, and not a condition subsequent, the fulfilment of which would make a defeasible vested estate indefeasible.

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*3. Because the interest of William M. Edings in the real estate was not a remainder, but an executory devise; and that his interest in the personal estate was an executory interest; and that the vesting of either depended upon his attaining the age specified.

4. Because the intermediate rents and profits of the said property accumulated for the benefit of the person who should become ultimately entitled to the corpus.

5. Because it is apparent from the will that the testator intended the intermediate rents and profits to accumulate, and to postpone the vesting.

6. Because the decree is contrary to law and equity, and the demurrer of the said John Evans Edings should have been allowed.

B. J. Whaley, for appellant. If the testator stood, as to W. M. Edings, in loco parentis, and this were an application by W. M. Edings to be allowed maintenance out of the rents and profits, the application could not succeed. *Hanson v. Graham*, 6 Ves. 238;

Chambers v. Goldwyn, 11 Ves. 1; *Mackie v. Alston*, 2 Des. 362; *Brailsford v. Heyward*, 2 Des. 30; *Allen v. Crosland*, 2 Rich. Eq. 68; *Fairman v. Green*, 10 Ves. 48; *Cavendish v. Mercer*, 5 Ves. 195; *Kendall v. Nash*, 5 Ves. 197; *Mitchell v. Bower*, 3 Ves. 282; *Long v. Long*, 3 Ves. 286, note; *Greenwell v. Greenwell*, 5 Ves. 195. But the exception to the general rule of law, (that a contingent legacy, with a limitation over, or a legacy payable at twenty-one, does not carry interest,) does not extend beyond the case of parent and child, or husband and wife; and the testator's will contains nothing which shows that he intended to place himself in loco parentis. *Crickett v. Dolby*, 3 Ves. 10; *Butler v. Butler*, 3 Atk. 58; *Lupton v. Lupton*, 2 Johns. Ch. 628; *Van Bramer v. Hoffman*, 2 Johns. Ch. 200; *Errington v. Chapman*, 12 Ves. 10; *Rawlins v. Goldfrap*, 5 Ves. 440; *Leslie v. Leslie*, Lloyd and G. 1; *Moggridge v. Thackwell*, 1 Ves. 474; *Earle of Rad v. Shafto*, 11 Ves. 457; 2 Jarm. on Wills. Upon the first and second grounds of ap. . . Mr. Whaley cited *Boraston's case*, 3 Rep. 19; *Edwards v. Hammond*, 1 B. and P. New Rep.

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324, note; *Fearne*, *241, et seq.; *Broomfield v. Crowder*, 1 B. and P. New Rep. 313, *Doe v. Moore*, 14 East. 601; *Doe v. Nowell*, 1 M. and S. 327, S. C. 5 Dow. 202; *Phipps v. Williams*, 5 Sim. 44; 2 Ves. Sen. 121; 18 Ves. 368; 3 P. W. 300; *Cases Temp. Talbot*, 228; 2 Ves. Sen. 521; *Freem*, 243; *Cases Temp. Talbot*, 245; *Bull v. Pritchard*, 1 Russ. 213; *Vawdry v. Geddes*, 1 R. and M. 203; *Leake v. Robinson*, 2 Mer. 363; *Smith on Execut. Int.* 136 et seq.; *Duffield v. Duffield*, 1 Dow and C. 268; *Barker v. Lea*, 1 T. and R. 413; *Bland v. Williams*, 1 M. and K. 411; *Judd v. Judd*, 3 Sim. 525; *Hunter v. Judd*, 4 Sim. 455; *Phipps v. Ackers*, 9 Cl. and Fin. 595; *Skey v. Barnes*, 3 Mer. 334; *Smith on Execut. Int.* 184; 1 Jarm. on Wills, 738, et seq.; *Brailsford v. Heyward*, 3 Des. 30; *Mackie v. Alston*, 3 Des. 362; *Redfern v. Middleton*, Rice, 459; *Fearne*, 503; 4 Johns. Ch. 388; 7 Wend. 52; *Jac. R.* 468; 1 Story Eq. § 289, 290.

Elliott, Petigru, contra, cited *Goodtitle v. Whitby*, 1 Burr. 234; 1 Jarm. on Wills, 624, et seq.; 1 *Fearne*, 241, 347; *Sug. on Real Prop.* 286; *Fearne Posth. W.* 191.

The opinion of the Court was delivered by

DUNKIN, Ch. The Court have given to this appeal all the consideration which the importance and difficulty of the questions involved, and the able argument of the counsel properly demanded. Not only have conflicting decisions been adduced, but text writers of acknowledged respectability have differed as to the result of those decisions. It is believed, however, that not only is the preponderance of authority in favor of the decree, but that, in adopting this construction, some

general principles are followed which this Court have uniformly recognized in the interpretation of testamentary instruments.

It is not proposed to attempt any further review of the authorities. But it has been familiarly stated, and was repeated by this Court in *Smith v. Hilliard*, 3 Strob. Eq. 211, that whenever there is a doubt whether the estate be vested or contingent, "the rule is to presume that the testator intended to give a

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vested rather *than a contingent interest; and even where the words import contingency, but do not create a condition precedent, they give a vested interest to the devisee, subject to be divested if the contingency should not happen." See also *Fearne*, 241 to 247, (10th Ed.) Although the reasons of this rule are various, and more or less obvious, and, as might be supposed, have been received with more or less favor, the rule itself seems well settled. So from *Boraston's* case, 3 Rep. 19, down to the very recent case of *Williamson v. Berry*, decided by the Supreme Court of the United States in 1850, 8 How. 495 [12 L. Ed. 1170], words seemingly creative of a future interest have been frequently construed to refer to the futurity of the possession, and not as designed to postpone the vesting of the estate. In *Boraston's* case there was a term of eight years devised to A. and B., and, after the said term, the land to remain to executors for the performance of his will 'till such time as H. should accomplish his full age of twenty-one years; and when the said H. should come to his age of 21, then to him and to his heirs forever.' It was held by the Court that the estate was vested in H.; that the adverbs of time, when, &c., did not make anything necessary to precede the vesting of the remainder, but merely expressed the time when it should take effect in possession. It was said at the bar, that, in the devise to the issue of John Evans Edings, there was a double contingency. The issue must be alive at the death of John Evans Edings, and must also attain twenty-one years of age, and that, although the issue might have attained twenty-one years of age and then died before his father, such issue failed to answer the description (as it was said,) and the estate never vested. I concur with the counsel that the absence of either circumstance is equally available, and, if non-age prevented the vesting, so would want of surviving the parent. The effect of this latter circumstance seems to have been fully considered in *Williamson v. Berry*. Testator devised his estate to trustees, in trust to pay the rents, &c., to Thomas B. Clarke, during his natural life, and from and after the death of the said Thomas B. Clarke, in further

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trust to convey the same *to the lawful issue of the said Thomas B. Clarke living at his death, in fee; and if the said Thomas B.

Clarke should not leave any lawful issue at the time of his death, then in further trust to convey the premises to testator's grandson, Clement C. Moore, and to his heirs. The Judges of the Circuit Court of the United States for the Southern District of New York concurred in the opinion, that, on this devise, the first born child of Thomas B. Clarke, at its birth, took a vested estate in remainder, which opened to let in his other children to the like estate, as they were successively born. Upon other points of the case the Judges were divided in opinion; and upon that division the cause was certified to the Supreme Court of the United States. It was not perhaps necessary for the Supreme Court to pronounce on a question upon which the circuit Judges were agreed. But they commenced by declaring as follows: "It is right, however, to say that we concur with the learned Judges of the Circuit Court, that, under the will of Mary Clarke, the first born child of Thomas B. Clarke, on its birth, took a vested estate in remainder, which opened to let in his other children to a like estate, as they were successively born; and that their vested remainder became a fee simple absolute, in the children living, on the death of their father." It might here have been urged, that the trustees were to convey only to the lawful issue of Thomas B. Clarke living at his death, and that until his death, it was uncertain who would answer that description; but the Court held, that the estate vested immediately on the birth, subject only to be divested, or defeated, if the issue should not be alive at the death of the parent. It will be remarked, that in *Williamson v. Berry*, as in the case under review, there was a limitation over in default of issue at the time specified. "This class of cases," says Sir Edward Sugden, "goes on this principle, that the gift over, in the event of the devisee dying under twenty-one, sufficiently showed the meaning of the testator to have been, that the first devisee should take whatever the party claiming under the devise over was not entitled to, which of course gave him the immediate interest, subject only to the

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*chance of its being divested on a future contingency." Sug. Law of Prop. 290. If, then, there is a previous gift, as in *Boraston's* case, and also in this, the first interest is regarded as an exception out of the gift to the infant, which takes effect on the determination of the preceding interest; or, if there is a gift over, the first devisee takes all to which the devisee over is not entitled. In both cases the Court struggle, and, as the writer states, have hitherto "struggled effectually to carry into effect the testator's intention." The devise in this will is substantially to the testator's son for life, "and from and immediately after" the death of his son, to the lawfully begotten issue of his son living at the time of

his death, who shall live to attain twenty-one years of age, &c., and if the son should die without leaving issue at the time of his death, who should attain twenty-one years of age, then to the right heirs of the testator then living, &c. The manifest object of the testator was to vest the fee in the issue of his son. The preceding interest, as in *Boraston's* case, was merely an exception out of the gift to them. On the determination of that preceding interest, or, in the stronger and more emphatic language of the will, "from immediately after" the death of his son, the devise to the issue took effect. But if the issue should not be alive at the death of the son, or, being alive, should not attain twenty-one years of age, "the said real and personal property described in that clause of his will," is devised and bequeathed to his right heirs then living. What could the right heirs of the testator then living claim? Certainly no more than the real and personal property described in that clause of the will. All not given over to them is taken, according to the authorities, by the first devisees in fee. The will of the testator is then complete. The son enjoys his life estate. His issue continue in the enjoyment of it until, on arriving at twenty-one years of age, in the language of *Williamson v. Berry*, "their vested remainder became a fee simple absolute." But until that time their vested estate was subject to defeasance by their death under twenty-one years of age. Upon the happening of that contingency, the estate, real and personal—

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*the plantation and slaves—passed to the right heirs of the testator then alive. It is this plan or purpose, so natural in itself, and, it may be added, so apparent in the instrument, which the Courts have endeavored to carry into effect, and which is declared by the circuit decree. On the other hand, it remains only to say that, if the estate was not vested, it is not only uncertain as to what should become of the interim profits between the death of John Evans Edings, and the arrival of his sons to twenty-one years of age, but it would become a grave question whether the whole purpose of the testator in the provision for his son's issue would not be effectually frustrated.

The appeal is dismissed.

WARDLAW and DARGAN, CC., concurred.

Appeal dismissed.

4 Rich. Eq. 301

Ex parte CAROLINE GEDDES, Executrix of G. C. Geddes et al.

(Charleston. Jan. Term, 1852.)

[*Partition* ⇨103.]

On a sale of land, for partition, in which the wife has a share, the husband may become

the purchaser, and thereby become invested, in his own right, with the title of all the co-tenants, including his wife.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 339; Dec. Dig. ⇨103.]

[*Husband and Wife* ⇨9.]

At a sale of land, by the master, for partition, of which wife owned one moiety, husband became purchaser; he paid the share of the proceeds of the co-tenant in money, and gave the master the joint receipt of himself and wife for her share of the proceeds:—*Held*, that husband was thus invested, in his own right, with the title, and that upon his death wife was not entitled to the moiety which had been hers.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 34; Dec. Dig. ⇨9.]

[*Husband and Wife* ⇨10.]

A wife by joining her husband in a receipt for money, the proceeds of the sale of her inheritance, waives her equity in such proceeds; and upon the money received by the husband, his marital rights attach.

[Ed. Note.—Cited in *Clark v. Smith*, 13 S. C. 596.]

For other cases, see *Husband and Wife*, Cent. Dig. § 43; Dec. Dig. ⇨10.]

[*Partition* ⇨109.]

[Cited in *Scaife v. Thomson*, 15 S. C. 356, to the point that on a purchase of land by a tenant in common at partition sale title to his original share is not derived from the sale.]

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 375-397; Dec. Dig. ⇨109.]

[This case is also cited in *Barnes v. Cunningham*, 9 Rich. Eq. 478, as to waiver of dower rights.]

Before Dargan, Ch., at Charleston, March, 1850.

A petition was filed by Mrs. Geddes and a creditor of the late Mr. Geddes, setting forth an account of his debts and assets, and praying a sale and distribution of the estate under the direction of the Court. On this pe-

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tion, an order was granted for a sale, *and Mr. Gray, one of the masters, was directed to take an account, and give notice to creditors. A sale was made, and the account taken, and by his report, dated 4th March, 1850, Mr. Gray found the amount of the debts and assets. A lot in Rutledge-street gives rise to this discussion as to which he found, as follows:

"There is also a vacant lot of land belonging to the estate in Montague-street, which remains unsold, and which is supposed to be worth about eight hundred dollars, which I submit ought to be sold for payment of the debts.

"Besides these, there is a lot of land, No. 16 Rutledge-street, which was sold under a decree of this Court, for partition between Mrs. Geddes and Mrs. Milne, in February, 1840; Gilbert C. Geddes was set down as the purchaser, but he paid only Mrs. Milne's share, or half of the nett sales, to wit: Three thousand nine hundred and fifteen dollars, 37-100, and gave master Laurens, his, and Mrs. Geddes joint receipt for the other half, taking his title for the property; but as the

lot remains undisposed of by Mr. Geddes. I submit that his undivided half or interest in it ought to be sold for the benefit of the creditors.

"The schedule annexed, marked A. will show the particulars of the sale of the plantation and negroes included in the mortgage held by the Bank of the State, which were sold by me under the decree."

To this report Mr. Memminger excepted that the whole of the Rutledge-street lot was assets to pay the debts of testator, instead of one half, and that the master should have so reported.

The cause came before Chancellor Dargan, who made the following decree:

Dargan, Ch. This case comes up on the master's report and exceptions. The part of the report which is the subject of controversy, relates to the lot of land No. 16 Rutledge-street. The Commissioner reports that this lot was "sold under a decree of this Court for partition between Mrs. Geddes and

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Mrs. Milne in *February, 1840. Gilbert C. Geddes was set down as the purchaser, but he paid only Mrs. Milne's share, or half of the nett sales, to wit, three thousand nine hundred and fifteen dollars, 37-100, and gave master Laurens his and Mrs. Geddes, joint receipt for the other half, taking his title for the property. But as the lot remains undisposed of by Mr. Geddes, I submit that his undivided half or interest in it ought to be sold for the benefit of creditors."

When the wife's land is sold for the purpose of partition under a decree of the Court, she becomes thereby divested of her title and inheritance in the land, and she becomes the equitable owner of the money or fund arising from the sale, or of her just proportion of it. Her title or interest ceases in the land, and attaches upon the money. I perceive no reason why the husband should not become the purchaser at such a sale as well as a stranger. And when he obtains the master's title, the land is his property, clear of any title or claim on the part of the wife. Over the purchase money, however, he has no control farther than is permitted by the wife, or authorized by an order of the Court.

The equities of the wife in the purchase money arising from the sale of her inheritance under circumstances like these, has been very clearly defined by a series of decisions of our own Courts. The master has no right to pay it to the husband on his own receipt, except under an order of the Court. If he does, the payment is no discharge to him as against the claim of the wife; or she may elect to set up her claim by bill against the husband himself, as having illegally possessed himself of her funds. But she may waive her equity by joining with her husband in a receipt, or doing some equally significant and unequivocal act. If she does this, the marital rights attach, as upon per-

sonalty, and she cannot afterwards recall her equitable claim. The rationale of these principles is this: The land was her inheritance. The sale does not in this Court, ipso facto, convert it into personalty, but it retains in equity its character of real estate. She has a right to a settlement. As before the sale under the decree, the husband could not sell

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her inheritance without her concurrence and formal renunciation as prescribed by law; so after the sale, no act of the husband, alone, can deprive her of this right, of which she cannot be divested except by a decree of the Court, or some formal renunciation of her equity in the fund. If the husband were permitted to give receipts for the wife's funds arising from the sale of her land, it is obvious she might be deprived of her equitable rights without notice of the proceeding, or opportunity of asserting them. *Wardlaw v. Gray*, 2 Hill, Eq. 644; *Yeldell v. Quarles*, Dud. Eq. 55; [*Geiger v. Geiger*] *Cheves Eq.* 162; *Ex parte Mobley*, 2 Rich. Eq. 56; *Daniel v. Daniel*, 2 Rich. Eq. 115 [44 Am. Dec. 244]. To which may be added the unreported cases of *Gardner v. Horton*, Columbia, May Term, 1849; *Davenport v. Davenport*, Columbia, December Term, 1849.

If Mrs. Geddes had been a femme sole at the sale of her inheritance for partition, and had herself become the purchaser at the master's sale, she would have bought her own share, and the moiety of her co-tenant in common. The case reduced to its essence then, would be, that she was the purchaser from herself and her sister. But a person cannot purchase from himself. The result of the proceeding would have been simply to blend the title of her co-tenant with her own. And I incline to the opinion, that in any question which might have arisen in the case supposed, in which the distinction would have been important, the title of Mrs. Geddes to her own moiety would be referred to its original source, and would not have been considered to be derived from the proceedings in partition. This rule would apply, because in such a case, as to her moiety, she was seized of the fee before the sale, and the sale could give her no more. There would be no change of title whatever; the result would be the same, as if her co-tenant, without any sale for partition under decree, had conveyed her share to Mrs. Geddes.

But the case is entirely different when the husband is the purchaser. He purchases in another right than that of his wife. He purchases in his own right. The title is changed. Before the sale he held as husband; afterwards as a purchaser from the wife.

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*Surely the Court of Equity, in proceedings for partition, can, when the proper forms are observed, convey the wife's lands to the husband for a consideration. That consideration is the purchase money to which the

wife's equity attaches. It is for herself to determine whether she will waive it. It is a matter for her own private discretion with which, if she be of age, the Court will not interfere. It would only be disposing of her equity in the purchase money, as she might have disposed of her legal estate in the lands, by joining with her husband in a conveyance under the proper legal forms.

The conclusion and judgment of the Court is, that the lot in Rutledge-street is the property of the estate of Gilbert C. Geddes, and that Caroline Geddes has no interest therein except her dower.

From this decree, Mrs. Geddes appealed, on the grounds:

1. That she was seized of an undivided moiety of the Rutledge-street lot, and her title has never been divested.

2. That the sale for partition is only a conversion as far as is necessary for the purpose of partition; and the conveyance of the other moiety to Mr. Geddes was all that the partition was designed to effect.

3. That in the bill for partition, she and her husband were joint complainants, and the decree treats their interests as joint; and

nothing in a bill so framed could be done to give her husband an interest against her rights.

Lesesne, Petigru, for appellants, cited *Meservey v. Barelli*, 2 Hill, Ch. 567; *Lucas v. Jacobs*, 1 Beav. 436; 4 Mylne & Cr. 389; *Graydon v. Graydon*, McM. Eq. 63; *Innes v. Jackson*, 16 Ves. 367; 6 Dow, 17; *Pow. on Mortg.* 756; *Wightman v. Vaulk*, Dud. Eq. 212; *Ackroyd v. Smithson*, 1 Bro. C. C. 503; *Tobey v. Barber*, 5 Johns. R. 68; *Edgerton v. Muse*, Dud. Eq. 179.

McCrady, contra, Chev. Eq. 162; *Young v. Teague*, Bail. Eq. 13; *McNish v. Guerard*, 4 Strob. Eq. 66.

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*PER CURIAM. This Court is entirely satisfied with the decree of the Chancellor, which is in conformity with the numerous decisions in this Court. It is therefore ordered that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and
WARDLAW, CC., concurring.

Decree affirmed.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT COLUMBIA, SOUTH CAROLINA—MAY TERM, 1852.

CHANCELLORS PRESENT.

HON. JOB JOHNSTON,
" B. F. DUNKIN,
" G. W. DARGAN,
" F. H. WARDLAW.

4 Rich. Eq. *307

*REUBEN DENNIS et al. v. JOHN DENNIS,
Jun.

(Columbia. May Term, 1852.)

[*Reformation of Instruments* ⚡32.]

Bill to reform a deed of gift of negroes, more than thirty years old, to M. D. "her heirs, executors and administrators;" it was contended that the donor, who was dead, intended to give only a life estate to M. D., with remainder to her children; whereas, by the fraud or mistake of the penman, an absolute estate was given to her. Bill dismissed.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. § 120; Dec. Dig. ⚡32.]

Before Wardlaw, Ch., at York, June, 1851.

Wardlaw, Ch. The plaintiffs are some of the children and sons-in-law of John Dennis, sen., and Mary his wife, and prosecute against the defendant, a son and principal

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legatee of said *John Dennis, sen., a claim to reform, according to the supposed intention of the parties, a deed from John Chesor and Anna his wife, to the said Mary Dennis, a sister of the said Anna Chesor.

The said John Chesor and Anna his wife, by deed, dated March 1, 1818, in consideration of love and affection to Mary Dennis, wife of John Dennis, gave and granted all their goods and chattels, consisting principally of three slaves, Hannah and her two children, Harry and Sarah, "to hold all the said goods and chattels, with the three above named negroes to her, the said Mary Dennis, and wife of John Dennis, as aforesaid, her heirs, executors, or administrators from

henceforth." Simultaneously and on the same paper, John Dennis and Mary his wife, agreed under seal, as a condition of the deed, that they would "support and maintain the above named Anna Chesor, with her issue begotten by her body, in meat, drink, and clothing, and treat her with her issue in a decent manner during her natural life." The deed and counter-part were drawn by George Ross, a farmer of high character, now deceased; attested by said George Ross and by Thomas H. Smith; proved by Smith before a magistrate, May 9, 1818; and recorded in the office of the register of mesne conveyances of York district, (in which district all the parties resided.) May 9, 1818, and in the office of the Secretary of State, May 2, 1827.

Smith, who was examined on this trial, testified that a draft of another deed was presented to John Chesor and wife which she refused to execute, because it made John Dennis the donee, and that two or three hours afterwards George Ross drew the deed which was executed. That to the latter, John Dennis at first made objection, but was quieted by George Ross's telling him, "you need not make a fuss, as you are Mary's heir, and this is as good to you as the first deed"—that this remark of Ross was made while they were standing near the steps of the door, within hearing of John and Anna Chesor, who were sitting at a table in the shed a few feet off, and immediately before the deed was read and signed.

Karen Smith, a daughter of John and

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Mary Dennis, who was *at first a defendant in the cause, but as to whom the bill was dismissed, and who had assigned her interest in the subject of controversy to her son, Elias Davidson, not a party, was admitted as a witness. She testified that Anna Chesor would not sign the first draft making the property over to John Dennis, because she intended it for Mary Dennis and her children—that George Ross drew and read to her the one executed, which was to Mary Dennis and her children—that John Dennis was dissatisfied because the property was not given to him, and George Ross told him not to mind it—that Anna Chesor said John Dennis might have the use of the property while his wife lived, and at her death to go to her children—that George Ross said 'heirs' was the proper way of putting it down, as Mary's children were her heirs—that John and Anna Chesor went from the shed where the deed was signed into the hall adjoining, with an open door between, when Ross was talking to Dennis. James Curry, the widowed husband of a pre-deceased daughter of John and Mary Dennis, testified that John and Anna Chesor and Mary Dennis refused to sign the first draft, because it was given up that the deed should be to Mary Dennis and her heirs—that John Dennis was dissatisfied with the second draft, until Ross took him aside and said it was immaterial, as he could have the use of the property as long as his wife lived—that the parties wanted the deed made to Mary Dennis and heirs, and Ross told them the effect of this draught was that the property would belong to Mary Dennis and the heirs of her body or children. These latter two witnesses also testified to declarations of John Dennis and of George Ross frequently, and until a recent date repeated that the property would belong to the children of Mary Dennis after her death. It was also proved for the plaintiff that John Chesor and Anna his wife, and Mary Dennis, were illiterate, and that the former two were of weak minds.

John and Anna Chesor have been dead many years. The latter, from the time of the execution of said deed until her death, lived in the house of John Dennis, and was maintained by him.

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*In 1825, John Dennis exchanged the negroes Hannah and George, the latter born after the execution of the deed, with Robert Latta, for two other slaves. In the bills of sale made by Dennis and Latta each to the other, their wives respectively joined. John Dennis treated the other slaves named in the deed as his own.

John Dennis died October 10, 1850, leaving of force his will, without date, executed October 10, 1845, whereof his wife Mary

and his son, the defendant, were appointed executors; and whereby he bequeathed two slaves and some other property to his wife for life, and all the rest of his estate, including by name the negroes now in controversy, to the defendant and the heirs of his body living at his death. Testator also directs that his wife Mary and his son John, the defendant, at his death pay all his just debts. Defendant has qualified as executor.

Mary Dennis never qualified as executrix, and died in the course of the present year, after the first of March. She was intestate, and defendant has become administrator of her goods and credits.

The bill alleges that it was the intention of the donors and of Mary Dennis, in the execution of the deed, that the property should be given to the sole and separate use of said Mary Dennis for life, and after her death to her children; and that the miscarriage of this intention, conceding that, according to the terms actually employed in the instrument, the marital rights of John Dennis attached should be corrected by the Court, whether it arose from the fraud and collusion of the pensman and John Dennis, or from the mistake of the pensman and the parties, as to the legal effect of the words of limitation.

The Chancellor was much pressed to order an issue at law in the case, particularly on the question of fraud. The pretence of fraud in the matter proceeds only on the conjecture, that the donors did not hear the remarks by which George Ross reconciled John Dennis to the deed. It would be an abuse of discretion to protract, upon such slight ground, the decision of the question.

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*The plaintiffs are mere volunteers, who seek to reform a deed after the lapse of thirty years, in the progress of which the donors, donees and scrivener have all died, and they have no claim to vex another forum with their vague imputations upon the character of their ancestor and his trusted friend. The suggestion of fraud is unsustained by proof.

The plaintiffs have as little standing on the ground of mistake. The discrepancies in the statements of the three witnesses, who testify as to the declarations and conduct of the parties preceding and attending the execution of the deed, strikingly illustrate the wisdom of the rule, that parol testimony is inadmissible to vary or explain the terms of a written instrument. It is probable that all concerned in the concoction and execution of the deed mistook the legal effect of the words of limitation employed, but it was a mistake arising altogether from overweening conceit of themselves, or rash neglect in advising with the skilful. Those who will ignorantly and rashly employ technical terms of the law must submit to the consequence of having the terms technically construed. If re-

lief be afforded in this case, the Court must undertake to correct all the miscarriages of audacious ignorance in conveyancing. We might thus acquire a wide field of jurisdiction and business. An illustration might be furnished from the terms of the devise in John Dennis's will to the defendant; but I forbear. After our own decisions in *Westbrook v. Harbeson*, 2 McC. Eq. 112, and *Ryan v. Goodwyn*, McM. Eq. 451, it would be ridiculous excess to extend this reasoning. It is ordered and decreed, that so much of the bill as seeks to reform the deed of John and Anna Chesor be dismissed.

From the statement of the bill, although there is no prayer to this effect, I suppose the plaintiffs desire an account of the estate of Mary Dennis from the defendant as administrator. The objection in the answer, that this object is prematurely sought, is well taken; and the suggestion, made also in the answer, that whenever this account be taken, the legacy to Mary Dennis must contribute ratably with the legacy to John

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Dennis for the payment of the debts of the testator, John Dennis, is sound and proper. Nevertheless, the bill in this respect is retained; and at the expiration of the year an order of reference may be applied for. Let the plaintiffs pay the costs.

The complainants appealed, on the following grounds:

1. Because it was most clearly proved on the hearing of this case, that the real intention of all the parties to the deed or contract of the 1st of March, 1818, was to secure the negroes then conveyed, to Mary Dennis and her children, and to them only, and the Chancellor should therefore have ordered the deed to be so reformed as to carry that intention into effect.

2. Because there was either a mistake or imposition on the part of George Ross in drawing the deed of 1st March, 1818, which gives this Court power to reform the deed, so as to carry the real intention of the parties to that deed into effect.

3. Because John Dennis, sen., uniformly admitted that he held these negroes as a trustee of his wife, and his acts all went to show that he admitted that the negroes would go to his children after the death of his wife; which acts and admissions for so great a length of time gave character to the use and possession which John Dennis, sen., had of the said negroes, and deprived him of the power to dispose of them by will, nor did he use them as his own, as the Chancellor has assumed.

4. Because the deed by its terms, and John Dennis, sen.'s, long possession as trustee of his wife, enured to the benefit of his children, and deprived him of the power to dispose of the negroes by will.

5. Because his Honor should have ordered the issue prayed by the complainants as to

the question of fraud, imposition, or mistake, in the deed of 1st March, 1818, from John and Anna Chesor.

Smith, for the motion.

—, contra.

The opinion of the Court was delivered by

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*WARDLAW, Ch. Where the parties to an agreement have expressed their purposes and stipulations in writing, a most salutary rule of law inhibits the admission of parol testimony to vary or explain the written instrument. As defensive equity, for example, in resisting the specific execution of a contract, Courts of Equity permit extrinsic evidence of the fact, that the real contract of the parties has not been truly reduced to writing, as of any other fact that makes it unconscientious to enforce the contract in its written form. But it is not clear that a plaintiff is ever allowed to give evidence of mistake in a deed or other writing, for the purpose of reforming the instrument. Such relief is at least to be extended with the utmost caution. The proof of the mistake should be unquestionable, and the parties to the mistake should be also parties to the suit. *Mayo v. Feaster*, 2 McC. Eq. 142.

In the case before us, the parties were probably ignorant of the effect of the terms of limitation employed by them, but there is no proof of mistake. No word was inserted in the deed nor omitted from it, not intentionally inserted or omitted. If we were willing to reform the deed, it would be impossible to ascertain from the testimony the terms and particulars in which it should be reformed. We may infer that there has been miscarriage in an attempt to limit personality, a matter which frequently baffles the skill of the expert, but we cannot learn from the testimony what were the precise intentions of the parties.

It is fair to conclude, that whatever may have been the original intentions of the parties, they acquiesced in the actual operation of the deed. It was competent for them to cure error by acquiescence. John Chesor, the person who has most cause to complain of the misdirection of his bounty, has made no clamor. It would be surely unsafe to look back through thirty years for the original wishes of the parties, and force all their subsequent acts into conformity to these wishes.

It may be gravely doubted whether a deed could ever be reformed after the death of

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the grantor. I apprehend that where a mistake should be corrected, the Court would not undertake to reform the deed by the personal act of a Chancellor or a master, but would, by attachment or other process, compel the grantor to execute an amended deed. But we have no power over the deceased.

Granting, however, that the heirs of a

deceased grantor might be compelled to reform a deed as to realty, and his personal representatives be compelled to reform a deed as to personalty, in the present case, the representatives of John and Anna Chesor are no parties to the suit. The defendant in his answer, operating in this particular as a demurrer, objects to the lack of these parties.

The statement in the third ground of appeal, that John Dennis acknowledged himself a trustee for his children, is not suggested in the pleadings, nor supported by proof.

Other considerations might be presented, but in any view we can take of this case, we think the plaintiffs are not entitled to relief.

It is ordered and decreed that the appeal be dismissed, and the decree be affirmed.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

Appeal dismissed.

4 Rich. Eq. 314

E. J. HIGGINBOTTOM v. WM. H. PEYTON,
Adm'r. et al.

W. H. THOMSON, Ord'y., v. SAME.
(Columbia. May Term, 1852.)

[Costs \curvearrowright 73.]

Where all the complainant's claims are substantially sustained, and the defendants are made liable in a definite amount, it is not necessary to make an order for costs, for these follow the decree, and are payable by the parties who are liable for the sum decreed to be due.

[Ed. Note.—Cited in *Brown v. Brown*, 6 Rich. Eq. 360; *Bratton v. Massey*, 18 S. C. 560; *Cooke v. Poole*, 26 S. C. 326, 2 S. E. 609.]

For other cases, see Costs, Cent. Dig. § 305; Dec. Dig. \curvearrowright 73.]

Before Dargan, Ch., at Barnwell, February, 1852.

This was an appeal by the complainant, E.

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J. Higginbottom, *from an order directing the costs to be paid out of funds of the estates of James Higginbottom and Aaron Gillett, respectively.

J. T. Aldrich, for appellant.
Bauskett, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. The leading object of this litigation was to obtain an account of the administration of the defendant, W. H. Peyton, on the estate of James Higginbottom, deceased. A final report was submitted by the commissioner at February sittings, 1851. In calculating interest, two modes were submitted by the report, the former of which was recommended by the commissioner, but the latter adopted by the Court.

All the other exceptions of the administrator were overruled. By this report a large amount was ascertained to be due by the administrator for moneys received by

him and not disbursed. His sureties were also parties defendants, and demurred to the bill on account of a defect in the bond. Their demurrer was overruled. On a collateral matter arising out of a controversy between Lucy J. Enicks, formerly the wife of George W. Collins, deceased, and one John F. Peyton, the administrator of Collins, the commissioner had reported against Mrs. Enicks; and, on exception thereto, the exception was sustained and the report ordered to be reformed. The report being reformed, was confirmed by the Chancellor in February, 1852. At the same time an order was made for the distribution of the fund ascertained to be due by Wm. H. Peyton and his sureties, under the report of 1851, among the parties entitled; and also an order for the commissioner to pay Lucy J. Enicks the sum which had been claimed by John F. Peyton, administrator of Collins, deceased. The Chancellor being given to understand that an order was necessary as to costs, and supposing, as he states to this Court, that he was only carrying out the previous decree, ordered the costs to be paid out of the estate of James Higginbottom and of Aaron Gillett, respectively. The complainant, E. J. Higginbottom, appealed from this order.

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*The general rule is, that where the decree is silent as to costs, costs follow the decree. But, as stated by the Court in *Muse v. Peay*, Dud. Eq. 236, and repeated in *Chaplin v. Jenkins*, 2 Strob. Eq. 100, where various claims are made, some of which are allowed and some rejected, the rule is inapplicable. But in this case all the claims of the complainant, who was a daughter and distributee of the intestate, were substantially sustained. The administrator was found largely indebted, and the defence of his sureties, vigorously and ably pressed, was overruled; and they, as well as their principal, declared liable in a definite amount by the decree of 1851. It was not necessary to make any order as to costs, for these followed the decree, and were payable by the parties who were liable for the sum decreed to be due, to wit, by the administrator, W. H. Peyton, and his sureties.

The litigation in relation to the claim of Lucy J. Enicks had no connection with the estate of Higginbottom, and as little with that of Aaron Gillett, deceased. It was a controversy between her and the administrator and creditors of her former husband, Geo. W. Collins, deceased, as to her interest in the estate of her father, Elijah Gillett, deceased. The claim of Mrs. Enicks was wholly sustained, and that of the administrator and creditors rejected, and their resistance overruled. In the absence of special directions, the costs of Lucy J. Enicks, as well as their own, should be paid by the administrator and creditors of Collins.

It may be proper to remark that this is not what is commonly designated as an appeal from a decree for costs. Where a Chancellor has heard and considered a cause, this Court will entertain no appeal from his decision as to costs. But in this case, the effect of the decree heretofore made (February, 1851.) was to carry the costs, and any further decree on that subject was unnecessary, and any order at variance with the decree would be the result of misapprehension.

It is ordered and decreed, that the decretal order of 9th February, 1852, be modified as herein expressed.

JOHNSTON, DARGAN and WARDLAW, CC., concurred.

Decree modified.

4 Rich. Eq. *317

*BENJ. J. BOULWARE v. CUTHBERT HARRISON and Others.

(Columbia. May Term, 1852.)

[1. *Payment* ⚡24.]

Plaintiff having a money decree against husband and wife, to satisfy which the decree gave him the right to sell certain slaves settled to the sole and separate use of wife, took husband's sealed note, payable at a future day, for the amount of the decree, and to secure the note took from husband a mortgage of the same slaves, and gave husband and wife a receipt in full for the amount of the decree; husband shortly afterwards died insolvent:—*Held*, that the acceptance of the note and mortgage was no satisfaction of the decree.

[Ed. Note.—Cited in *Trimmer v. Thomson*, 10 S. C. 190; *Arnold v. Bailey*, 24 S. C. 496.]

For other cases, see *Payment*, Cent. Dig. § 28; Dec. Dig. ⚡24.]

[2. *Judgment* ⚡855.]

That the contract between plaintiff and husband was so far to be respected, that plaintiff could not enforce his decree until the sealed note fell due.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1571; Dec. Dig. ⚡855.]

Before Wardlaw, Ch., at Fairfield, July, 1851.

Wardlaw, Ch. The general object of this bill, is for relief to the plaintiff, from the effect of a receipt given by him for a decree of this Court in his favor as executor; when there was, in fact, no payment, and his acceptance of another security was under mistake.

Thomas Boulware, by his last will and testament, dated March 28, 1839, amongst other things, appointed the plaintiff an executor thereof, and bequeathed to his daughter, Sarah, then an infant and unmarried, upon her marriage or attaining twenty-one years of age, the following slaves, namely: Prince, his wife, Eliza and her children, Milly, Ailsie, Bina, Lewis and Julia, with their future increase, for the sole and separate use of his said daughter, not subject to the debts or contracts of any husband during her nat-

ural life, and at her death to her issue then living, according to the statute of distributions; with a further contingent limitation to the children of testator, if she died without leaving issue. The testator died in 1842. His daughter, Sarah, intermarried in 1845, with H. H. Paulling. Testator was seized and possessed of a large estate at the time of his death, but he owed considerable debts, for which he made no adequate provision in his will. Plaintiff, in the execution of his trust as executor, sold some of the estate given specifically to legatees, and advanced

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*large sums from his own funds in payment of testator's debts.—A suit accrued in this Court between the legatees and the executor, entitled, "Thomas B. Lewis, per pro. am, v. Benjamin Boulware, executor, and others," to which Paulling and wife were parties; and at July sittings, 1846, a decree was made that the devisees and legatees pay to the executor the several sums ascertained to be due to him by the commissioner's report, including the sum of \$1,601.61 from Paulling and wife; "and unless paid by the first day of January next, that the said Benj. J. Boulware have leave to raise the same by the sale of such property of the several legatees and devisees as may be required to pay said demands, according to the sums to be paid by them respectively, as specified in said report." After this decree the executor retained possession of Mrs. Paulling's slaves, applying the avails of their labor towards the satisfaction of her debt to him, but not much reducing the debt, as the slaves, from the large number of children, were worth little more than a support. On February 1, 1849, H. H. Paulling gave to the plaintiff his sealed note for \$1,546.27, the balance then due by Mrs. P. under the decree, with interest from the date, payable on January 1, 1854; and as a security for the same, executed a mortgage to the plaintiff of the slaves bequeathed to his wife, then consisting of Prince, Eliza, Bina, Lewis, Julia, Jane, Sarah, Reuben and Charles; and plaintiff, in consideration thereof, gave a receipt in full from Paulling and wife, for the sum decreed for him against them. Mr. McCants, learned in the law, and the commissioner of this Court, drew the note, mortgage and receipt, and witnessed their execution; but he was not called upon for any counsel as to the construction of the will, or the sufficiency of the mortgage as a security. The arrangement was made at the instance and for the accommodation of Paulling. At this time Paulling was a physician in good practice; but he died soon after in April, 1849, and his estate is represented to be insolvent. Cuthbert Harrison, as administrator of Paulling, has had the negroes in possession since Paulling's death.

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*It is manifest that the plaintiff, in the change of securities for his debt, still intended to preserve his lien upon the negroes bequeathed to Mrs. Paulling. If he had accepted a security of a higher nature for his debt, his debt would have been extinguished. *Mills v. Starr*, 2 Bail. 360: If he had accepted in payment anything which produced satisfaction; or had accepted absolutely in satisfaction any valuable thing not money; he would have been remediless; but a receipt is not a release; it is susceptible of explanation, and does not in law imply necessarily a satisfaction of the whole debt. *Eve v. Mosely*, 2 Strob. 203; *Skirving ads. Sheriff*, 2 *Rice's Dig.* 155. I am little disposed, in most cases, to grant relief, on the ground of mistake of law, for I see very dimly any distinction between ignorance and mistake of law; but the present case seems to me to be stronger than the cases of *Lowndes v. Chisolm*, 2 McC. Eq. 455 [16 Am. Dec. 667], and *Lawrence v. Beaubien*, 2 Bail. 623 [23 Am. Dec. 155], by the authority of which I am bound. The plaintiff here occupies the favored character of a trustee. Without any pretence of compromise or speculation, in mere mistake, and with the professional assistance of an officer of this Court, he has acknowledged in writing the satisfaction of a decree, contrary to the fact, and has substituted a lien inferior in nature, and practically worthless. It is easy to place the parties in statu quo before the substitution. Under all the circumstances, with some hesitation, I have concluded to grant the plaintiff relief.

It is ordered and decreed, that the receipt, mortgage and note of February 1, 1849, described in the pleadings, be cancelled, that the defendant, Cuthbert Harrison, account with the plaintiff for the hire of the negroes of Mrs. Paulling, bound by the decree of *Lewis v. Boulware*, and that the plaintiff be remitted to his original rights under said decree. It is further ordered that the costs of Harrison be paid out of the estate of Paulling, if sufficient, otherwise out of the hire in his hands; and that the other parties pay their own costs.

The defendant, Sarah Paulling, appealed, on the grounds:

1. Because the receipt given by the com-

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plainant to H. H. *Paulling, was an extinguishment of the decree now sought to be enforced.

2. Because the present decree is contrary to law and evidence.

Boyce, for appellant.

Hammond, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. We are perfectly satisfied that the Chancellor should have granted relief to the plaintiff, under the circumstances stated in his decree: but we do not en-

tirely concur in the measure of relief decreed by him.

It is perfectly manifest, that the decree held by the plaintiff as executor, was not satisfied by the security taken by him from Doctor Paulling.

If he who holds a demand for money, receives in satisfaction a horse or a picture, or any other specific chattel, this amounts to payment, and is as effectual a satisfaction as if the whole demand were paid in money.

And if he accepts in payment another security of higher grade, the demand which he holds is extinguished and satisfied.

But it is plain that satisfaction in this case has accrued in neither of these ways.

The receipt for money given by the plaintiff, is not conclusive where it is made to appear that no money was paid. The receipt is nothing more than the admission of the party: and if it had been proved in this case that he had admitted he had received the amount of his decree in money, he might still prove, as he has done here, that the fact was otherwise: and that he had received no money.

This demand, under the decree, can be extinguished only by payment or a release: or by proof of a contract equivalent to a release.

When the circumstances of this case are investigated, it is palpable that the plaintiff intended to give up his decree upon receiving a valid lien on the negroes.

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*The lien which he did receive was one which Paulling, the husband, was incapable of creating: for, by the very terms of the will, the negroes were the sole property of Mrs. Paulling, and not subject to the disposition of her husband. A plainer case of mistake is seldom presented.

But we think the contract between Paulling and the plaintiff is so far to be respected, that the plaintiff is not entitled to collect the money before the expiration of the indulgence he stipulated to give.

Neither is the administrator of Paulling bound to account for the hire of the negroes. They constitute no part of the estate of his intestate; and he is not responsible for their hire; I mean he is not responsible to the plaintiff, but to Mrs. Paulling, the owner of the property, if he received the hire.

The contract between the parties should be enforced, as far as it can be: and the plaintiff is then entitled to fall back upon his decree, at the expiration of the credit he has engaged to give, and enforce it; so far as he may need the benefit of it.

It is decreed that the administrator of Doctor Paulling, do come to an account for the estate of his intestate, and pay to the plaintiff, on the 1st of January, 1854, upon his demand, the due proportion thereof, to which he is entitled, in the due course of administration; and that after the 1st day

of January, 1854, the plaintiff be allowed to enforce his decree, referred to by the Chancellor, for whatever balance may remain due him.

As the Court has not the pleadings before it, it will not undertake to decide how far Paulling's administrator may be entitled to claim whatever amount his estate may be obliged to pay, against the wife, for the benefit of whose separate estate his contract appears to have been made. The Court, therefore, reserves that point.

Let the case be remanded to the Circuit Court, for further proceedings under the decree as now modified.

It is also ordered that the decree be modified by directing the costs, so far as they cannot be made out of Paulling's estate, be paid by the defendant, Mrs. Paulling.

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*Ordered that the decree, in all respects except as above modified, be affirmed.

DUNKIN and DARGAN, CC., concurred.

WARDLAW, Ch., absent at the hearing.
Decree modified.

4 Rich. Eq. 322

JOHN DOUGLASS and Wife et al. v. ROBERT BRICE et al.

(Columbia. May Term, 1852.)

[*Descent and Distribution* ⇨117.]

Negroes purchased by a son and daughter, who resided with their father and managed his plantation and household affairs for him, *held* to be advancements to them by the father, although it did not positively appear that he knew that the bills of sale had been taken in their names, and although, by a will ineffectually attested, he had attempted to bequeath the negroes to them.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 428; Dec. Dig. ⇨117.]

[*Trusts* ⇨81.]

Where a parent permits a son to purchase in his own name, no trust results to the parent; the presumption is, that the purchase proceeded from natural affection, and was intended as an advancement.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 118; Dec. Dig. ⇨81.]

[*Wills* ⇨108.]

[Cited in *Noble v. Burnett*, 10 Rich. 517, to the point that a will may be sufficient as to devises of land and insufficient as to bequests of personality.]

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 249–258; Dec. Dig. ⇨108.]

Before Wardlaw, Ch., at Fairfield, July, 1851.

Wardlaw, Ch. This bill is for an account and settlement of the estate of William Brice, senior.

William Brice, sen., died in May, 1849, leaving seven children: Jane Douglass, Elizabeth Stevenson, James C. Brice, John Brice, William Brice, Robert Brice and Jen-

net Brice. The estate, which indisputably belonged to him at his death, consisted of a plantation, twelve slaves, namely, Henry, Sarah, Clarissa, Lige, Catharine, Charles, big Sam, Ben, Rachel, little Sam, old Fanny and Darkey, stock of the plantation and household furniture. On March 24, 1843, he executed an instrument purporting to be his last will and testament, wherein he appointed his son, William, and his nephew, Walter Brice, executors; devised his plantation to his son Robert, and assumed to bequeath, besides the slaves named above and other chattels, fifteen other slaves, namely, Norman and Winney, to his daughter Jennet; and Bob, Abbey and five children, Martin and

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Rose and their four children, to his *son Robert. This will was attested by three witnesses, one of which was Walter Brice, named therein as an executor. Walter Brice renounced his executorship. William, jun., made probate of the will in common form, qualified as executor, and proceeded in the administration of the estate, until he was arrested by a decree of the ordinary, that the instrument was invalid as a testament, for lack of due attestation. William afterwards resigned his executorship, and Robert received a grant of the administration *de bonis non*.

Our cases have settled that such attestation of a will as was made of the instrument before us, is sufficient as to devises of land, and insufficient as to bequests of personality. *Taylor v. Taylor*, 1 Rich. 531; *Henderson v. Kenner*, Ib. 474; *Workman v. Dominick*, 3 Strob. 589. Robert therefore is entitled to the plantation by devise. The personality of which the testator was possessed must be distributed equally amongst his children, without reference to advancements, which are not taken into the account where the intestacy is not total. *Snelgrove v. Snelgrove*, 4 Des. 274; *Newman v. Wilbourne*, 1 Hill Eq. 11.

The plaintiffs claim, as subject to distribution amongst the children of William Brice, not only the estate which indisputably belonged to him at his death, but lands, slaves and other chattels of great value, which the defendants hold under releases, bills of sale, and by possession.

When William Brice purchased the plantation in 1824, upon which he lived at the time of his death, this plantation and five or six slaves constituted the bulk of his estate. His daughter Jane, and his son James, respectively, married about 1818, left the homestead and were advanced by the father, as he afterwards declared, to the full extent of any share he proposed to allow to them in his estate. The remaining children wrought diligently and successfully in the affairs of the family—the sons in the plantation, and the daughters in the house-

hold duties; the father himself being of infirm health. William, jun. and John had the principal management and direction of

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the plantation, selling the crops, and receiving and investing the proceeds, until January, 1835, when having purchased plantations and slaves for themselves with some of the proceeds of the crop of the home plantation, they withdrew from the family, and managed their own acquisitions. Afterwards Robert managed and controlled the out-door concerns of the family, selling the crops and purchasing property in his own name and that of his sister Jennet, until his father's death. In 1842 Robert purchased a plantation for himself, and worked thereon, in his exclusive and continued possession, most of the slaves claimed by him, although he still retained the superintendence of the home place, working it with slaves claimed by himself and Jennet, as well as those of his father. Elizabeth intermarried with Stevenson about 1837, received an advancement of four negroes and some other chattels, and left the homestead; and Jennet afterwards had the exclusive management of the domestic affairs of the household.

It is not important to state with fullness and precision the particulars of real and personal estate claimed by the sons, James, William and John, for it is clear that their title to this estate is perfect under the statute of limitations, by more than fourteen years of adverse possession, before the death of their father, without any claim whatever on the part of the father. The bill proceeds upon the notion, that although the legal title to this estate by conveyances and bills of sale may be in the sons respectively, yet as the estate was acquired from the means of the father—the proceeds of his plantation—a trust in the estate so acquired, results to the father and to his heirs. But the presumption of a trust is rebutted, where in such case it is a parent, who purchases in the name of a son, or which is the same thing, allows the son so to purchase; and the presumption is that the purchase proceeds from the motive of natural affection in the parent, and is intended as an advancement to the child. Story Eq. § 1202-3. In this case the advancements are not to be brought into hotch-pot, as the father died testate to some extent.

It is equally clear that Robert Brice is

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protected in his title by the statute of limitations to so many of the slaves as he held in adverse possession, at his separate plantation, for more than four years before his father's death. His title to this separate plantation—the Rocky Creek place—is nearly as strong. It is true that he did not have adverse possession of this place for the full statutory term of ten years; but he pur-

chased and settled it a year or more before the execution of his father's will, which makes no mention of it; and we do not hear at any time of any claim to it on the part of the father. It is plain that this purchase was made with the consent and approbation of the father, especially when we consider the whole course of his advancements. One witness testifies, that on one occasion, several years before his father's death, he heard Robert Brice say that we, (afterwards naming his father, his brothers, John and William, and himself,) shall make 100 bags of cotton this year; and it is argued that this is proof of Robert's admission that they worked in common, and that he had no separate estate. The remark, as sworn to, is quite too equivocal and flimsy to authorize the deduction.

The main controversy in the case is, whether certain slaves claimed by Robert and Jennet, severally, belonged to them or to their father, at the time of his death. Twelve slaves, which have been already named, are all which have been set down in the inventory as belonging to the father's estate. Fifteen others, also heretofore named, are mentioned in ineffectual bequests by the father to Robert and Jennet, respectively. Of these fifteen, Winny had been sold; to Bob, Ibbey and four of her children Martin, Rose and one of her children, a good title had been acquired by Robert Brice's adverse separate possession; three of Rose's children, Ned, Jim and Ann, one of Ibbey's children, Peter Page and Norman, were on the testator's plantation at the time of his death. Besides these five, several others not included in the appraisement, were also at the testator's plantation, namely, George, little Sarah, Lydia and four children, Susannah and Saml, Robert and Porter. Robert Brice produces bills of sale to himself, dated as follows: of Rose, February 3,

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1834; of Bob, April 4, 1835; of Ibbey and two children, August 13, 1836; of George, November 30, 1846. Jennet Brice produces three bills of sale to herself—one of Winny and Norman, dated May 1, 1838; and another executed by J. W. Hudson, March 22, 1847, and the third for little Sarah. These bills of sale, if valid, convey all the slaves in controversy, except Martin, who is held by possession. No express evidence is given that William Brice, sen., had notice of these bills of sale; but I am entirely satisfied from all the circumstances of the case of the truth of the statement in the answer, "that these bills of sale were executed with the full knowledge and approbation of the father." This is the natural presumption from the existence of the papers themselves; for fraud cannot be snuffed at a distance where the breeze is not tainted. The household of this old man was remarkably harmonious, industrious, frugal and thrifty;

and it is manifest that the father and children proceeded upon the principle of apportioning acquisitions according to the value of the services of the members of a community. *Murrel v. Murrel*, 2 Strob. Eq. 148 [49 Am. Dec. 664]. One witness testifies that after William Brice had made his will, he said "those of his children who had married and gone off had got their full share of his property at that time, and that the boys had made this property and had the best right to it." Another witness testifies, that "William Brice when his will was being drawn up, and afterwards, said he had given his other children what he allowed for them, and that the boys ought to have the other property as they had made it." Again: the father, by acts and declarations, recognized the title of some of these slaves as being in Robert and Jennet, in conformity to the bills of sale. He permitted Robert to establish by exclusive possession title to Ibby and Rose, the mothers of most of the slaves now claimed from Robert; and that some of the young children of these mothers were kept at the home place, probably for convenience of nurture, is a circumstance of little weight in the contrary scale. It is further proved that William Brice said, "Jennet had a negro woman, Winny and two

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children, with which she *became displeased, and directed Robert to sell them; and that Robert did sell them, and purchased for her a family from Mr. Hudson, Julia and her children." Norman is in the same bill of sale with Winny to Jennet. Against the force of these circumstances the fact principally argued is, that William Brice, sen., undertook to bequeath as his own, some of these slaves to his children, Robert and Jennet. But it is quite common for parents in their wills to devise or bequeath in terms to their children, estate that had been in fact previously given as an advancement. Such dispositions are intended rather to magnify the extent of the donor's bounty, or to quiet litigation among his legatees, than to assert existing title in the subject in himself. There might be something in the argument, if the testator had attempted a different disposition of any of these slaves from that which follows from the operation of the bills of sale; but such is not the fact. When we add to this, that the testator attempted to cut off by his will each of the plaintiffs from a share of his estate, the inference of claim by the testator to these slaves is destroyed. In my judgment the plaintiffs have not established that William Brice, sen., at the time of his death, was entitled to lands and chattels, beyond what is conceded by the defendants to be his estate. The crop of 1849, as the testator died after the first of March, must be accounted for, according to the agreement, if any existed, for the division of the pro-

ceeds among the testator and his children, Robert and Jennet; otherwise, according to the amount of capital invested and of the labor employed, regarding the plantation and the twelve negroes appraised as belonging to testator. The testator's share to be equally divided among all of his distributees.

William Brice, executor, and Robert Brice, administrator, must account for the chattels of the estate, and the funds by them respectively received. It seems that John Brice received for a time the avails of the labor of Charissa and her children, and he must account to the representatives, and they to the distributees as to this matter.

If an order for the sale of the chattels for partition be necessary, it may be applied for.

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*It is ordered that this opinion stand for a decree; that it be referred to the commissioner to take the accounts upon the principles herein indicated. Costs to be paid from the intestate property of William Brice, senior.

The complainants appealed, on the following grounds:

1. That the defendants cannot hold any property, real or personal, claimed by them under the statute of limitations, inasmuch as they have not asked for protection under the said statute by plea, answer or otherwise.

2. That William Brice, sen., being the proprietor or sole owner of the land and negroes, and other property from which the crops were made, was the sole owner of the crops raised on his plantation, and of their proceeds; and was the sole owner of all property purchased thereby; unless the defendants had, in express terms, proved a gift; or an authority so to invest his monies, and take title or bills of sale in their own right; which they failed to do.

3. That the evidence does not show that William Brice, sen., had ever heard or known, that any bill of sale was held by any one of the defendants for either of the negroes named in his will, (of date March 24, 1843,) and by which he believed he had lawfully conveyed said negroes, twenty-six in number, as his own property. The complainants, therefore, submit that the said negroes and their increase were rightfully the property of William Brice, sen., at his death.

4. That the twelve negroes in the possession of deceased at his death, and not appraised as his property, to wit: Lydia, Susannah, little Sam, Robert, Porter and Norman, claimed by Jennet Brice; and George, little Sarah, Ned, Jim, Ann, Peter Page, claimed by defendant, Robert Brice, of right belong to the estate of deceased; the first five named, and also George and little Sarah, having been purchased since the will was dated, and the remaining five negroes having been in-

cluded in the will, and all living on the plantation of the deceased as his property.

5. That the entire crop of 1849, raised on

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his plantation, be*longed to the deceased and his estate, and that the defendant, Robert Brice, as administrator, ought to be required to account for the same.

6. That the defendants are bound to pay the costs of this suit, for the reason that the defendant, John Brice, claimed and took possession after the death as his property, of four negroes, now agreed by defendants in their answer, as belonging to the estate of the deceased, to wit: Clarissa and her children, Lige, Catharine and Charles; the defendants, William Brice, as executor, and afterwards Robert Brice, as administrator, having acquiesced in the claim, or having taken no steps to right the estate; and the complainants having been thereby forced to bring their bill.

Buchanan, Hammond, for appellants.

Gregg, McAliley, contra.

PER CURIAM. This Court perceives no error in the decree appealed from. It is, therefore, ordered that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.

4 Rich. Eq. 329

R. ZIMMERMAN and Wife et al. v. ELIZABETH WOLFE et al.

(Columbia. May Term, 1852.)

[Deeds ¶120.]

Negroes were conveyed by deed "to J. M. during the term of his natural life, and at his death to M. M., his wife, and the heirs of her body, and in the event of the said M. M. departing this life, without children living at her death, then the said negroes to go to the said J. M. during his life, and at his death to be divided equally, one half to the children of J. C. and one half to the children of E. Z."—*Held*, that the limitation over to the children of J. C. and E. Z. was valid.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 380; Dec. Dig. ¶120.]

Before Dargan, Ch., at Orangeburg, February, 1852.

Dargan, Ch. Conrad Holman, of St. Matthew's Parish, departed this life on or about

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19th August, 1816, leaving a personal *estate, consisting principally of negroes. He died intestate, and his son, John C. Holman, and his daughter, Elizabeth, who afterwards intermarried with Daniel Zimmerman, and his daughter, Mary, who afterwards intermarried with John Murph, were his distributees. On the 8th June, 1821, the parties, viz: the son and daughters of the intestate, with their

husbands, made a partition of the negroes among themselves, by a tripartite indenture, duly executed, by the terms of which indenture they mutually agreed to receive their respective shares, subject to certain contingent limitations prescribed therein. The part of said deed, which is now the subject of consideration, is to the following effect: It transfers certain negroes, who are specially named, and their future increase to John Murph and Mary, his wife, as their share,— "to the said John Murph, during the term of his natural life, and at his death to the said Mary and the heirs of her body, and in the event of the said Mary departing this life without children living at her death, then the said negroes to go to the said John Murph during his life, and at his death to be divided equally, one half to the children of the said John C. Holman, and one half to the children of the said Elizabeth Zimmerman; and if either the said John C. or the said Elizabeth should depart this life without children living at his or her death, then the said negroes to go to the children of the other."

John Murph departed this life in the year 1844, leaving his wife, the said Mary, surviving him; and in the year 1848, she departed this life without leaving any children surviving her and being in possession of the negroes at the time of her death.

John C. Holman died in the year 1839. He left children as follows: Elizabeth Holman, who has intermarried with Russel Zimmerman, and a son, John Holman. These are the complainants. He also left a daughter, Catharine, who intermarried with one Wolfe, and has died leaving two children, Elizabeth and Catharine Wolfe, who are defendants.

The complainants allege that Mary Murph, in her life time, made a parol gift of the

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said slaves in their behalf, accompanied *by delivery. They contend that she had a right to make such a disposition of the negroes, as according to their construction of the deed, her estate in the said negroes was absolute in the event she survived her husband, which she did. They further charge that they have heard that the defendants dispute their title to the negroes under said parol gift. And they prefer their bill to quiet their title to the said negroes, as against the claim set up by the defendants; and for a partition, if it should be decided that the defendants are entitled to a share under the limitations of the deed.

Daniel Zimmerman and his wife, Elizabeth, are both dead.—They left children, who also would be interested in the issues made in these proceedings; but in answer to a question by the Court, "Why were they not made parties?" it was said that Mrs. Murph

in her life time, and in anticipation of her death, delivered certain of the negroes to the children of Mrs. Zimmerman, and to the surviving children of John C. Holman, (who are the complainants,) the negroes mentioned in the bill: and that both the complainants and the Holmans agreed to receive the negroes delivered to them in her life time as their interest and share of the negroes limited to them by the deed. From this statement it would seem that the Zimmermans are satisfied, and the Holmans, including the defendants, are also satisfied, so far as regards the partition between the two branches of the family. The matter to be adjudged is whether the Holman share of the negro property of Mrs. Murph is subject to further partition, so that one third part thereof shall be assigned to the defendants, who are the representatives of Catharine Wolfe, a deceased daughter of John C. Holman.

Whether the defendants are so entitled will depend upon the construction of the deed. If the deed had conveyed the negroes to John Murph during his life, and at his death to Mary Murph and the heirs of her body, and in the event of dying without children living at her death, then over, I apprehend, there could not have been a doubt as to the validity of the limitations: and

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these are *substantially the provisions of the deed. I have stated them precisely as they are, with the exception of the life estate to John Murph, interposed between the estate of Mary Murph and the limitations in favor of the ulterior remainder-man. But the life estate given to John Murph in that connexion, is a mere repetition. The first estate conveyed to him is to him for life, absolutely and independently of his surviving or of his not surviving his wife; and the repetition of the grant to him for life, in the subsequent clause, gives him neither more nor less than he takes by the first. He was to have a life estate by the first clause, whether he or she were the survivor, and whether she left children or not. If she died before her husband, without leaving children living at her death, then at the expiration of the estate already given to him for life, the limitation over was to take effect. This, I think, is the true reading of the deed, so far as relates to the clause in question.

If Mrs. Murph had left children surviving her, whether they would have been entitled to take as purchasers, I am not under the necessity of deciding. Such, however, I think, would have been the result. Under the expression, "the heirs of her body," the estate is given to her issue, which, if the description had stopped there, would have been too indefinite, and would have failed for remoteness. But the condition which follows, viz: that if she dies without children living at her death, the estate was to go

over by way of remainder to persons who, if they took at all, must take within the period prescribed against remoteness, restricts the generality and vagueness of the expression, "heirs of her body," and makes it mean those very children, the failure of whom, at her death, would cause the estate to go over. The term "heirs of her body," thus explained, means children living at her death, who are in this way sufficiently described as a class, and to whom, without resort to implication, an estate is directly given as purchasers. According to this construction, Mrs. Murph would in no event have taken more than a life estate. Under this view of the case, there was an estate

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to John Murph for life, remain*der to Mary Murph for life, remainder to her children living at her death in fee; and if she should die without children living at her death, remainder to a class of persons, of which the defendants constitute a portion. But the right of the defendants, as I have already intimated, does not depend upon a construction which would make Mrs. Murph take a life estate, with remainder to her children (if she left any) in fee. The same result would follow, if it was intended that she should take a fee, provided she left children surviving her; for in that case it would have been a fee defeasible upon the event of her dying without children living at her death. And the condition has happened upon which the estate was to pass away from her. If this construction should prevail, then there was an estate to John Murph for life, remainder to Mary Murph in fee, but in the event she should die without children living at her death, remainder to the children of John C. Holman and of Mary Zimmerman.

In the opinion of the Court, the defendants are entitled to one third part of the negroes described in the bill, and to an account of the hire and profits of the said negroes, from the death of Mary Murph. And it is so decreed.

It is further ordered, that the parties to these proceedings have leave to apply at the foot of this decree, for all orders necessary and proper to carry the same into effect.

The complainants appealed, on the following grounds:

1. Because under a proper construction of the deed in question, and on the case as made, the defendants are not entitled to one third part of the negroes described in the bill.

2. Because the decree is, in other respects, erroneous and contrary to law and equity.

3. Because there being no privity between complainants and defendants, and the slaves having been given to complainants in the life time of Mrs. Murph, and the complainants being stake holders, they should not be charged with hire for them.

Keitt, Whaley, for appellants.
—, contra.

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*PER CURIAM. This Court concurs in the decree of the Chancellor; and it is ordered that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN, and
WARDLAW, CC., concurring.
Appeal dismissed.

4 Rich. eq. 334

CHESLEY D. EVANS and Wife et al. v. WILLIAM EVANS.

(Columbia. May Term, 1852.)

[Wills ⚡740.]

Testator directed his slaves and other property to be divided by freeholders, to be chosen by his executors, into lots—that each one of his children should draw one lot and hold the same for life, with remainder to his or her issue: In making the lots, the freeholders inadvertently put a female slave into one lot, and her infant child into another; the legatee who drew the mother agreed, at the time and before the allotment and division was complete, to take the child and give the legatee who had drawn it his note for \$100—the amount at which it had been appraised—which was accordingly done: *Held*, upon the evidence, that the child passed, in the division, to the legatee who drew the mother, and that the \$100 was paid for equality of partition, and not as purchase money for the child.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1892; Dec. Dig. ⚡740.]

Before Johnston, Ch., at Marion, February, 1851.

Johnston, Ch. This suits relates to a part of the estate of General Godbold, late of Marion district.

His will was executed the 17th day of May, 1825, and he died in the same year. Throwing out immaterial facts, the circumstances of the case may be briefly stated as follows:

He left six children—Hugh, Charles, John, Elizabeth, Sarah and Mary. Charles died intestate and without issue, in 1827, and before the division of the estate hereinafter to be stated. Sarah married the defendant, William Evans. Elizabeth married first, John Haselden, and afterwards David Monroe, and died in 1844, leaving the plaintiffs, the issue of her two marriages, surviving her.

The testator's will directed his executor

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to keep his lands and *negroes together as a planting establishment until the 1st January, 1830; subject to this, the following provisions are found in the will.

1. "That my lands be divided into six equal parts, as near as can be done, by not less than three respectable freeholders, chosen by my executor. After being so divided, the tracts or divisions to be numbered and put into a box or hat and drawn out by a child not ex-

ceeding ten years old, beginning with the number first drawn for the oldest heir, my son, Hugh Godbold; No. 2, for my son, Charles F. Godbold; No. 3, for my son, John M. Godbold; No. 4, for my daughter, Elizabeth Godbold; No. 5, for my daughter, Sarah Ann Godbold; No. 6, for my daughter, Mary Godbold."

2. "The negroes, stock," &c., to be divided, as the land, by numbers.

3. "All the property I have loaned," (there are other clauses giving the above property in the form of a loan to his children,) "to my sons and daughters, before mentioned, after he, she or they depart this life, shall go to the lawful issue of their bodies; and if either of my children shall depart this life leaving no lawful issue of their body, then the whole of that part of my estate allotted to him, her or them, should be equally divided among my surviving heirs."

When the period of division arrived, there were still large debts of the testator remaining unsatisfied, and the executor would not consent to the division unless these were provided for, and himself secured from the consequences of assenting to the legacies. An instrument was therefore drawn up and subscribed by the parties, by which each of the legatees was to take the property to be assigned to him, with the burden of paying off a specified portion of the debts; and it was stipulated that the executor should have power to subject the share of each legatee, in his, (the legatee's) hands, for the payment of the demands against the estate, and that no legatee should be regarded as having such title to his share as would authorize him to dispose of it even towards paying these demands, unless the price was so applied, and

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the executor *was satisfied with the sum raised by the sale. Upon this agreement the freeholders were called in by the executor, appraised the property, and threw it into lots. Charles Godbold, one of the legatees, being dead, no share was distinctly made up for him; but the property was thrown into five instead of six lots.

In doing this, by some inadvertence a little female negro child, by the name of Sena, then of such tender age as to render it improper to take it from its mother, was put into one lot and its mother in another. The child had been valued at one hundred dollars. The lot, including the mother, was drawn by Sarah, (Mrs. Evans,) and that including the child by Elizabeth, (Mrs. Haselden.) Evans and Haselden were present; and as soon as Haselden was informed of the fact that the child had fallen to him, disconnected from its mother, he remonstrated. This seems to have been before Sarah's lot was drawn, and while it was uncertain to whom the mother would fall. He said that he would not take the child home; that if who-

ever drew the mother would take it at the appraisement, he might, and if he would not, he would give it to him. There was a general concurrence of the appraisers, the executor and every person present, that the child and mother should go together; and Mrs. Evans having drawn the mother, it was, at the executor's suggestion, and with the appraisers' approval, (and, as one of them testifies, before the process of allotment and the division was complete,) arranged that Evans should take the child along with its mother at its appraisement. He gave his note to Haselden for the amount. How or when he paid the note does not appear; but be this as it may, the division was completed, and the parties received the property accordingly, of which they have retained the possession.

The share assigned to each of the five children on this division was of the average value of about \$1,400, (subject to a proportionate share of the estate's debts still due, which was considerable, and to over advances made by the executor, amounting to over \$300,) one-sixth of the property thus assigned, it will be

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*remembered, consisted of the share of Charles Godbold, which was thrown in with the others.

Upon the death of Elizabeth, the original share given to her under the will, (according to the cases on Bell's will,) was vested in her children, who survived her, and who are the plaintiffs in this case, most of whom are minors now, and all of them until lately.

The bill is to have Sena and her children, (for she is now grown and has several children, mentioned in the pleadings,) delivered to the plaintiffs by defendant, Evans, with an account of the profits since their mother's death; and the ground taken is, that upon the drawing of the lot in which Sena was included, by their mother, she became vested in their mother, subject to the limitations of the will, and that their father was incompetent to dispose of her to Evans.

This is the case for decision. I do not think I have omitted any material circumstance. If I have inadvertently done so my notes of evidence and the pleadings are open for my correction.

I shall decide this case upon a single ground.

It is very clear that if the slave vested in Mrs. Haselden, it vested subject to the debts of the estate, which bore a proportion to Mrs. Haselden's whole lot greater than the value of this child; and it vested also subject to alienation for estate debts with the concurrence of the executor, which in this case took place. The assent of the executor, which was necessary to the vesting of the legacy, was given only on these conditions; and upon these conditions the legacy was received.

It is also clear that in the lot of Mrs. Has-

elden was included her proportion of the share of her deceased brother, Charles, to which share no limitations were annexed by the will beyond the simple limitation over to Mrs. Haselden and her brothers and sisters. Her proportion therefore was her absolute property, and subject to the disposal of her husband. Who will say, at this distance of time, that Sena did not represent the proportion received of Charles' share? But the

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ground upon which I put the *case, (whatever forms were gone through,) is that Sena never was really included in the share finally allotted and assigned to Mrs. Haselden.

The case is analogous to the division of Richard Thompson's estate, which came up before us several years ago, from Spartanburg.

The negro in question was appraised, and in the first instance placed in lot No. 4, but, (says Col. Harlee, the executor, who was examined as a witness,) the allotments were modified by the transfer of Sena to lot No. 5. This modification was made at the instance of all the legatees, particularly Mrs. Haselden, and with the assent of the commissioners or freeholders who made the division; and this was done before the division was completed. Mr. Hugh Godbold, another witness and one of the legatees, concurs in this statement, and says he considered this transfer, both then and now, as much a part of the division as any other.

The drawing of this lot preceded the transfer, and it is supposed that the property vested eo instanti upon that drawing. The lot was dictated and adopted not for the purpose of vesting the property, but for the mere purpose of giving satisfactory evidence of impartiality. It was competent for any party to waive it so far as himself was concerned, and certainly it was competent for all the parties together. It was not the allotment, nor even the division which vested the legacy. That depended alone upon the assent of the executor, and that was given to the lots as modified.

It is objected, however, that upon this view Evans owed \$100 for equality of partition; that the limitations of the will applied to that sum no less than the specific property; and that Evans must make it good to Mrs. Haselden's children. The answer to that is, that the bill makes no such claim; nor does it arise incidentally to the claims made in the bill.

Another answer is, that there is nothing in the will to forbid Mrs. Haselden or her husband, (to whom the use of the property was given,) from receiving and using the

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money; that it was com*petent for Evans to pay it to them; and that the time which has elapsed raises the presumption that he did pay it. If they wasted it and defeated the

remainder of their children, the children must look to them.

I must dismiss the bill; and it is ordered that the same be dismissed.

The complainants appealed, on the following grounds:

1. Because the answer of defendant drawn by the executor, admitted the division of the estate of Thomas Godbold, as charged in the bill of complainant, and alleges that the negro in question was bought by the defendant from John Haselden, the father of complainants, to whom she was allotted by the commissioners in partition, with the assent of the executor.

2. Because the return and certificate of the commissioners who were selected to divide the estate under the directions of the will, were conclusive as to said partition, and his Honor erred in admitting or allowing parol evidence to alter or contradict it.

3. Because there was no evidence that the negro Sena was allotted to any other person except to Mrs. Haselden, the mother of complainants; and it is submitted that such allotment vested the property in her for life, and in her children at her death, and that no act of her husband, or of her executor, after such allotment had taken place, could divest either her or her children, provided the debts were paid as agreed upon with the executor.

4. Because it was proved that no part of the purchase money of Sena was applied to the debts of the estate; but, on the other hand, John Haselden sold more of the property allotted to his wife than would extinguish his portion of the debts of the estate, and his wife's share of the estate of C. F. Godbold, the deceased brother; and it is insisted that the defendant being a purchaser with notice, is bound to account and specifically deliver the property in question in the same manner that Haselden would if living.

5. Because, according to the proof the property of the negro in question was vested in complainants' mother, at the division for

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*life, and no act of the parties was established which could legally deprive complainants of their rights in remainder thereto of a specific delivery and account prayed for in the bill.

Harilee, for appellants.

Dudley, contra.

PER CURIAM. This Court concurs in the circuit decree; and it is ordered that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.

4 Rich. Eq. 340

GEORGE CRIM and Wife et al. v. WM. KNOTTS et al.

(Columbia. May Term, 1852.)

[Wills \hookrightarrow 524, 531.]

Testator declared, "it is my will and desire that the rest and remainder of my estate be divided into equal shares among my brother, Jacob Patterson, and Anthony Patterson's lawful children, and that my brothers, Jacob and Anthony, have the use of their children's portion, or part, during their natural lives, and at their death to their children forever." At the death of testator Jacob had eight children living, and Anthony had three; and Anthony had nine children born afterwards: Held, that Jacob and Anthony were each entitled to take one moiety of the estate for life; and that at Anthony's death all his children, as well those born after the death of testator, as those born before, were entitled to his moiety as remainder-men.

[Ed. Note.—Cited in *Felder v. Felder*, 5 Rich. Eq. 515; *Tindal v. Neal*, 59 S. C. 14, 36 S. E. 1004.]

For other cases, see Wills, Cent. Dig. §§ 1123, 1149; Dec. Dig. \hookrightarrow 524, 531.]

Before Dargan, Ch., at Orangeburg, February, 1852.

Dargan, Ch. John Patterson, of Edisto Island, died in the month of January, A. D. 1818. He left, in full force and duly executed, his last will and testament, bearing date the 31st December, 1817. William Seabrook, William Edings and Ephraim Mikell, were appointed by the testator as the executors of his will, and the said will having been admitted to probate, the executors took upon themselves the burthen and execution thereof. After bequeathing several specific legacies, (not necessary to be particularly alluded to,) the testator proceeds to declare

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as follows: "It is my will and desire, that the rest and remainder of my estate be divided into equal shares among my brother, Jacob Patterson, and Anthony Patterson's lawful children, and that my brothers, Jacob and Anthony, have the use of their children's portion, or part, during their natural lives, and at their death to their children forever."

At the time of the testator's death (and of the said sale,) Jacob Patterson had eight children, (not necessary to be described,) and Anthony Patterson had three children. The children of the said Anthony Patterson, who were living at the death of the testator, and the representatives of those since dead, are as follows: Margaret, his daughter, who has intermarried with George Crim; George C. Patterson, a son, who, according to the statement of the bill, left the State 12 or 13 years ago, and not having since been heard from, is supposed to be dead; and Mary, a daughter, who intermarried with Amos Harris, and who died on the 25th of February, 1844, leaving her husband, the said Amos Harris, and her children, Daniel Harris, Ellen Harris and Jane Harris her heirs at

law and distributees. After the death of John Patterson, (the testator,) Anthony Patterson had one other child by his first marriage, namely, Eliza Wactor, who is now a widow. After the death of his first wife, Anthony Patterson formed a second marriage, by which he had eight children, namely, Rachael O., wife of James Wimbish, (now residing in Virginia,) Barbara S., wife of John Lucas, Leah E., wife of William Cleckley, Sarah C. Patterson, Jane Patterson, Donald Patterson, Jerome Patterson and Susannah Patterson. These children, with his second wife, Elizabeth Patterson, all survived the said Anthony Patterson.

The slaves purchased by Anthony Patterson at the sale of the estate of John Patterson, (or rather the survivors thereof,) and the natural increase of the stock are at the present time, seventeen in number, namely: Sarah, Isaac, John, Moses, Mary, Betsy, Joe, Sinda, Sealy, Sampson, Sylvester, Adam, William, George, Aaron, David and Rachael. These slaves were in the possession of Anthony Patterson at the time of

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his death, which occurred *on the 31st May, 1850. Besides these, he had at the time of his death, two other slaves of a different stock, namely: Eleanor and Stephen, and some other personal property. The said Anthony Patterson having died intestate, one William Knotts has sued out letters of administration of the intestate's estate, and has possessed himself thereof, as well of the negroes derived by his intestate from the sale of John Patterson's estate as those derived by him from another source.

The complainants are George Crim and Margaret, his wife, Amos Harris, Daniel P. Harris, Ellen Harris and Jane Harris. The defendants are William Knotts, the administrator, Eliza P. Wactor, a daughter of Anthony Patterson by his first wife, George C. Patterson, a son by his first wife, (who is absent and supposed to be dead,) and all his aforesaid children by his second marriage.

The complainants contend that they, with George C. Patterson, are entitled to the whole of the legacy given by John Patterson's will to Anthony Patterson's children, to the exclusion of the post natal, or those born after the testator, and after his will took effect.

The general rule is, that a bequest to children as a class, embraces only the children who are in existence at the testator's death. If the period of distribution be postponed, all who can bring themselves within the description of the time appointed for the distribution, will be entitled, whether the time be a fixed date or contingent upon some future event. If the bequest be indefinite as to the time for the partition and the enjoyment of the legacy, the general rule will prevail, and the children in esse at the death of the

testator, will take to the exclusion of the post natal.

If an estate be given to one for life, and after his death to his children, all the children will be entitled to take the post natal as well as the ante natal. The same result would follow, if an estate was given to one for life, with remainder to children of another person. The interposition of the life estate has the effect of postponing the partition, and thus lets in all the children equally. This, I mean to say, would be the con-

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struction, unless there were *other manifestations of the testator's intention expressed in the context, or arising by implication.

On behalf of the post natal, it is contended, that Jacob Patterson and Anthony Patterson had a life estate respectively in the property given to them by John Patterson's will, which postponed the period of distribution to the death of the tenants for life, and thus let in all the children, according to the doctrine so well settled. The argument is specious, but there are circumstances which forbid such a construction.

I lay no great stress on the fact, that the will in form gives the estate directly to the children, and then provides that the parents, (the testator's brothers,) should "have the use of their childrens' portions or shares, during their natural lives, and after their death to their children forever." Substantially, the will may be regarded as giving to Jacob and Anthony Patterson an estate for life, respectively, in their childrens' portions, with remainder to their children.

"The rest and remainder" of the estate is given to the children of Jacob and Anthony Patterson. In what proportions do the children of the two brothers take? Do they take per stirpes or per capita? In my opinion, the solution of this question will have an important bearing on the construction of the will as to the issue now before us. The testator declares it to be his will that the rest and remainder of his estate shall be divided in equal shares among his brother Jacob and Anthony Patterson's lawful children; and that his brothers, Jacob and Anthony Patterson, have the use of their childrens' portions or shares during their natural lives, and at their death to their children forever.

I take it to be very clear, that the children of Jacob and Anthony Patterson took per capita. "Where a gift is to several persons, whether it be to the children of A. and B., or to the children of A. and the children of B., they take per capita and not per stirpes." 2 Jarm. on Wills III.; *Weld v. Bradbury*, 2 Vern. 705; *Lady Lincoln v. Pelham*, 10 Ves. 166; *Barnes v. Patch*, 8 Ves. 604; *ex parte Leith*, 1 Hill Eq. 153.

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*Jacob Patterson had eight children, and Anthony Patterson had three children at

the death of the testator. He gave to each of his brothers the use of his children's portion or share during his life. He therefore designed a partition per capita among the children of his brothers who were living at his death. How otherwise could his brothers have the use of their childrens' portions or shares during their lives? An instant division was necessary to the enjoyment of their life estate or interest; for it could not be known what their childrens' shares or portions were without such division. It is obvious also, that if a distribution then took place, only the existing children could participate in the division. The three children of Anthony Patterson were entitled per capita to three shares, and the eight children of Jacob Patterson to a corresponding number of shares. Upon this principle a partition was actually made of the property embraced in the residuary clause, among the children of Jacob and Anthony Patterson, by a decree of the Court of Equity in the year 1818; and Jacob and Anthony Patterson have, since that time, had the possession and enjoyment of their portions respectively.

It may be asked, why not now let in the post natal in a distribution of the part, which, in the partition already legally made, has been assigned to the children of Anthony Patterson? Why not do this, as the period of their enjoyment, and for a division among themselves, has just arrived? Why not let them in, as they can now bring themselves within the description of children? I do not think that there is any thing to be inferred from the will, that the testator had in contemplation two periods of distribution as affecting the rights of the parties who were to take. To let in the after-born children of Anthony Patterson, in the distribution of the three shares (out of eleven,) which the ante natal drew in the per capita division with the children of Jacob Patterson, would violate the manifest and declared intention of the testator. He said that the property should be equally divided amongst the children of Jacob and Anthony Patterson. How can it be an equal division, if after eight-elevenths have been

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taken off by the children of Jacob Patterson, the three-elevenths assigned in the division to the children of Anthony Patterson, should again be subdivided into twelve shares, corresponding to the number of Anthony Patterson's children. The shares which his three oldest children took in the division, they took as legatees under the description of children, and they took in their own right. If there is any thing certain in the will, it is that those who were to take at all were to take in equal shares. It seems to me but little short of an absurdity to say that when they, in pursuance of the terms of the will, and coming in under the description of "children," took three

shares out of eleven, which were then equal shares, and all they were entitled to receive, now they should be compelled to make partition with the after-born children of Anthony Patterson, who were not then in esse, and not entitled to draw any shares. If such a construction were to prevail, it is clear that the whole estate must be brought together, as well that which was assigned to Jacob Patterson's children, as that which was assigned to Anthony Patterson's children, and a division made equally among all. Jacob Patterson, however, has long since gone to the West, and carried with him his children and their property. It is not known to the Court whether he is living or dead. If living, he has still a life estate in his childrens' portion of the testator's estate. And were he now within the jurisdiction of the Court, the claim could now be made, (that is, in his life time,) for an equal division of all the testator's residuary estate among all his nephews and nieces, the post natal as well as the ante natal. The different periods at which the life estates of Jacob and Anthony Patterson would terminate, is another argument to show that the testator did not contemplate an equal division among all the children of his two brothers, born or to be born.

The result of my reflections is, a decided opinion, that only the three children of Anthony Patterson living at the death of John Patterson, are entitled to the legacy bequeathed to the children of Anthony Patterson by the residuary clause of John Patterson's will; and it is so ordered and decreed.

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*And it is further ordered and decreed, that one part thereof be assigned to Margaret Crim, one third part to the distributees of Mary Harris, and one third part to George C. Patterson. As to the share of the latter, if the circumstances warrant the legal presumption of his death, there must be an administration as in any other case of death and intestacy. And the persons interested as his distributees must proceed as they are advised. There is nothing in the present proceedings that warrants any thing more to be done in reference to his share, than to order it to be set apart to him.

The defendants appealed:

Because, under the provisions of John Patterson's will, the defendants were entitled to share equally with the complainants in the residuary estate.

Glover, for appellants.

—, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. In the construction of bequests to children, it is well settled, that where a bequest is immediate to children in a class, children in existence at the death of the testator, and these exclusively, are entitled to take. But where the division of

the fund among the legatees is deferred until a particular period, which takes place after the death of the testator, children born after the testator's death may be entitled under a bequest to children in a class. Thus, where legacies are given to the children of A, when a child or children attain a particular age, or to be divided amongst them at the death of A; any child who falls under the description at the time when the fund is to be divided, is entitled to a share, although not born until after testator's death, and although born of a subsequent marriage. 2 Wms. Ex'rs. 797; *Gilmore v. Severn*, 1 Bro. C. C. 582; *Barrington v. Tristram*, 6 Ves. 345.

The bequest to be interpreted in the present case, is in the following words: "It is my will and desire, that the rest and re-

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*mainder of my estate be divided into equal shares among my brother Jacob Patterson and Anthony Patterson's lawful children, and that my brothers, Jacob and Anthony, have the use of their childrens' portion, or part, during their natural lives, and at their death to their children." This clause is drawn ungrammatically and inartificially, but the intention of the testator, which is the great guide of interpretation, where no rule of law is infringed, seems pretty plain. The testator has directed, in effect, that the residue of his estate be divided into two equal shares; that Jacob Patterson shall have one of these moieties for life, and that at his death his children shall take the same among them absolutely; and in like manner, that Anthony shall take the other moiety for life, and at his death his children shall take it among them absolutely. No dispute is made as to the accuracy of this interpretation in any particular, except as to the original division into two equal parts. It is argued for the plaintiffs, that the original division should be into as many parts as there were children of testator's brothers at his death; and consequently that Jacob for life, and his children after him, should take eight shares, and Anthony take for life three shares only, distributable at his death among his three children in being at testator's death, to the exclusion of the eight born subsequently. The argument has some support in the letter of the former portion of the clause, but it is opposed to the general scope of the provision, particularly that which postpones the enjoyment of the fund by the children, until the deaths of their fathers respectively. The employment of the terms "childrens' portion or part," seems to contemplate that a moiety for each class of children was to remain an unseparated mass until the period of enjoyment arrived. The direction as to division of the residue into equal parts, is satisfied by understanding

it as applicable to the brothers of the testator who were the immediate objects of his bounty; and no reasonable motive can be assigned for the supposed purpose of the testator, to exclude from the remainder any of the children of his brothers. In the case cited from Vesey, Lord Eldon remarks:

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"The rule *of the Court has gone upon an anxiety to provide for as many children as possible with convenience. Therefore any coming in esse, before a determinate share becomes distributable to any one, is included."

In opposition to the construction indicated, it is further urged, that the construction given by the plaintiffs was adopted by the decree of this Court in 1818, in a suit between the tenants for life and the executor. But the partition then decreed is not obligatory upon the children who were no parties to the proceedings. *Bool v. Mix*, 17 Wend. 119.

The fact that Jacob Patterson received too much in the partition of 1818, in no wise diminishes the right of the defendants to equal distribution with the other children of Anthony in the partition received by him. Any claim to recoup from Jacob or his estate for the excess above one half received by him, is common to all the children of Anthony.

It is declared and adjudged, that all the children of Anthony Patterson, living at his death, are entitled to distribute amongst them the legacy enjoyed by the said Anthony for life, under the will of John Patterson: and it is ordered and decreed, that the accounts be taken accordingly. Costs to be paid out of the estate of Anthony Patterson. It is further ordered and decreed, that the circuit decree be modified according to this opinion, and in other respects be affirmed.

JOHNSTON and DUNKIN, CC., concurred.

DARGAN, Ch. I dissent. I see no reason whatever for changing or modifying the construction of the will given in the circuit decree.

Decree modified.

4 Rich. Eq. *349

*GEORGE D. KEITT and Wife v. JAMES J. ANDREWS and Wife.

HENRY W. MOORER and Wife v. THE SAME.

(Columbia. May Term, 1852.)

[*Executors and Administrators* ⌘509.]

Testator having an only daughter and two grand-children, issue of his daughter, bequeathed property to his "grand-children to be equally divided between them:" after the death of testator three other grand-children, issue of his daughter, were born: when the two eldest

grand-children, who alone were entitled to take under the will, arrived at age, the executor paid each of them one-fifth of the legacy, and took from them written acquittances and discharges; this settlement was intended to be in full,—all the parties, including the ordinary who stated the account, supposing in good faith that all the grand-children were entitled to share the legacy: near eight years afterwards the two eldest grand-children filed their bill to have the settlement opened, on the ground of mistake of law:—Bill dismissed.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2199–2219, 2233, 2234; Dec. Dig. ¶509.]

[*Executors and Administrators* ¶509.]

Where executor and legatee honestly misconstrue the will, and have a settlement in full, based upon such misconstruction, the settlement will not be opened merely because of such misconstruction.

[Ed. Note.—Cited in *McDow v. Brown*, 2 S. C. 109; *Lost Bonds Case*, 15 S. C. 231; *Cunningham v. Cunningham*, 20 S. C. 332; *Kerngood v. Davis*, 21 S. C. 209; *Norman v. Norman*, 26 S. C. 48, 11 S. E. 1096; *Munro v. Long*, 35 S. C. 360, 14 S. E. 824, 28 Am. St. Rep. 851; *Smith v. Winn*, 38 S. C. 192, 17 S. E. 717, 751; *Porter v. Jefferies*, 40 S. C. 101, 18 S. E. 229; *Brock v. O'Dell*, 44 S. C. 36, 38, 39, 41, 21 S. E. 976; *Hutchison v. Fuller*, 67 S. C. 284, 45 S. E. 164; *Smith v. Linder*, 77 S. C. 542, 58 S. E. 610.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2199–2219, 2233, 2234; Dec. Dig. ¶509.]

[*Executors and Administrators* ¶516.]

Parties desirous of opening a settlement, on the ground of errors or mistakes, must make haste in their application to the Court: long acquiescence amounts to a presumed ratification.

[Ed. Note.—Cited in *Brock v. O'Dell*, 44 S. C. 36, 21 S. E. 976; *Ex parte Baker*, 67 S. C. 83, 45 S. E. 143.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2224; Dec. Dig. ¶516.]

Before Dargan, Ch., at Orangeburg, February, 1852.

Dargan, Ch. These two cases, involving precisely the same issues of law and fact, were, by the consent of the parties, tried together.

Daniel Hesse, at the time of his death, (1826,) was seized and possessed of a considerable real and personal estate, all of which he disposed of by his last will and testament, bearing date the 7th February, 1826. He had, at the time of his death, but one child, Ann Catherine Felder, then the wife of Henry Felder, now the wife of the defendant, James J. Andrews. The said testator had at that time no living descendant but his daughter, the said Ann C. Felder, and her two children, Olivia, now the wife of the complainant, George D. Keitt, and Sarah A., now the wife of the complainant, Henry M. Moorer. After the death of Daniel Hesse, Ann Catherine Felder had another daughter by her first

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*marriage, namely, Henrietta Felder, now the wife of Wesley Keitt.

Henry Felder and Ann Catherine, his wife, were appointed the executor and executrix of the will of Daniel Hesse. Shortly after the

testator's death, Henry Felder proved the will, qualified as executor, and took upon himself the burthen and execution thereof. He died shortly afterwards, (28th April, 1826,) and Ann Catherine Felder, by virtue of her appointment, became the executrix of the said will. She qualified on the 15th of February, 1827. On the 18th day of May, she obtained letters of administration of the estate of her deceased husband, the said Henry Felder.

On the ——— day of April, 1829, the said Ann Catherine Felder intermarried with the defendant, James J. Andrews, by whom she has issue two sons, James Hesse Andrews and Edward W. Andrews. The defendant, James J. Andrews, by virtue of his marital rights, became the acting executor of the estate of Daniel Hesse. From the time of his marriage to the present time, he has continued to manage the estate, and he made the settlements with, and took the receipts and discharges from the complainants, that will be hereafter noticed and considered.

The testator, Daniel Hesse, disposed of his whole estate in favor of his daughter and her children. The present litigation grows out of the sixth, eighth and ninth clauses of the will. The sixth clause is as follows: "The remainder of my lands I will and bequeath to my grand-children, to be equally divided among them, share and share alike." The lands have been sold since the wives of the complainants have come of age, and all the parties in interest have joined in the execution of the conveyances in the proper legal form, to assure the title to the purchasers. And so far as this clause goes, it is the proceeds of the sale of the lands that constitute the subject of controversy.

The eighth clause reads thus: "I will and bequeath to my grand-children the sum of four thousand dollars in paper bills and notes on interest, to be equally divided among

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them, share *and share alike. My executors are authorized to loan the money into good hands, and not without, and the interest arising therefrom to go to my grand-children, to be equally divided among them, share and share alike."

The ninth clause is in these words: "My will is, that all my stock, including horses, cattle and hogs, household and kitchen furniture, plantation tools, and every other article of property belonging to me, should be set up at public sale, and knocked off to the highest bidder, and the money arising from the sales to go to my grand-children, to be equally divided between them, share and share alike. The sale money may also be loaned, if it can be put into good hands, and not without, and the interest arising from it to go to my grand-children, to be equally divided between them, share and share alike."

The complainants contend, that Mrs. Keitt

and Mrs. Moorer being the only grand-children of the testator at the execution of his will, and at his death, are entitled to take, to the exclusion of all the after born grand-children, all the property bequeathed in the three clauses that have been recited. This construction the defendants deny, and contend that all the grand-children are equally entitled.

The case is too plain for doubt. The rule is clear, that where there is a bequest to children or grand-children, as a class, and in general terms, only those in existence at the death of the testator are entitled. A modification of this rule is where the distribution is postponed to a particular time, or is directed to be made on the happening of a particular event contingent as to time. In such a case, all who can bring themselves within the class, or answer the description, at the period fixed by the testator for the distribution, are entitled to participate. Where there is an immediate gift to children, to take effect in possession at the testator's death, the children living at that time are alone entitled. 2 Jarm. on Wills, 74. See also the elaborately considered case of *Myers v. Myers*, 2 McC. Eq. 215 [16 Am. Dec. 648], where it was held that a devise to grand-children, without any

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definite period fixed by the *will for the division, included only such grand-children as were living at the death of the testatrix.

The intention of the testator, as indicated in the context, may control the rule. But in Daniel Hesse's will, there is no light reflected from the context upon the construction of these clauses. They must be construed according to their own import, under the rules of law above referred to. And my conclusion is, that Mrs. Keitt and Mrs. Moorer, being the only grand-children of the testator born and existent at the time of his death, were alone entitled to the legacies bequeathed to grand-children in the sixth, eighth and ninth clauses of the will.

But the parties have settled upon a different construction of the will. Proceeding upon the principle that the after born grand-children of the testator were entitled to share equally with those who were in being at the time of his death, George D. Keitt, in behalf of himself and his wife Olivia, and Henry M. Moorer, in behalf of himself and his wife Sarah, have, on a formal settlement with the defendants, Andrews and wife, received one-fifth part of the property bequeathed in the three clauses of the will before cited, in full of their shares thereof, and have released, acquitted and discharged the said Andrews from any further accounting for the same. The release and discharge of Moorer is dated the 15th December, 1841, and is under seal; and that of Keitt is dated the 21st day of January, 1843, and is not under seal. Except as to the seal, the discharges of Moorer

and Keitt are substantially the same. The settlement with each of them was made upon the same rules of calculation and the same principles of construction.

On the 18th December, 1851, George D. Keitt and wife filed their bill against James J. Andrews and wife, for the purpose of setting aside the release and discharge and opening the settlement, praying that the same should be made according to the true construction of Daniel Hesse's will, which they contend excludes the after born grand-children as to all the property devised and bequeathed in the sixth, eighth and ninth claus-

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es of the will. And *on the same day, the said Henry M. Moorer and wife filed their bill against the same defendants for the same purposes.

The complainants claim to be relieved from the effect of their settlement with the defendants, and of the receipts and discharges which they have executed to them, on the ground that they were "misinformed, mistaken and deceived as to the extent of their rights and interest under the will of the said Daniel Hesse," and were "led to believe that the after born children of the said Ann Catharine Felder were entitled by law to share equally with" Mrs. Moorer and Mrs. Keitt, "who were in being at the death of the testator." They do not charge that there was any fraudulent misrepresentation or concealment on the part of the defendants, or that they were in any way instrumental in misleading them. If such a charge had been made, it was not supported by the evidence. All the parties in the settlement seemed to have acted in good faith, and honestly to have fallen into a common error. Mr. Grambling, who was the ordinary of the district, was requested by Andrews to make out a statement preparatory to a settlement between himself and Moorer. The only instructions given were that the statement of the account should be made out according to the terms of the will, and the returns of the executor. He did not express his views as to the construction of the will, or on the question whether the after born children were entitled to share with those who were in being at the testator's death. The witness was simply requested to make the statement of the account according to the will and the returns, with one exception, in which Andrews erroneously supposed he was making a generous concession. The testator had on hand at his death five thousand dollars in specie, which he disposed of in the seventh clause of his will, and which he forbid being put out at interest. Disregarding the inhibition, Andrews had loaned out the specie, and had made interest on it, and was willing to be charged with interest. Except in regard to this, Grambling was to state the account according to the will and the returns.

Grambling thought all the testator's grand-

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children were entitled to share equally, and stated the account upon this principle of construction. He retained the same opinion as to the proper construction of the will to the time of his giving evidence on the trial. Thus the settlement was made bona fide by the parties to it, and by their accountant. There was no ignorance, mistake, misrepresentation, or concealment of the facts of the case. The only facts necessary to be known were the provisions of the will, and the returns of the executor—the fairness and accuracy of which are not questioned. These facts were in the possession of the complainants, or were accessible to them. The ground on which complainants claim to be relieved is simply ignorance of law; or, in other words, ignorance of the true legal construction of the will. But ignorance of law does not entitle one to open a settlement formally and solemnly made. And it would be unsafe in the extreme to allow a settlement to be opened, and a formal discharge set aside, on account of an erroneous construction of the will or instrument under which it arises. If this rule were to prevail, no such settlement would be binding and conclusive, unless made under a decree of the Court.

Is there any authority which goes so far as to say that a party is entitled to relief from a mistake of law, where there is no fraud, misrepresentation, management, or undue influence, and where the mistake was simply his own erroneous construction of a will or deed? In this case the parties seeking relief had the will before them. They were familiar with its provisions. The defendants did not seek, in any way, to impose their construction of it upon the complainants. It does not appear that they expressed any opinion as to its proper construction. If the parties now complaining, possessed as they were of all the facts of the case, and with the will before them, had applied to the proper sources of information and had sought legal counsel, they would have been advised as to the true construction of the will; and if their legal adviser himself had entertained doubts, he would have said that it was a proper case for the consideration and judgment of the Court. Their not pursuing this course was laches on

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their part, *against the consequences of which the Court is not bound to protect them. Where one interested in a will undertakes to construe it for himself, and construes it erroneously, or adopts the erroneous construction of another, and predicates a settlement and discharge on such construction, he is not entitled to open the settlement in consequence of such errors. He must abide the consequences of his misconstruction; provided, of course, there be no fraud, management, or undue influence employed to inveigle him into the settlement. The case is

not materially altered where both parties have fallen into the same error. A misconstruction, like that made out in this case, is rather an error of the judgment, than a mistake either of the law or of fact.

The simple misconstruction of a will or deed, where there is no fraud or circumvention, cannot be regarded in any point of view as coming within the scope and authority of those cases where mistakes at law, in contradistinction to ignorance of law, have been considered as affording grounds for relief. It is a cardinal theory of the law, founded upon a necessary policy, that every one is presumed to have a knowledge of its principles. This presumption prevails as well in reference to civil rights as in the criminal code. Without this doctrine, no system of law can practically fulfill the ends of its institution. If a man learned in the law has before him the will or deed in which he is interested, is he not possessed of all the information, both as to the law and the facts, which will enable him to arrive at a just conclusion? If such a man were to fall into an error of construction, could he call upon this Court to relieve him from a contract or a settlement based upon such misconstruction? The rule that would apply to the case of such a man would apply to one not quite so eminent in legal attainments; and in fact to every other person legally competent to enter in such transaction. By what standard will the Court undertake to measure the intellects of men, or what graduated scale will it apply to ascertain the extent of their legal knowledge? Upon what process or principle could it be determined that one man had enough legal

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knowledge, and another *had not enough to enable him to give a proper construction to the will? In a case like this, there is but one resource. All must lie in the same Procrustean bed. All must be supposed to be alike informed. All must bear the consequences of their misconstruction; though in some cases it would be the error of an enlightened, and in others of an unenlightened judgment. In the opinion of the Court the complainants have failed to make out a case which would entitle them to have the releases set aside and the settlements opened.

There is another view of the case yet to be presented. The settlement with the complainant, Moor, was made the 13th December, 1841, and that with the complainant, Keitt, the 21st January, 1843. Both the bills were filed the 18th December, 1851. The defendants have not pleaded the statute of limitations, nor insisted thereon in their answers. It is needless to say, that the statute would have been applied if the same had been pleaded. But the defendants insisted that the complainants, if their complaint had been otherwise well founded were too late in their application to the Court for

relief; that their claim was stale, and the settlement had remained unquestioned for too long a time to be now disturbed. The complainants, Moorers and wife, had acquiesced for more than ten years; and the complainants, Keitt and wife, for nearly eight years before they sought relief in this Court. During the whole of this long interval, they have had as ample means of information as to their rights as they have at the present time. There is no information of which they are now possessed, which they did not possess or have the means of possessing, immediately after, or even before the settlement. In my opinion they have come too late. Parties desirous of opening settlements on the ground of errors and mistakes, where the facts are all within their knowledge, must make haste in their application to the Court for relief. Their long acquiescence amounts to a presumed ratification. The views of an eminent American commentator on this subject are so well expressed, and are so pertinent to the question, that it will be sufficient to conclude my discussion by quoting his language.

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"It is a most material ground," he says, "in all bills for an account to ascertain whether they are brought to open and correct errors in the account *reventi facto*: or whether the application is made after a great lapse of time. In cases of this sort, where the demand is strictly of a legal nature, or might be cognizable at law, Courts of Equity govern themselves by the same limitations as to entertaining such suits, as are prescribed by the statute of limitations in regard to suits at common law in matters of account. If, therefore, the ordinary limitation of such suits at law be six years, Courts of Equity will follow the same period of limitations. In doing so, they do not act in cases of this sort, (that is, matters of concurrent jurisdiction,) so much in analogy to the statute of limitations as positively in obedience to the statute. But when the demand is not of a legal nature, but is purely equitable, or where the bar of the statute is inapplicable, Courts of Equity have another rule, founded sometimes upon the analogies of the law where such analogies exist, and sometimes upon its own inherent doctrine, not to entertain stale or antiquated demands, and not to encourage laches or negligence. Hence, in matters of account, although not barred by the statute of limitations, Courts of Equity refuse to interfere after a considerable lapse of time, from considerations of public policy, from the difficulty of doing entire justice, and from the consciousness that the repose of titles and the security of property are mainly promoted by a full enforcement of the maxim, *vigilantibus, non dormientibus, jura subveniunt*." 1 Story Eq. § 529, and the cases cited.

It is ordered and decreed, that the bill of George D. Keitt and wife against James J. Andrews and wife, be dismissed. It is also ordered and decreed, that the bill of Henry M. Moorers and wife, against the said James J. Andrews and wife, be dismissed.

The complainants appealed, on the ground:

Because the said settlements and discharges were founded on such mistake of law, as

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rendered them no bar to the relief *prayed for by the complainants, and such relief should have been granted.

Hutson, for complainants.

Glover, contra.

PER CURIAM. This Court concurs in the Chancellor's decree, which is hereby affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.

4 Rich. Eq. 358

THOMAS BALLARD v. WILLIAM McKENNA and Others.

(Columbia. May Term, 1852.)

[*Insane Persons* ⇨74.]

B. of Lancaster district, knowing that M. of Georgia was entitled to a distributive share of the estate of A., who died intestate in Lancaster district, went to Georgia, and there entered into a written contract with M., (whose lunacy, if he was a lunatic, was unknown to B.) whereby M. agreed to give to B. one-half of his share in the estate, upon B.'s prosecuting the claim, at his own expense, to a successful termination. B. returned to Lancaster, and there prosecuted the claim successfully. M. died, and, on bill filed, his heirs impeached the contract between B. and M. on the grounds (1) of fraud, (2) that the consideration was excessive, and (3) of M.'s insanity. The Court overruled the two first grounds, ordered an issue at law upon the third, and held that, if the lunacy should be established, still B. would be entitled to just and reasonable compensation for his services.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 126, 127; Dec. Dig. ⇨74.]

[*Insane Persons* ⇨74.]

If one enters, in good faith, into a contract with a lunatic, without a knowledge of his lunacy, and, in pursuance of the contract, renders him important services, whereby he is greatly benefitted, though the contract be void, the party rendering the services is entitled to just and reasonable compensation.

[Ed. Note. Cited in *Sims v. McLure*, 8 Rich. Eq. 288, 70 Am. Dec. 196.

For other cases, see *Insane Persons*, Cent. Dig. § 126; Dec. Dig. ⇨74.]

Before Wardlaw, Ch., at Lancaster, June, 1851.

Wardlaw, Ch. The main controversy between the parties, submitted to my decision, is as to the execution, specifically, of a contract between Wm. Miller and Thomas Ballard, by which the former agreed to give the

latter one-half of his distributive portion in the estate of Anna McKenna, upon the latter's prosecuting, at his own expense, the claim to a successful termination.

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*Under a marriage settlement between William McKenna and Anna his wife, a separate estate was secured to Mrs. McKenna. She died intestate, February 26, 1848, leaving as distributees, under the Act of 1791, her husband, entitled to two-thirds, and her uncle, William Miller, to one-third, of a real estate, valued at \$3,000, and of a personal estate valued at \$15,000. On April 28, 1848, the contract in question was made between Miller, an inhabitant of Butts county, in the State of Georgia, and Ballard, a citizen of Lancaster, and the son of a pre-deceased sister of Miller; the contract being made in Butts county, and the intestate having resided and died in Lancaster district. In August, 1848, Ballard, administered upon the estate of Anna McKenna, and soon afterwards filed a bill as administrator against William McKenna, for an account of the estate of intestate. At June Term, 1849, Chancellor Dunkin heard this cause, decreed an account, ordered that Miller should be made a party, and gave leave to any party, when Miller should be properly before the Court, to apply for an order for partition of the estate of intestate. In pursuance of this decree the bill was amended by naming Miller as a defendant, but before any answer from him, or order pro confesso against him, namely, October 15, 1849, Miller was found a lunatic by inquisition in Georgia, and was committed, as a pauper, to the lunatic asylum at Milledgeville, where he died in April, 1850. The present bills were filed September 9, 1850, in one of which plaintiff seeks revivor of the former suit and partition of the personality of intestate, and in the other he seeks partition of the real estate of intestate; the parties being, besides Ballard and William McKenna, the children and husbands of children of William Miller. In these bills for the first time, the plaintiff, Ballard, brings forward his contract, with Miller, and claims that one-half of Miller's share shall be assigned to him in the partition of the estate of intestate. William McKenna, in his answers, assents to the partition decreed at June session, 1849, but protests against the being burdened with the expenses of the controversy between the plain-

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tiff and his co-defendants. The other defendants assent also to the partition between William McKenna and themselves, but they deny the validity of the contract between Miller and the plaintiff, and insist that, at the date of that contract, Miller did not have mind enough to make him competent to contract, and that, under all the circumstances, the contract is unconscientious and inequitable.

The litigation in the original cause of Bal-

lard v. McKenna, was not expensive nor protracted, as the case was heard upon a state of facts admitted, and no appeal was prosecuted, although notice of appeal was given. McKenna, who is represented to be shrewd and pertinacious in the maintenance of his rights, it was supposed before suit, had secured in some way his exclusive right to his wife's estate; yet Ballard was advised by his counsel in this State and in Georgia, before he made the contract with Miller, that Miller's right to distribution in the estate of Mrs. McKenna was clearly valid.

The evidence as to the competency of Miller to contract on April 28, 1848, when the agreement between Ballard and himself was executed, is very voluminous, and mostly taken by commissions. On the part of the plaintiff, James H. Starke, an intelligent and respectable member of the profession, now occupying the post of Judge of the Superior Court in Georgia, testifies that he drew the agreement in question, at the instance of Miller, his son-in-law Glass and Ballard, and advised its execution; that Miller, separately and intelligently, explained the circumstances of the matter, and took his counsel; that he had previously been Miller's counsel, and knew him intimately, and that Miller well understood what he was doing, and made a reasonable contract. I know something of Judge Starke by reputation, as he was brought up and acquired his profession in the same district with myself, and I cannot doubt the sincerity of his statements. In addition to his testimony, the plaintiff furnishes evidence that Miller was a poor old man, having no pecuniary means to carry on a law-suit, especially in a different State from that of his residence, and living with his son-

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in-law, Glass, and that Ballard *first informed him of his rights in Mrs. McKenna's estate; and that Glass, and his wife, son-in-law and daughter of Miller, in letters and orally, have declared that Miller, at the time, was competent to contract, and that he made a fair contract with Ballard. On the side of the defendants, seventeen witnesses, including a lawyer, a physician, ministers of the gospel, farmers, merchants and mechanics, swear positively that Miller was demented without lucid intervals for several years before the date of the agreement with Ballard, and state sufficient reasons, in the conversation and conduct of Miller, for their opinion of his insanity. Two of these witnesses, son and daughter of Glass, by a former wife, not the daughter of Miller, make by their testimony a case of positive fraud against Ballard, stating that he was premonished by Mrs. Glass, of her father's insanity, and that he falsely represented the value of Mrs. McKenna's estate, and that he was an equal heir with Miller therein. If I consider the case as depending entirely upon the testimony of these two witnesses, I might direct an issue to a jury, but such is not my view.

Before indicating my opinion, however, I may further mention that the physician who was examined as a witness, ascribes the imbecility of Miller's mind to the physical cause, of a softening of the brain; and that Ballard, on September 21, 1849, wrote a letter to Glass, informing him of the progress of our law-suit; and desiring to know how uncle Miller's mind is, and whether uncle recollects me (B.) being at your (G's.) house on the occasion of the agreement; yet this letter was written after Ballard had been informed by letters from Glass and wife, that some of Miller's children impeached the contract on account of Miller's insanity.

One who seeks the specific execution of a contract is bound to satisfy the judicial discretion of the Chancellor, that the contract is fair, just and reasonable. In the present case, from the testimony, I cannot, in conscience, declare that I am satisfied of Wm. Miller's mental sufficiency to contract on April 28, 1848, nor that Ballard did not misrepresent himself as an equal distributee with Miller in Mrs. McKenna's estate.

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*Waiving these considerations, the contract is infected with the taint, so grievous at the common law, of champerty and maintenance. It secures to Ballard an immoderate compensation for his services, and it places his individual interests in conflict with his duty as trustee in the administration of Mrs. McKenna's estate. I cannot support the plaintiff's claim to a partition of the spoils, although I am not indisposed to allow him compensation beyond his commissions, if I believed I had any discretion in the matter.

It is ordered and decreed, that the decree of Chancellor Dunkin, for an account of the estate of Anna McKenna, be revived; and that a writ of partition, to divide the lands and chattels of Mrs. McKenna, in the proportion of two-thirds to her husband, and one-third to the distributees of William Miller, deceased, be issued, to be directed to commissioners, named by the parties, and the Commissioner of this Court. It is further ordered, that the costs of the account and partition be paid out of the estate, according to the interests of the parties, and that the costs of the controversy between the plaintiff and the distributees of Miller, be paid by the plaintiff.

The plaintiff appealed, on the following grounds:

1. Because, under the evidence, it is respectfully submitted, his Honor should have decreed a specific performance of the agreement between Miller and the complainant.

2. Because the evidence of Judge Starke clearly showed that Miller was competent to contract, and did knowingly contract with Ballard to give him one-half of the recovery.

3. Because, even if Miller was a lunatic, the contract was a fair, just and reasonable

contract, and one to his interest, which should be enforced.

4. Because his Honor, it is respectfully submitted, should have ordered an issue to determine the question at issue in the cause.

5. Because in any point of view, and if even the contract between complainant and Miller should not be specifically enforced, yet an issue should have been ordered to as-

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certain what would be *a fair and reasonable compensation to complainant for his services for Miller.

6. Because the complainant should not be ordered to pay the costs.

Hammond, Dawkins, Boyce, for appellant.
Hanna, Clinton, contra.

The opinion of the Court was delivered by

DARGAN, Ch. Anna McKenna, wife of the defendant, Wm. McKenna, by virtue of a deed of marriage settlement between herself and her husband, before marriage, had a separate estate consisting, at the time of her death, on the 26th February, 1848, of real estate to the amount of \$3000, and of personal estate to the value of \$15,000. The deed of settlement secured to her a general power of appointment. But this she never exercised, and died intestate, leaving her husband, the said Wm. McKenna, surviving her. She left no issue, nor brothers, nor sisters, nor children of brothers or sisters, and her nearest collateral relation was her uncle, one Wm. Miller, of Butts County, in the State of Georgia, who, under the law of distributions, was entitled to one third of her estate, while her said husband was entitled to two thirds thereof.

Miller received the first intimation of his rights, in the estate of Anna McKenna, from the complainant, Ballard, who also informed him, that his rights would have to be contested in a law suit. Miller was, at that time infirm and advanced in life, penniless, and dependent for subsistence and shelter upon his son-in-law, Pleasant H. Glass, with whom he resided. From Glass and his wife, who was Miller's daughter, he received that kindness and support due from children to parents under those unfortunate circumstances.

The complainant is the son of a pre-deceased aunt of Mrs. McKenna, who was the sister of Miller. Living in the immediate vicinity of the intestate, he became aware of Miller's probable rights in her estate. I say his prob-

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able rights; for although it *was very clear that Miller was a distributee: as a matter of fact, it was deemed very uncertain whether McKenna would not assert a claim to the whole estate by the deed, or will, of his wife, executed under her power of appointment. It was also supposed that he might have large claims against his wife's separate estate.

With this information as to the circum-

stances attending the claim, the complainant made a visit to Miller, in Georgia. His object was to make a contract with his uncle, by which he should be authorized to prosecute his claim for a distributive share of Mrs. McKenna's estate, and to receive his remuneration out of the property to be recovered. The interview took place at the house of Glass. The complainant proposed to prosecute the law suit at his own hazard, and expense, and to have, as compensation, one half of Miller's share, when it should be realized. The proposal was made, and the negotiation opened in the presence of Glass and his wife, (Miller's daughter). On the next day Ballard, Miller and Glass repaired to the county seat of Butts, for the purpose of having an interview and consultation with Miller's counsel. This gentleman had, for many years before, borne the relation of legal advisor to Miller, enjoyed a distinguished reputation for his probity, and forensic talents and success, and has since been promoted to the Bench of the Superior Court of Georgia. Upon a full discussion, and consideration of all the circumstances, Miller was advised, by his learned counsel, to enter into the contract on the terms proposed. This was accordingly done. A contract, upon those terms, was then prepared by the counsel, and executed by Miller and the complainant. It was dated the 28th April, 1848.

The complainant then returned to South Carolina, administered upon the estate of Mrs. McKenna, filed a bill in Equity against the defendant, and prosecuted the same to a hearing and judgment. The decree adjudged that the marital rights of McKenna had not attached upon Mrs. McKenna's separate estate, that she died intestate as to the same, that it was subject to partition among her heirs at law and distributees, that the hus-

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band was entitled to two thirds thereof, and the next of kin to the remaining third, and ordered the administrator to account to the proper parties. About this time Miller died. The complainant became the administrator of Miller, filed his bill of revivor against McKenna, making the distributees, of Miller, parties defendant, and added, by way of supplement, a statement of his claim against the estate of Miller under the contract of the 28th April, 1848; praying that his share, as secured by that agreement, should be allowed him in the settlement and partition among Miller's distributees.

The claim of the complainant, under his contract, with Miller, of the 28th April, 1848, has met with an opposition more or less active, from all the distributees of Miller, with the exception of Pleasant H. Glass and his wife.

The claim of Ballard is resisted, by the defendants, on three grounds; 1st. That the contract was fraudulently obtained; 2d. That the consideration was extravagantly

disproportioned to the services to be rendered, and is so excessive, that the contract, being executory, should not be enforced by this Court; and 3d. That the contract was null and void, in its inception, on account of the insanity of Miller at the time of its execution.

As to the first ground, this Court perceives nothing in the evidence by which it may be supported. There was no fiduciary relation subsisting at that time between the contracting parties. There was no fraudulent misrepresentation or concealment. There was no mis-statement of any kind as to material facts. It seems that he over-estimated Miller's share. One of the witnesses says that he represented the whole estate of Mrs. McKenna at eight or ten thousand dollars. But this is obviously a mistake of the witness. And the Court is disposed to believe the statement of the other witness, who testified on this point: who says that Ballard, in the presence of Glass, represented the share of Miller at eight or ten thousand dollars. I cannot suppose that this over-estimate of Miller's share was intentional. This would have a tendency to operate against Ballard in obtaining the contract on the terms proposed: for in proportion as Miller's probable share

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*was magnified, would, one half of it, as remuneration for the prosecution of the claim, become excessive, and Miller's mind become indisposed to grant such conditions. His estimate was nothing but a conjecture, innocent in intention; for he had no means of knowing the precise value of the estate, and immaterial in its consequences, for it had no tendency to secure him an advantage, but rather the reverse.

One witness spoke of Ballard as having represented himself to Miller as a co-heir and distributee. I much doubt the accuracy of this witness. He certainly did not so represent himself in the presence of Miller's counsel and his son-in-law, when the agreement was made and executed. I can scarcely suppose that he held different language on this point upon the two occasions. And conceding that he did represent himself as co-heir and distributee, I cannot perceive that it would have any material bearing upon the fairness of the contract. Like the other alleged misrepresentation, if it had any material effect, it would be rather to thwart than to aid him in obtaining a favorable contract. For Miller might very well suppose, that if Ballard was a co-heir and distributee, he would at all events prosecute the claim on his own account; and might, under these circumstances, afford to take a lower remuneration for prosecuting his (Miller's) claim, which depended upon the same facts, and principles of law, and which would, as a matter of course, be embraced, in the same proceedings.

This Court is also of the opinion, that the objection to the contract, founded on the ex-

ness of the consideration, is equally unsupported. It seems to the Court, that under all the circumstances of the case; the uncertainty that then existed as to the result, and the hazards incurred by Ballard, in the event that the suit was unsuccessful, all of which were entirely assumed by him, the contract was fair, just and reasonable. It had the unqualified approbation of Miller's son-in-law (Glass) and his daughter, with whom he resided and by whom he was supported, upon a full and fair exposition of all the circum-

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stances. It was also earnestly *recommended by his able and experienced counsel, who acted on the occasion as much in the character of a personal friend as a legal adviser, and who thought then, and still thinks, that the contract was just and reasonable. In fact it is only the fortunate result, that gives it any other aspect, even to those who now object to it, and who I doubt not would have approved, if they had been consulted when the contract was made. Finally, it is such a contract as this Court would unhesitatingly enforce by its decree, if it was free from the difficulty involved in the third objection above stated, namely, the sanity of Miller at the time of the execution of the contract.

As to the sanity of Miller at the date of the contract, the evidence is so contradictory and difficult to be reconciled, the Court has been able to arrive at no conclusion satisfactory to itself.—When we regard the evidence adduced on this point in behalf of the distributees of Miller, it makes a very strong case against his sanity. But, on the other hand, the evidence of Judge Starke, who was his legal adviser, and who drafted the agreement, and recommended him to make it, represents him upon that occasion, as so calm and collected, so fully possessed of all the faculties of his understanding, as renders it very difficult to believe that he was, at that time, laboring under mental alienation. It was Miller who opened the discussion upon the subject, as to which the witness was to be consulted. It was Miller who stated all the circumstances of the case, the relationship with Mrs. McKenna, and with Ballard, and his confidence in the latter from his being a deceased sister's child. He did not occupy the back ground on that occasion, as a lunatic or imbecile would naturally have done, but led the conversation. After making a lucid statement of the facts, exciting no distrust as to his sanity, and his statement being confirmed by Ballard, he asked the advice of his counsel.—And on receiving a favorable opinion, and being recommended to go into the contract with Ballard on the terms proposed; not content with this, and with a shrewdness and delicacy which a lunatic would hardly have exhibited, he

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sought a private interview *with his legal

adviser, where he might have a freer conference.—It would be very difficult to doubt the veracity or the accuracy of this witness, who for many years before this period bore intimate professional relations with Miller, and had the most ample opportunities of noting the decadence of his understanding. In the view of an intelligent witness who knew him well, and who states not opinions merely, but facts, Miller's bearing upon the occasion of the execution of the contract, was so reasonable, so self-possessed, so much that of a sane man in every respect, that the Court experiences the greatest degree of embarrassment, when it looks at the great mass of evidence on the other side, going to show that before that time he was an extravagant lunatic.

Under this state of circumstances, the Court is disposed to seek aid and relief from the embarrassment by a resort to the usual mode, namely, an issue before a Jury. At the same time that an issue is ordered, it will be necessary to the ends of justice between these parties, that further orders shall be made. If the final judgment of the Court shall be, that Miller was a lunatic at the date of the agreement, and that the same was not executed during a lucid interval, it follows, as a matter of course, that the instrument as a contract is a nullity. But it by no means follows, that Ballard will not, in that event, be entitled to compensation for his services, and his risks. If one enters into a contract with a lunatic without a knowledge of his lunacy, and the contract is in other respects made in good faith; and in pursuance of the contract, renders him important services, by which the lunatic receives great benefits, though the contract be void, the party rendering the services is entitled to just and reasonable compensation. If an overseer, for example, contracts with a lunatic, without knowing him to be such, to superintend his planting interest, and does in fact perform the services, can it be doubted that he would be entitled to just compensation? Or, if a mechanic, under the like circumstances, contracts to build a house on the lunatic's land, and to furnish the materials, and he does in fact bestow his labor and capital in the im-

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provement of the *lunatic's estate, he is entitled in equity, not to recover upon the contract, (which is a nullity, though he was ignorant of the lunacy,) but to be reimbursed to a reasonable extent, provided his labor and capital has improved the value of the lunatic's estate. And this upon the principle, that a contract that is void, should be void as to both parties. And inasmuch, as in the cases supposed, the parties cannot be restored to the statu quo; the mechanic cannot have back his labor and his capital, and the overseer cannot have restored to him his services and his time consumed in the performance of those services, and their conduct has

been bona fide, this Court will aid them in obtaining a fair and just remuneration, provided their services have been actually beneficial to the lunatic.

On the supposition, that Miller shall be found to have been a lunatic at the date of the contract, this appears to be the situation of Ballard. He was ignorant of the lunacy, (so far as it appears,) the contract was fairly made, and the compensation was reasonable and just as I have before stated. His services under the contract were important and successful. They secured to Miller his distributive share of Mrs. McKenna's estate; which, but for those services, in all probability he would never otherwise have obtained.

If Miller was not a lunatic, Ballard is entitled to have his contract enforced. And if he (Miller) was a lunatic at the date of the contract, the complainant is entitled to remuneration out of Miller's estate, in his hands, in proportion to the value of the services rendered, the degree of pecuniary responsibility and expenditure incurred, and the time and labor expended. And it is so ordered and decreed. It is further ordered and decreed, that the complainant, if the issue as to the lunacy of Miller be determined against him, shall have the privilege of going before the Commissioner in Equity of Lancaster, after due notice to the opposite party or their counsel, for the purpose of ascertaining the amount of compensation to which

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he is entitled on the principles of this *decree. And the commissioner is hereby ordered, on a proper application, to institute such inquiry.

It is further ordered and decreed, that an issue at law be made up to be tried by a jury, in the Court of Common Pleas for Lancaster district, in which the following questions shall be submitted: First, whether William Miller, late of Butts county, in the State of Georgia, was a lunatic on the 28th April, 1848; and secondly, if the said William Miller was, at or before that time, a lunatic, whether the contract between the said Wm. Miller and Thomas Ballard, dated 28th April, 1848, was executed by the said Wm. Miller during a lucid interval.

It is further ordered and decreed, that, in the said issue, the said Ballard shall file the declaration, and in other respects be the actor in the proceedings.

It is further ordered and decreed, that the said Ballard shall be entitled to waive the making up and trial of the issue hereby ordered, (by which waiver he shall be considered as admitting the lunacy,) and go at once before the commissioner, upon the inquiry herein before ordered to be made upon the quantum meruit.

The question of costs is reserved.

The circuit decree is modified in conform-

ity with this appeal decree. And it is so ordered.

JOHNSTON, DUNKIN and WARDLAW, CC., concurred.

Decree modified.

4 Rich. Eq. 370

WM. CAMPBELL and S. G. BARKLEY v. B. F. BRIGGS and A. W. YONGUE.

(Columbia. May Term, 1852.)

[Judgment \hookrightarrow 678.]

Four obligors gave their joint and several single bill, and two of them, C. and B., were sued, separately, at law, by the obligee, and defended the actions on the ground of fraud and misrepresentation on the part of the obligee, but judgments were recovered against them; the four obligors then paid up the amount of the judgments, and the two who had not been sued at law, J. and D., assigned their interest in the matter to C. and B.: C. and B. then filed their

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*bill against the obligee, seeking relief on the same ground on which the actions at law had been defended, and, at the trial, used J. as a witness: *Held*, that they were not entitled to relief, and their bill was dismissed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1196; Dec. Dig. \hookrightarrow 678.]

Before Wardlaw, J., at Fairfield, July, 1851.

Wardlaw, Ch. In this bill the plaintiffs seek relief from judgments at law obtained against them separately, by the defendant, Briggs, upon a single bill, joint and several, executed by them, together with John Campbell and David McDowell, alleging that, in the bargain for the land, which was the consideration of the obligation, the obligors were overreached by the false and fraudulent representations of Briggs, by words and tokens, that the land contained a valuable gold mine.

The contract in question was made March 25, 1845, by which Briggs assigned to the plaintiffs and the two other persons above named, long leases he held of the "Love mine," in York district, and received their obligation for the payment, on January 1, 1847, of \$1,000, with interest from June 1, 1847. Briggs, after the day of payment, sued, separately, in the Court of Common Pleas for Fairfield two of the obligors, the present plaintiffs; the defendants at law set up his fraud in the transaction by way of defence, but he obtained judgments against them at Fall Term, 1848. On these trials no attempt was made to use the testimony of John Campbell and William Campbell, who were the principal agents in the negotiation with Briggs. On March 31, 1849, these judgments were satisfied by payments to Yongue, the clerk of the Common Pleas, (no executions having been lodged with the sheriff,) by equal contributions from the four obligors. On the same day J. Campbell

and D. McDowell assigned all their interest in the matter to the present plaintiffs, and this bill was filed. No allegation is made in the bill of any surprise or fraud in the trials, nor of any newly discovered evidence, nor of any special insufficiency in the tribunal which determined the cases, nor of any circumstances whatsoever, producing manifest injustice to the defendants at law; and

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the appeal to this Court is rested *altogether on the ground that John and William Campbell were incompetent witnesses at law.

The substantial aim of this bill is for a new trial in this forum of an issue already adjudicated by a Court of competent jurisdiction. Actual fraud as fully vitiates a contract in the Court of Law as in the Court of Equity; and this Court follows the Court of Law in questions as to the competency of witnesses, with some exceptions, irrelevant to the present case, as to parties to the suit. Apart from the answer, which increases by its demands the proof required from the plaintiffs, the plaintiffs are in no better condition here as to remedy, and in worse condition as to evidence, than in the Court of Law. In the case at law against Barkley, both of the Campbells, John and William, if competent in either Court, might have been used for Barkley; and in the case at law against William Campbell, John Campbell, relied upon in the present case, was as competent as here.

Dropping the question as to William Campbell's competency as immaterial, on what ground is it supposed that John Campbell was not a competent witness in the case at law? None is suggested, except that he was maker with the persons sued, of the single bill sued upon; yet not occupying the relation of principal to them as sureties. He was no party to the records; he was not liable for the cost of the cases; his testimony could not affect his own liability upon the instrument. Under these circumstances, he would seem to be a competent witness, even without release. In *Cleveland v. Covington*, 3 Strob. 184, it was held, that where the principal in a single bill is liable for the costs of his surety, he is, on that ground, an incompetent witness for the surety, when sued by their common creditor; but the decision is put upon his direct interest in the event of the suit, and the old notion of his incompetency, as a party to the instrument, is repudiated. See *Knight v. Packard*, 3 McC. 71; *Harmon v. Arthur*, 1 Bail. 83. In *Leech v. Kennedy*, 3 Strob. 488, it was expressly decided that one of the makers of a single bill, not sued, nor liable, as principal, for costs, was competent to prove the

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signature of another maker to the instrument; and the general doctrine is recognized, that a surety, in a joint and several note or bond, as he is not liable for the costs of

his principal, is a good witness for plaintiff or defendant, in a separate suit against the principal. In all legal incidents that case is identical with the one before us. Granting that this doctrine may be doubtful where there is no release, (*Dogan v. Ashby*, 1 Strob. 433,) rules, that where the surety in a single bill releases the principal maker from all liability, this will render the principal a competent witness for the surety. The assignment or release subsequently executed, which it is supposed makes John Campbell a competent witness here, might have been executed on the trials at law. I know of no peculiar facilities in this Court for rendering witnesses competent through releases or assignments. The rules of evidence are the same in both Courts; or rather, in this matter, equity follows the law.

I may remark, without intending to imply that this would have the effect of destroying his competency as a witness, that John Campbell should have been made a party to this suit. The assignor of a debt, or right, not transferable at law, must be a party to any suit in equity respecting it by the assignee. *Cathcart v. Lewis*, 1 Ves. jun. 463; *Walburn v. Ingilby*, 1 M. and K. 61. The device of procuring an assignment from a party in interest, with the view of dropping him as a party to the record, and of using him as a witness, savors too strongly of maintenance to deserve encouragement. *Strob. Eq. § 1048*; *Hopkins v. Hopkins*, MS. [4 Strob. Eq. 207, 53 Am. Dec. 663].

It is superfluous to argue that the fraud, which is the ground of this bill, if sustained by proof, would have been available as a defence to the suits at law.

If the defendants there considered their evidence insufficient without the aid of discovery from Briggs, they ought, in the exercise of proper diligence and attention to their interests, to have made a more timely application to this Court. If a defendant has omitted to file a bill for discovery of facts known to him and material to his defence, and has suffered the case to go to trial

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*without adequate proof of such facts, he cannot afterwards claim an injunction or a new trial from a Court of Equity; for it was his own folly neither to have prepared himself with such proof, nor to have filed a bill for discovery and to have procured a stay of the trial until discovery. *Story Eq. § 895*; *Winthrop et al. v. Lane et al.* 3 Des. 324.

In the just and satisfactory administration of law, every party should have the opportunity of fairly presenting his claim or defence for adjudication before a tribunal of competent authority; but when he has once had such opportunity, the peace of society, the claims of other litigants to the attention of the Courts, and other elements of policy, require that he should forbear from further

clamor. From the inattention of parties, the oversights of counsel, the infirmity of Judges, and other casualties, exact justice is rarely done in contested cases; but general justice to the community demands that an end should be put to litigation. Courts of Equity will not interfere after a verdict at law, where the case in equity proceeds upon a defence equally available at law, unless some special ground of relief be established, such as fraud or surprise, or manifest injustice in the trial at law. Story's Eq. § 894, '5, '6; Maxwell v. Connor, 1 Hill Eq. 22; Gist v. Davis, 2 Hill Eq. 346 [29 Am. Dec. 89]; McDowall v. McDowall, Bail. Eq. 330. The negligence or mistakes of the party or his counsel, or even supposed error in the Court of Law, do not constitute such special ground of relief here. Ware v. Horwood, 14 Ves. 30; O'Keefe v. Rice, Bail. Eq. 180; Maxwell v. Connor.

I am of opinion that the plaintiffs have not made a case entitling them to be twice heard; and that, on this ground, the bill must be dismissed.

Having attained this conclusion, I deem it unnecessary to state at length the other facts and pleadings in the cause. A single witness, John Campbell, testifies to a case of fraud, on the part of Briggs, in the bargain for the land. The answer positively denies the fraud; and upon the general rule the answer must stand as proved, unless con-

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tradicted by two witnesses, or one *witness with such circumstances of corroboration as have the force of another witness. In my judgment, the other evidence in the case rather impairs than corroborates John Campbell's testimony. The only circumstance of corroboration relied upon, is that stated by Dr. John W. Campbell, that from the dilapidation of the mill and the appearances about it, Briggs could hardly have collected through the mill a small bar of gold, which, in the course of the negotiation, he exhibited as recently obtained from the Love mine. This, at most, raises suspicion where the proof should be clear. Briggs did not say he obtained the bar by grinding, and possibly may have obtained it by panning. J. Campbell is contradicted, in various particulars, by other witnesses, although he seemed to be a respectable and intelligent person. One fact however, is, of itself, conclusive, where the opposing testimony is so feeble. The plaintiffs purchased, after a full opportunity of examining the mine, and after testing its qualities to their own satisfaction, and with much deliberation. This is partly admitted by Campbell, and is more distinctly proved by Black and Whitesides. Unless the evidence of deceit was much more decisive, it must be held that the plaintiffs purchased on their own judgment.

It is ordered and decreed that the bill be dismissed.

The complainants appealed, on the following grounds:

1. That the trial at law was no let or bar to the recovery and relief sought by the complainants in a Court of Equity.

2. That the testimony showed a knowledge, in defendant Briggs, that the Love mine was worthless, and that he falsely represented the same, in divers ways to complainants, to be a good and valuable mine, before he sold.

Buchanan, for appellants.

Thompson, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. The argument of this appeal has been placed mainly upon the ground, that John Campbell was an incompetent witness in the trial at law, but that he has

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become competent in *this case in consequence of having paid his proportion of the judgment recovered against the complainants, and of having "assigned his interest in the matter" to the complainants. The instrument of assignment is not before us; but it is not easy to perceive what right of action he could have against the defendant, Briggs, who had never impleaded him. This Court deem it, however, unnecessary to express any opinion, as to the competency of John Campbell in the trial at law. If he were competent, it was the duty of the complainants to have proposed him as a witness, and it must be presumed that his testimony would have been received. But, assuming for the purposes of the argument, that as one of the principal obligors in a joint and several bill, John Campbell was incompetent to testify in behalf of his co-obligor, why might not the same process have been resorted to for restoring his competency, which has been since adopted, or why was he not rendered competent by a release from his co-obligor? It is said, and truly said, he was not bound to release him. But, if a witness is called to the stand, and successfully objected to, on the ground of interest, which he declines to release, is it any ground for a bill in equity on the part of the unsuccessful litigant, in behalf of whom he was called, that he has since paid the witness his debt, and thus extinguished his interest, and desires the benefit of another hearing with this additional evidence? Or, would it make any difference that the witness, rejected as incompetent at the trial, had, after the trial, voluntarily released his interest, and thereby rendered himself competent to testify on another hearing of the cause? If the principle were recognized it is easy to conceive, that a party would rarely want the advantage of a trial in chancery, not in consequence of newly discovered, but newly created, testimony.

Nor is this, perhaps, the strength of the

objection to the complainants' proceeding. Substantially they seek to recover back not only what they have themselves paid, but, as assignees what has been paid by John Campbell and the other co-obligor. John Campbell was not only a principal in the obliga-

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tion, but the chief actor in the transaction. He so regarded himself, and either voluntarily or involuntarily paid his proportion of the judgment, and then assigned, what he calls his interest in the matter, to the defendants in the suit, his co-obligors, who are the complainants in this bill. Why might not the defendants in the judgment, with equal propriety, after judgment rendered and payment by them, assign their interest to a stranger, without consideration, and thus enable him to maintain a bill to be sustained by the evidence of his assignors? So far as the complainants seek to recover the sums paid by John Campbell and D. McDowell, the principle is directly analogous. The argument is, that they had an interest to recover back the money paid in consequence of an erroneous verdict. They voluntarily assign that interest, and thereby qualify themselves to testify in behalf of their assignee, and the Court is asked to entertain the bill, because, in the suit at law, being parties to the record and directly interested, the assignors of the complainants were incompetent to testify. The Chief Baron of the Exchequer, in the recent case of *Welch v. Faucett*, (25th Feb. 1852,) adverts to some of the inconveniences of the late Act of Parliament authorizing the admission of parties as witnesses, and says, that "the change will necessarily lead to increased litigation;" and that "cases will now be brought into Court which would never have been thought of," and recommends that the operation of the statute of frauds and perjuries should be extended. But to sanction a bill of this character, would not only increase and protract litigation, but would stimulate an angry and unsuccessful suitor at law, by assigning his interest, to set on foot a new proceeding, in which he could tell his own tale and his adversary be unheard. It seems enough that the diligent researches of the complainants' counsel have furnished no precedent for these proceedings.

But, in the trial at law, the complainants resisted the recovery, on the ground of fraud and misrepresentation on the part of the defendant, Briggs. On the evidence submitted, the jury rendered a verdict for the plaintiff

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in the suit. In this Court the complainants have had the advantage of the defendant's answer, and also of the evidence of John Campbell, and, upon the question of fraud and misrepresentation, the Chancellor has arrived at the same conclusion with the jury. Under these circumstances, it would require

an extraordinary case of misapprehension to warrant the interference of this Court; but, upon a review of the evidence, we are well satisfied with the conclusions of the Chancellor and of the jury.

The decree is affirmed, and the appeal dismissed.

JOHNSTON, DARGAN and WARDLAW, CC., concurred.

Appeal dismissed.

4 Rich. Eq. 378

CHARLES C. HAY v. FREDERICK J. HAY, Jr., et al.

(Columbia. May Term, 1852.)

[Wills, *§* 612.]

Testator devised and bequeathed his estate, real and personal, "to his daughter S. B., and the heirs of her body, provided if my said daughter should happen to die without living issue of her body, then, and in that case, all my said estate, both personal and real, to return to the nearest heirs of my body by my mother's lineage." Held that, in the personality, S. B. took an absolute estate, and there was no valid limitation to her issue as purchasers.

[Ed. Note. -Cited in *Simons v. Bryce*, 10 S. C. 366; *Renwick v. Smith*, 11 S. C. 306; *Gadsden v. Desportes*, 39 S. C. 132, 144, 17 S. E. 706; *Person v. Fort*, 64 S. C. 508, 42 S. E. 594.

For other cases, see *Wills*, Cent. Dig. *§* 1387; Dec. Dig. *§* 612.]

Upon the question ordered to be re-argued, (see 3 Rich. Eq. 384) to wit, whether, as to the personal estate of the testator, Charles J. Brown, there was a valid limitation to the issue of his daughter, Mrs. Hay, as purchasers, this cause was again heard.

J. T. Aldrich, for Harriet Ford Hay, contended, first, that the limitation over, to the "nearest heirs of my body by my mother's lineage" was not void for uncertainty; that it was manifest the testator intended to limit the estate over to his next of kin in the maternal line; that the Court had only to substitute self for body, and the sentence would then read thus, to the "nearest heirs of myself by my mother's lineage;" and he

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cited, 1 Jarm. on Wills, *442; *Craik v. Lamb*, 28 Eng. Ch. Rep. 489; Secondly, That the words "die without living issue" were equivalent to "die without leaving issue," or "die without surviving issue;" and cited 2 Jarm. on Wills, 328; *Butler's Fearn*, 470, 395, 418, 420, 430. Thirdly, assuming that the limitation over "to the nearest heirs" depended on a contingency which was not too remote; and assuming also, that the limitation over was void for uncertainty, still he contended that Mrs. Hay, the daughter, took only a life estate and that her issue took as purchasers; and he cited and commented on *Forth v. Chapman*, 1 P. Wms. 666; *Fearn*, 488; *Henry & Talbird v. Archer*, Bail. Eq. 535;

Powell v. Brown, 1 Bail. 103; Knight v. Ellis, 2 Bro. C. C. 578; Carr v. Porter, 1 McC. Ch. 60; Reed v. Snell, 2 Atk. 642; Fearne, 487; Lampley v. Blower, 3 Atk. 396; Lemacks v. Glover, 1 Rich. Eq. 141; Thebridge v. Kilburne, 2 Ves. 283; Chandless v. Price, 3 Ves. 301; Butterfield v. Butterfield, 1 Ves. 133; Wilkenson v. South, 7 T. R. 551; Guerry v. Vernon, 1 N. & McC. 71; Butler's Fearne, 471, et seq.; Shearman v. Angel, Bail. Eq. 351; Brown v. Geiger, 4 M'C. 427; Fearne, 533; Dougherty v. Dougherty, 2 Strob. Eq. 63; Pulliam v. Byrd, 2 Strob. Eq. 134; Lyon v. Mitchell, 1 Madd. 475; Jackson v. Noble, 2 Keen, 590; Joslin v. Hammond, 3 M. & K. 110.

Bellinger, contra.

The judgment of the Court was announced by

DARGAN, Ch. The judgment of the Court in this case turns upon the construction of Charles J. Brown's will. The language of the bequest in question is as follows: "I give and bequeath to my loving daughter, Susan Cynthia Brown, and the heirs of her body, all my worldly estate, both real and personal; provided, if my said daughter, Susan Cynthia Brown, should happen to die without living issue of her body, then and in that case all my said estate, both personal and real, to return to the nearest heirs of my body by my mother's lineage."

The Chancellor who heard this cause on

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circuit, held, that as *to the real estate, the will created a fee conditional; and that part of the circuit decree has heretofore been affirmed by this Court. He also held, that Susan Cynthia Brown took, under the above recited bequest of the will, an absolute estate in the personal property. A majority of the Court concurs, also, in this part of the circuit decree, but a majority does not concur in all the reasoning by which the Chancellor has arrived at his conclusion. The Chancellor says: "if the word 'living' were omitted, and the limitation over had been upon Susan's dying without issue, it admits of no doubt, that this would not have been a limitation over to take effect definitely at Susan's death, but at any time after her death, however remote; that is, as the cases have ruled, upon an indefinite failure of issue." This is unexceptionable. Thus far, the reasoning is satisfactory, and the principle well illustrated. But when the Chancellor proceeds to say, that the word 'living' prefixed to the word 'issue' affords no qualification, and that the words "if she should happen to die without living issue of her body," are not restrictive, and mean no more than if the testator had said, "if she should happen to die without issue of her body," a majority of the Court dissents. We are of the opinion that the expression, "if she should happen to die without living issue of

her body," then over, is equivalent to the words, "if she should die without leaving issue" or "without issue living at her death;" both of which forms of expression, when there is a gift to the issue (though in general words) in the direct bequest, with a limitation over, have been held, in numerous cases, to be restrictive. As for example: where there is a direct gift to the issue in general words, which, standing by themselves, and unaided by the context, would fail as a limitation to the issue as purchasers, yet if it be followed by an ulterior and valid limitation over to take effect in the event of the first taker's dying without leaving issue, or without issue living at his death, it is settled law, that such explanatory provisions of the will have the effect in reference to personal estate of restricting the primary and technical sense of the words, "heirs of

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the body" or "issue," so as to make *them mean, not the issue or heirs of the body in indefinite succession, but a class of persons who shall be living at the death of the first taker. By this construction without violating the rules of law against perpetuities, the issue take, as purchasers, under the words of the direct, but otherwise general and indefinite gift. I am unable to distinguish between the cases by which the foregoing rule has been established and that now before the Court. I think that the expression "dying without living issue," implies a dying without issue living at the death of the first taker—and such is the opinion of a majority of this Court. So that the failure of Susan Cynthia Brown's issue to take as purchasers will not result from that part of the will.

But there is another question arising upon the construction of Charles J. Brown's will, which divides and embarrasses this Court. The limitation over which the testator has attempted to create, is to the nearest heirs of his body of his mother's lineage. It is impossible to designate the persons embraced under this description. It is utterly unmeaning. So far as certainty is concerned he might as well have given the estate to the most virtuous man in the State, or to some imaginary personage. The limitation over is void for uncertainty. And the question which remains is, whether this ulterior and void limitation is sufficient to reflect back such a restrictive meaning upon the general words of the direct gift to the issue as to make them take as purchasers. Upon this question, after two arguments at the bar, and much deliberation and research, the Court has been unable to harmonize in opinion. And if the adjudication of the case depended upon a decision of this question, there could be no disposition of it, by this Court, on account of differences of opinion.

For myself, I think, that the will must be read and construed as if the void limitation over had not been inserted. I have hereto-

fore been of the opinion, that it must be a valid limitation over, to have the effect of qualifying the generality of the words of the direct gift to the issue, so as to make them take as purchasers. And I have heard nothing in the recent discussions upon the

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subject, nor have I been able to find any in the way of authority, to shake my previous opinion.

A gift to A., and if A. should die without issue living at the time of his death, then to B. is unquestionably a good limitation to B., if the contingency happens upon which he was to take. And if it does not happen A. retains an absolute estate. In this case the issue of A. do not take as purchasers, because nothing is intended to be granted to them in the words of the direct gift. Their existence or non-existence at the death of A., like any other contingent event, is simply made the condition upon which the remainder to B. depends.

A gift to A. and to his issue, or the heirs of his body, and if he should die without leaving issue or heirs of his body, then to B. is a good limitation to B. as in the preceding illustration; and will take effect if A. should die without leaving issue, or heirs of his body. But in this case, the testator intends a direct gift, though in general and in definite terms, to the issue of A., and A. will take only a life estate, and his issue will take in remainder as purchasers. The valid limitation over to B. has, by a fair construction, the effect of qualifying the generality of the words of the direct gift to the issue of A., so as to make them mean the issue of A. living at his death.

It is equally clear that a gift to A. and the issue or heirs of his body, without any limitation over, or other words indicating that the testator meant to embrace in the direct gift only the issue of A., who should be living at his death, confers upon A. an absolute estate. In other terms, "issue," or "heirs of the body," unrestricted and unexplained, are words of limitation and not of purchase. So far there cannot possibly be any difference of opinion.

But some of the members of this Court are of the opinion, that in the case of Charles J. Brown's will, the abortive attempt to create the limitation over, has the effect of cutting down the estate of Susan Cynthia Brown to a life estate, with remainder in fee to the children. Other members of the Court think

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that the *estate of Susan Cynthia Brown, absolute by the words of the direct gift, is not to be cut down to a life estate, by a limitation over, which was void by its own inherent defects. The last is my own opinion, as I have already intimated.

The whole argument on the other side proceeds upon the unfounded assumption, that an interest is given to the issue of the first

taken by the terms of the direct gift. This is a great mistake. The issue are mentioned in the clause of the direct gift, but not in a manner to give them an estate. The whole estate, according to the rules of law, is in the first instance given as absolutely to Susan Cynthia Brown as the forms of language admit of. This will not be disputed.

Is this absolute gift to be divested or cut down by an ineffectual limitation over? The case of *Henry & Talbird v. Archer, Bail. Eq. 535*, decides, that a good limitation over may reflect a restrictive meaning upon the general words of the direct gift, and so qualify the word "issue" in the direct gift as to make it mean issue living at the death of the first taker. But is there any authority for saying that a bad limitation over will have that effect? The authorities are the other way.

"An original vested gift shall not be qualified by a subsequent gift engrafted on it, which the law will not allow to take effect, as by a gift over which is void, by reason of its being too remote." 2 Wms. on Ex'ors. 1087; *Blease v. Burgh*, 2 Beav. 221; *Ring v. Hardwick*, 2 Beav. 352. "And the rule is general, that an absolute interest is not to be taken away by a gift over, unless the gift over may itself take effect." 2 Wms. on Ex'ors. 1087; *Green v. Harvey*, 1 Hare, 428; *Winckworth v. Winckworth*, 2 Beav. 576; *Eaton v. Barker*, 2 Coll. 124.

In *Jackson v. Noble*, 2 Keen, 590, the testator gave real and personal property to his daughter A. and two other persons, in trust, to permit A. to receive the rents and profits for life to her separate use, and after her decease in trust to convey the estate to A's heirs, executors, &c.; but in case A. should marry and have no children, then the testator gave the property to B.; or in case

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*of his decease before A., then to B's children. The testator's daughter married, but had no children; and B. died in her life without issue. The Master of the Rolls held that the testator's daughter, A., took an absolute equitable estate, with an executory gift over to B. and his children; and that B. having died without children in the life time of A., the absolute title of the latter remained undefeated.

Mr. Jarman, (1st vol. on Wills, 783,) in commenting on this case, says, "so if the executory devise were void on account of its remoteness, or for any other cause, the prior devise would be absolute." He proceeds to say, "On the same principle, it would seem to follow, that, if personal estate were bequeathed in terms which, standing alone, would confer the absolute interest, and there followed a bequest over in a certain event to a person for life, the first legatee would, (subject to such executory gift for life,) be absolutely entitled. It might appear to be

a farther deduction from this doctrine, that if the second gift were a contingent bequest of the entire interest in the property, and not for life only and such contingent and substituted bequest failed in event, the prior legacy, in derogation of which the same was to take effect, would remain absolute."

Thus it appears to be a doctrine well-sustained by the authorities, that where the words of the direct gift would confer on the first taker an absolute estate, such absolute estate is not to be cut down or defeated, by a subsequent contingent limitation over, which is ineffectual. This was clearly Chancellor Harper's opinion. For in *Henry & Talbird v. Archer*, (Bail. Eq. 550) he remarks; "I believe it may be safely said, that there is no adjudged case, except that of *Lyon v. Mitchell*, of such limitation to issue, in which, the questions of the first taker's being restricted to less than an absolute estate, and the goodness of the limitation over, were not regarded as identical." And I may conclude these observations by saying, that, in all the discussions which we have had, at the bar, and in the consultation room, no case has been presented, where the absolute estate given to the first taker

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by the *words of the direct gift, has been cut down or restricted to a life-estate, by a limitation over, which was bad for any cause.

A majority of the Court, though upon different grounds, concur in the opinion, that the issue of Susan Cynthia Brown, (afterwards Susan Cynthia Hay,) do not take as purchasers under the bequests of Charles J. Brown's will.

The circuit decree is in that respect affirmed, and the appeal from that part of the circuit decree is dismissed.

WARDLAW, Ch., concurred.

JOHNSTON, Ch. Upon the point on which the Court is now to give judgment, I am still of the same opinion which I expressed in the decree.

I am not sufficiently satisfied with the ground upon which my Brethren DARGAN and WARDLAW have put the case, to adopt their opinion, at present.

I do not perceive the force of the objections made to the view I expressed in the decree, that the word "living" does not add to, or vary, the meaning of the word "issue" to which it is prefixed. It is merely superfluous,—as are the words following,—"of her body." Instances of such superfluous language are very common in the cases, and wherever they occur, do not vary the decision which would have been made had they been wanting.

If the testator had made the limitation over to take effect if his daughter Susan should happen to "die without issue of her

body"—his meaning would certainly have been without issue alive, or living. The addition of the words alive or living would have served no purpose whatever. They would not have served to fix the time at which the limitation over is to take effect—which is the important, and, indeed, the only point of our inquiry here.

It is assumed here, that the word "living" means living at her death: but I conceive it has no such meaning.

The reference, by one of my brethren, to the case of *Henry & Talbird v. Archer*, is, in my conception, very unfortunate: and does not serve to destroy, but rather to eluci-

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date the principle upon *which the circuit decree, in this case, is put. The will, in that case, is, that, if either of the daughters should die without leaving issue alive, then over. It was not the word "alive" (equivalent to "living," in the present case), that fixed the juncture for the limitation over to take effect: nor did the Court give it any such effect. The time was fixed solely by the word "leaving."

In this case there is no such word, nor any other word of the same efficacy.

There is not a single word of time in the sentence of Brown's will under examination. Die without issue, by well-settled rules, means an indefinite failure of issue: refers to no time when, after the death of the party, he shall be without issue—meaning always issue alive or living. And unless there be something in the will besides, to fix the time, at the death of the party, it is too remote and indefinite.

But, as my Brethren, DARGAN and WARDLAW, come to the same result with me, I concur with them in affirming the decree, and dismissing the appeal.

DUNKIN, Ch. dissenting. A majority of this Court are of opinion (and I concur with them) that the words "die without living issue of her body" are equivalent to "die without leaving issue of her body alive at her decease." Judicially read, it is a bequest to the testator's daughter, Susan Cynthia Brown, and the heirs of her body, but "if my said daughter should happen to die without leaving issue of her body alive at the time of her decease, then and in that case" over. Certainly, since *Henry & Talbird v. Archer*, (Bail. Eq. 535,) I think it has not been questioned that the effect of these subsequent words is to restrict the generality of the previous expression, and to create a life estate in the first taker, and enable the children to take as purchasers. The bequest in *Henry & Talbird v. Archer*, was to the testator's daughter, "to her and the lawful issue of her body forever," but if any of his daughters should die "without leaving lawful issue of their bodies alive,"

then their part to be equally divided among the surviving children.

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*The daughter died leaving children, and they were held entitled to take as purchasers; and upon the principle, that "where there is an express gift to issue generally, a limitation over, in the event of the first taker's dying without leaving issue living at his death, will confine the gift to such issue as are living at that time, and entitle them to take as purchasers." Where the bequest is to one and his issue, or the heirs of his body, without more, the law gives an absolute estate, not because the testator intended to give an absolute estate, but because he intended to give an estate restricted indefinitely in lineal succession which the law does not permit. But if there are superadded words which manifest that the testator did not contemplate such indefinite lineal succession, the Court lays hold of such words in order to give effect to the intention.—The circumstance of limiting the property over, on the event of not leaving issue has been held, in a large class of cases, sufficient to show the testator's intention to use the word issue, or heirs of the body, not as a word of limitation, but of purchase. The authority of *Henry & Talbird v. Archer* has been repeatedly recognized, and may now well be regarded as a rule of property, nor is the obligation of that decision now called in question. In the will before us, the intention of the testator to restrict the meaning of the term issue to the children, or other descendants of his daughter living at her death, is manifested by language nearly identical with that of *Bell's will*. The daughter left children, who are parties to these proceedings, and who, according to *Henry & Talbird v. Archer*, are entitled to take as purchasers, under the will of their grandfather.

But it is objected that the children are not entitled, because, if their mother had happened to leave no children, the terms of the ulterior limitation over leave it uncertain to whom, in that event, the estate would pass. In other words the testator has clearly manifested the objects of his bounty if his daughter left children alive, and she has left children, but he has not been so fortunate in designating the objects of his bounty in a contingency which has not happened; but this want of certainty is to defeat his de-

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clared purpose in the event which has happened. Let the proposition be analyzed with reference to this case. The gift is to the testator's daughter and the heirs of her body, which, by the restrictive words subsequently used, would be construed to give a life estate to the mother with a remainder to her issue living at the time of her death. But the testator further provided that if his daughter "should happen to die without living issue of her body, then and in that case the estate

is to return to the nearest heirs of testator's body by his mother's lineage." It is said that this contingent limitation over is void for uncertainty, as the Court would be unable to say who were the nearest heirs of testator's body by his mother's lineage; and in what remains to be said that will be assumed. But what is the consequence deduced from it? Does this uncertainty as to the ultimate and contingent object of the testator's bounty, in an event which has never occurred, create the smallest uncertainty as to the objects of his bounty, in the event which has occurred? Does it create a suspicion that he contemplated an indefinite lineal succession, and that he did not restrict his vision to the period of his daughter's death, and the state of things then existing? Not at all. Nothing is more hazardous than to take up a general expression without reference to the context, and apply it indiscriminately. In *Henry & Talbird v. Archer*, Chancellor Harper is speaking of the validity of the gift over in reference to the previous gift, but he never meant to say, that because the contingent limitation over is void for uncertainty or illegality, the previous estate, well given, is thereby defeated. All the authorities maintain a contrary doctrine. "A gift over," says Lord Langdale in *Blease v. Burgh*, 2 Beav. 221, "which is too remote and void, cannot defeat a vested interest previously given." Does it make any difference that the gift over is void for uncertainty or illegality, and not for remoteness?—The rule is recognized and the authority cited by Mr. Williams in his treatise on Executors, p. 1089. It is also recognized in the case of *Dougherty v. Dougherty*, 2 Strob. Eq. 67. In the case before us there is a direct bequest to the daughter and the heirs of her body. The inquiry, says Mr. Justice Cheves, in *Guery v.*

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Vernon, (1 N. & McC. 71,) is "whether these words, issue, heirs of the body, &c., express an indefinite succession of persons, or whether they point out certain particular persons who may exist, and must take within a period not excluded by the rules of law?" To determine this inquiry the Court is permitted to look to other expressions in the context, and if it be thence ascertained that the terms are used in a restrictive sense, then the heirs of the body are held to take as purchasers. Such expressions as 'dying without leaving issue alive at the death of the first taker,' have received judicial interpretation as so restricting the testator's meaning. And the acknowledged intention of the testator, thus violating no rule of law, is permitted to take effect, and the gift to the children is sustained under the description of heirs of the body. But the certainty or uncertainty of the objects described in the contingent limitation over, sheds no light upon the only material inquiry, and affords no aid to the Court in solving it. If the bequest were to A. and

the issue of her body, but if she should die without leaving issue of her body alive at her death, then and in that event to the wisest man in England, or the man in the moon, or to the testator's faithful slave Adam, (void under A. A. 1841,) are the issue living at the death to be defeated, because, if they did not exist, the contingent limitation would have proved illusory or impracticable? If the bequest had been directly to the daughter for life, and afterwards to her issue living at the time of her death, with a contingent limitation in default of such issue, would it be contended that children, living at the death, had any interest in the inquiry as to this contingent limitation? But the Court so construe the bequest now under consideration; and yet the issue of the daughter living at her death are held not entitled, because it is impracticable for the Court to determine who would have taken if no such issue had existed. I think the rights of the children depend on no such inquiry, but that they are entitled to the personality as purchasers under their grandfather's will.

Appeal dismissed.

4 Rich. Eq. *390

*DANIEL FOSTER et al. v. D. KERR and W. EDRINGTON.

(Columbia. May Term, 1852.)

[*Husband and Wife* ⇨117.]

Bequest of slaves to a feme covert "to her and the heirs of her body, and to them alone," does not confer a separate estate on the wife, in exclusion of the rights of her husband.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 419; Dec. Dig. ⇨117.]

Before Wardlaw, Ch., at Fairfield, July, 1851.

Plaintiffs, children of Josiah Foster and Pinkey, his wife, which Pinkey was the only child of Z. Hall, filed this bill, April, 1849, claiming certain slaves as enuring to them under the operation of the will of their said grandfather. The will bore date February 18, 1826, and was admitted to probate, February 20, 1830. Its fourth clause was as follows: "I give unto my beloved daughter, Pinkey Foster, to her and the heirs of her body, and to them alone, the following tracts of land, &c.; also seven negroes and their increase, namely: Sal, Anny, Caroline, Cynthia, Beck, Jim, Charity; also one bed and furniture furnished equally to the one above mentioned."

In December, 1833, Josiah Foster sold Sal and her children, born since the death of testator, to wit: Jerry, Daniel and Burrell, to defendant Kerr and in February, 1836, sold Caroline to defendant Edrington. Pinkey Foster died about 1835, and Josiah Foster died intestate, in 1836.

Wardlaw, Ch. The question is, whether the bequest is of a separate estate in the slaves to the wife, Pinkey Foster, in exclusion of the rights of the husband. The gift is 'to her and the heirs of her body, and to them alone.' It has been long ago settled, that these terms, without the last clause, would, in a gift of personalty, carry the absolute estate, upon which of course the rights of a husband would attach, and the only dispute is as to the meaning and effect of the words, "and to them alone." I construe these words according to their natural and grammatical reference, to qualify the force of the word 'heirs' only, and to convey, by a common pleonasm, the meaning of the testator, that none but heirs of the body, not

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heirs general, should take *by succession from the first taker. Upon this construction, the quantity of estate in the wife, and through her in the husband, would not be limited by the words. But the consequence would be the same, if we construe the words *reddendo*, *singula singulis*, as referring as well to the wife as to the heirs: for then the meaning would be, that none besides the wife and the heirs of her body, successively, should take the estate, which, as to chattels, would be a gift absolute to the wife, upon the fixed technical construction, often defeating the real wishes of donors. Myers v. Pickett, 1 Hill, Eq. 37. No doubt can arise in the case, except by torturing the phrase heirs of the body, into children, and deducing that those in existence at the death of the testator, shall take jointly with their mother. If we held the children thus to take as original donees and purchasers, all of the plaintiffs would now be barred by the statute of limitations, except, perhaps, Susan Morris; but I reject this forced construction. A separate estate in a married woman, in derogation of the husband's common law right, can be created only by express terms, or by necessary and unequivocal implication. *Wilson v. Bailer*, 3 Strob. Eq. 260 [51 Am. Dec. 678]. The implication in this case, to exclude the husband, is much feebler than in *Weatherford v. Tate*, 2 Strob. Eq. 27, where it was regarded as insufficient. The gift there was to a married woman for life, and at her death to the heirs of her body, with a provision that the property should not be sold by the husband, nor removed from the State; and this was held to confer an absolute estate on the husband, upon his reduction of the property into possession.

It is ordered and decreed, that the bill be dismissed.

The plaintiffs appealed, on the ground, because it is apparent that it was the intention of the testator to create a separate estate in Pinkey Foster and her children, free from and beyond the control of her husband, Josiah Foster; and the decree should have

ordered that intention to be carried into effect.

A. W. Thomson, for appellants.

Boyce, Boylston, contra.

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*PER CURIAM. This Court is satisfied with the decree of the Chancellor from which the appeal is taken; and it is ordered that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN and DARGAN, CC., concurring.

Appeal dismissed.

4 Rich. Eq. 392

A. BAKER and Wife v. D. M. LAFITTE et al.
(Columbia. May Term, 1852.)

[Reference ⇨57.]

Where a party is not ready to go on with a reference, a motion to continue should be made before the commissioner, and it is irregular to pass him by and make the motion before the Court.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 57; Dec. Dig. ⇨57.]

[Guardian and Ward ⇨150.]

A guardian by failing to make returns does not forfeit his commissions.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 507; Dec. Dig. ⇨150.]

[Trusts ⇨219.]

Though there are cases in which trustees have been charged with compound interest, yet the course of the Court is to discourage the compounding of interest.

[Ed. Note.—Cited in *Hugeins v. Blakely*, 9 Rich. Eq. 469; *Graveley v. Graveley*, 25 S. C. 23, 60 Am. Rep. 478.

For other cases, see Trusts, Cent. Dig. § 317; Dec. Dig. ⇨219.]

[Guardian and Ward ⇨54.]

Rules by which guardians and other trustees should be charged with or allowed interest on their accounts, stated.

[Ed. Note.—Cited in *Griffin v. Bonham*, 9 Rich. Eq. 81, 82; *Pettus v. Sutton*, 10 Rich. Eq. 357; *Adams v. Lathan*, 14 Rich. Eq. 308; *Ex parte Glenn*, 20 S. C. 64, 68, 71; *Tucker v. Richards*, 58 S. C. 27, 28, 36 S. E. 3.

For other cases, see Guardian and Ward, Cent. Dig. §§ 242-253; Dec. Dig. ⇨54.]

[Trusts ⇨304.]

Where a trustee admits his accountability, he must file with his answer a stated account showing the balance which he admits to be due. Where this is done (and the answer is incomplete and subject to exception, if it is not done) the plaintiff is entitled to a short order that the sum admitted be paid to him.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 413; Dec. Dig. ⇨304.]

Before Dargan, Ch., at Barnwell, February, 1852.

In 1839, the defendant, D. M. Lafitte, was appointed guardian of the plaintiff, Laura L. Baker, (then Garvin,) and William L. Gar-

vin became his surety. This bill, filed August 16, 1851, was for an account.

In February, 1839, certain slaves of the plaintiff were sold under an order of the Court, by the commissioner, on a credit, with interest, payable annually. In January, 1840, the commissioner was ordered to pay the annual interest on receipt thereof, and also the amount of the sales, when collected, to the defendant. The commissioner received considerable sums of money on account of the sales, and paid, at different times, sums of money to the defendant; but a consider-

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able portion of the *money, received by the commissioner, remained uncalled for in his hands, until after the intermarriage of the plaintiffs, when, by direction of defendant, it was paid to the plaintiffs.

The plaintiffs held their first and only reference on Tuesday, the 27th day of January, 1852; the commissioner then appointed Wednesday, the 4th day of February for the defendant's reference. On Wednesday, D. M. Lafitte did not attend, and assigned the causes of his absence in a letter to his solicitor, dated on the 3d day of February, 1852, as follows: "I did not get home from Barnwell C. H. until Saturday evening last, and that with great difficulty. My physical inability at present is so great, that it is impossible I can withstand the fatigue of attending the reference appointed for to-morrow, but I will attend as soon as I shall have recruited sufficiently to get up my witnesses—of my disqualification at this time to transact business, I am not able to send an affidavit, as the nearest magistrate to my residence is fourteen miles off, and I have not strength to go to him. At the reference on Tuesday last, I was in no condition for business; bodily suffering caused me to overlook bringing to the notice of the commissioner a statement from his predecessor showing an account of my administration as guardian up to January 12, 1844, which, with some other matters then neglected, are essential to making out a correct report; besides there are five witnesses that I desire should be examined. You will therefore please endeavor to procure some postponement on my account, particularly as I deem my presence at the reference to be of importance." On the receipt of this letter the solicitor of D. M. Lafitte exhibited it to the solicitors of the plaintiffs, and requested their consent to a continuance of the cause, as but four days, including Sunday, would intervene before the sitting of the Court. The plaintiffs' solicitors refused their consent to a continuance, but agreed that the letter should be read as if sworn to by the defendant, when the cause was called by the Chancellor, and a motion made to continue. The commissioner made up his report, to

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which numerous exceptions were taken by plaintiffs and defendant. When the case was called a motion for a continuance was made and overruled. His Honor recommitted the report, holding, that defendant was chargeable with interest on the moneys received by the commissioner and not called for; that defendant was not chargeable with compound interest, or interest upon interest; and that defendant was not entitled to commissions for the years in which he had failed to make returns as guardian. The commissioner reformed his report, to which exceptions were again taken. His Honor overruled the exceptions and confirmed the report. Both parties appealed—the defendant on the grounds, *inter alia*, that his motion to continue should have been granted; that he was not chargeable with interest on the moneys collected by the commissioner and not paid to him; that he was entitled to all his commissions; and that there were errors in the calculation of interest, which should be corrected: and the plaintiffs, on the ground, that defendant was chargeable with interest upon interest, according to annual balances.

J. T. Aldrich, for defendant;
Bellinger, for plaintiffs.

The opinion of the Court was delivered by

JOHNSTON, Ch. Upon the subject of the continuance, this Court is of opinion, that the Chancellor's discretion was well exercised. Indeed, it is hardly proper to say that the motion to continue was properly brought before him. The accounts were before the commissioner, and it was to him the motion should have been submitted before the close of the reference. This was not done; and it was very irregular to pass by the commissioner, and bring before the Chancellor a motion which should have been made to and decided by the former, according to his discretion.

On the subject of the commissions, this question was argued before the Chancellor as if the penalty for not making returns, contained in the statute, was by the terms of the statute applicable to guardians as well as to executors and administrators. The

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*distinction, in that respect, established in the case of *Muckenfuss v. Heath*, 1 Hill Ch. 182, was not brought to his view. We are of opinion that his ruling on that point, resulting from the cause just mentioned, was erroneous, and that the guardian, irrespective of his returns, is entitled to commissions on his receipts and disbursements.

There is no authority for the position contended for by the plaintiffs that the defendant should be charged with compound interest in this case. There are cases in which a trustee employing the funds of the cestui que trust for his own benefit, and subjecting

them to the casualties of trade, and there is no means of ascertaining the profits made, has been subjected to compound interest by annual and even semi-annual rests; of which an instance exists in *Schieffelin v. Stewart*, 1 Johns. Ch. 620. But there is nothing of that kind here; and the course of this Court is to discourage the compounding of interest, as will appear in a note subjoined in which the cases are collected. (a)

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*We are satisfied with the Chancellor's ruling that the guardian was chargeable, under the evidence, with the money he neglected to receive from the commissioner.

The remaining questions in the case relate to the computation of interest, (of course I mean simple interest,) on the guardian's accounts. It is a subject of great difficulty.

The general principles applicable to the subject are, that a trustee is not to make profit out of the trust funds in his hands, and that he shall exercise that degree of

(a) Authorities on mode of computing interest: *Darrel v. Eden*, 3 Des. 241 [4 Am. Dec. 613], holds, that from 1797, when the case of *Stuart v. Carson* [1 Desaus. 500] was decided, the course has been to allow interest on executors' accounts. But, says the Court, the account must be made up yearly, and the interest should be kept in a separate column, and compound interest should not be allowed.

Jenkins v. Fickling, 4 Des. 370, holds, that executors ought to pay interest.

Benson v. Bruce, 4 Des. 464, holds, that interest shall be charged against an administrator, because he kept the money of the intestate in his hand an unreasonable time, &c.

Walker v. Bynum, 4 Des. 555. The Court laid down the rule, that where an executor, administrator, or guardian, receives money, he is bound to pay debts or put it out at interest on proper securities, and that when he receives considerable sums and no circumstances exist for retaining it, he is bound to pay interest.

Taveau v. Ball, 1 McC. Eq. 456. The Court held, that defendant was not chargeable with interest except on annual balances, and that time should be allowed an executor to look out for proper investments, after the balance is ascertained.

Black v. Blakely, 2 McC. Eq. 1. The Court say, the rule for calculating interest has long been settled in this State. It is, where partial payments have been made, to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes to discharge the principal, and interest is computed on the balance of principal. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal, but interest continues on the former principal until the period when the payments taken together exceed the interest then due. That method of calculating interest has been settled by the decisions of our Courts

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for more than *thirty years. The Court then adds, that they had never known compound interest allowed on a mere neglect to pay over money.

Wright v. Wright, 2 McC. Eq. 194. *Nott, J.*, in delivering the opinion of the Court, says, that the allowance of compound interest seems to be an invention of modern date. That there is no such general rule, and that even if it were the rule in the English Courts, it would be impracticable in this country, where money can-

diligence in relation to the trust estate, which men of ordinary prudence exercise with respect to their own estates, and if any loss result from his failure in this respect, he, and not his cestui que trust, must bear it. These principles must guide in the decision of all cases; and the application of any universal and inflexible rule is impossible, because such rule would, under some circumstances, serve rather to sacrifice than to advance the general principles, which it is its intention and purpose to carry out.

If a trustee should have in his hands securities, bearing interest, which securities are not realized until just before his settlement with his cestui que trust, in such case it is clear that he should be charged with

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the interest borne by the securities, and *no more; and whatever expenditures he may have made in the meantime out of his own funds, should bear a simple interest in his favor from their dates respectively. In such a case as this which I have mentioned, there is neither necessity nor propriety in casting annual balances, and computing interest upon them.

If a security comes into the trustee's hands, bearing interest, he is not allowed to take the interest to himself; and in such case there is no propriety in deferring the computation of interest, so far as that security is concerned, until the end of the year. It is not necessary to allow time for investment—an investment already existing in the security itself.

Again: Although the general rule be not to charge trustees with interest upon sums received until the end of the year in which they are received, yet if it should happen that a large sum should come into his hands on the first day of January, and he should not pay it out until the last day of December, it would not seem proper to excuse him from interest from some reasonable time after the money came into his hands. He should have put it out, as a prudent man would

not always be let out promptly, much less safely, at interest. Simple interest is usually more than can be realized with the utmost diligence.

Rowland v. Best, 2 McC. Eq. 321. The rule is, to allow interest on the annual balances, but not so as to allow compound interest; and, on appeal, this was sustained.

Schnell v. Schroder, Bail. Eq. 335; Brown v. Vinyard, Id. 460; Jones v. West, 2 Hill, 561, note; Davis v. Wright, Id. 560; Dixon v. Hunter, 3 Hill, 204. All these cases recognize the principle of annual balances, and simple interest kept in a separate column, all repudiate the doctrine of compound interest. In Dixon v. Hunter, it is said: the general rule laid down in Jones v. West, and Davis v. Wright, charging interest on annual balances, may be just in its operation where the receipts exceed the expenditures of the current year. But where the payments exceed the receipts, the receipts should be added to the annual balance on hand, and from the aggregate the payments of that year be deducted, and on this balance only should interest be charged.

have done with his own. But if, on the other hand, he should show that he was obliged to keep the money ready for the creditor, it would be very unfair to compel him to pay interest on it. The circumstances must govern in the decision of such cases.

Again: Though the general rule is to deduct from the last annual balance, and the sums received during the current year, all sums expended during the same year, reserving the balance thus left as that upon which interest should be computed from the beginning of that year; yet there may be special circumstances attending particular cases, which should deflect the rule.

We see no special circumstances in this case, however, to take it out of the general rule and practice, which are, that a trustee is not chargeable with interest upon moneys received (where there are both receipts and expenditures) until the end of the year in which they are received; nor is he entitled (in such a case) to interest upon his expenditures

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until the end of the year. The receipts and expenditures are set off against each other, and the balance carries interest from the end of the year in favor of the party—trustee or cestui que trust—in whose favor it is cast. The balance, however, may be reduced, (and of course the computation of interest varied,) by the receipts and expenditures of the year following that in which it is established. As for instance: if in that succeeding year the trustee expends more than he receives, he should be presumed to have held so much of the last annual balance as was necessary to make up the difference; in which case interest should be computed only on the residue of the balance not thus employed. Or he may, on the other hand, have received more than he expended, in which case the excess of receipts over expenditures should be applied to the extinguishment of any balance that may have been previously established in his favor; leaving only the residue of that balance to bear interest for his benefit.

According to these rules, we think this account should have been stated by the commissioner, and

It is ordered that the account be remanded to the Circuit Court, and to the commissioner, to be stated according to the opinion expressed by this Court.

But in sending the case back, the Court must accompany it with a further order.

In Booth v. Sineath, 2 Strob. Eq. 31, the Court has laid it down that when a trustee admits his accountability, he must file with his answer a stated account showing the balance which he admits to be due. Where this is done, (and the answer is incomplete and subject to exception, if it is not done,) the plaintiff is entitled to a short order that the sum admitted be paid to him. And such an order might have been granted in this

case, if the account filed with the answer had stated the interest which the defendant admitted, and had struck a balance. As it is, the Court perceives clearly that all interest overcast against the defendant, and all commissions improperly disallowed to him cannot possibly amount to eight hundred dollars.

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Deducting that sum, *therefore, from the sum of five thousand three hundred and eighty-one dollars and seventy-seven cents, reported by the commissioner, it is impossible that the defendant can be injured, if the Court should now order him to pay to the plaintiffs, within thirty days after notice of this decree, the balance, in round numbers, four thousand five hundred and eighty dollars. And it is ordered that he do pay them the last mentioned sum accordingly.

DUNKIN, DARGAN and WARDLAW, CC., concurred.

Decree modified.

4 Rich. Eq. 399

CATHARINE RAINES and Her Children v. R. C. WOODWARD, Sheriff, et al.

SAME v. JOHN ADAMS, Sheriff, et al.

(Columbia. May Term, 1852.)

[Trusts \hookrightarrow 86.]

Feme covert purchases negroes for valuable consideration, taking conveyance to herself "for her sole and separate use." The conveyance needs no registration, and creditors of husband impeaching it must show that the negroes were purchased with the funds of husband.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 128; Dec. Dig. \hookrightarrow 86.]

[Trusts \hookrightarrow 140.]

A mother, in consideration of love and affection for her daughter C., a feme covert, and for "the purpose of contributing to the support and maintenance of said daughter during the term of her natural life, and for the better support, maintenance and education of the children of said daughter, born or hereafter to be born," conveyed certain slaves to the said C., "in trust for the use, benefit and behoof of the said C. for and during the term of her natural life, and from and immediately after her death, in trust for the use, benefit and behoof of all the children of the said C., equally to be divided between them; in case, however, if any of the children of the said C. shall have died in her life time leaving issue, living at the time of her death, such issue shall take the same share of said slaves, which the deceased parent would have been entitled to if living." *Held*, that C. took a life estate in the slaves, with remainder to her children.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 186; Dec. Dig. \hookrightarrow 140.]

[Husband and Wife \hookrightarrow 8.]

That the marital rights of her husband attached thereon, and, therefore, that the life estate was liable to be sold under *fi. fas.* against him.

[Ed. Note.—Cited in *Wade v. Fisher*, 9 Rich. Eq. 363.

For other cases, see Husband and Wife, Cent. Dig. § 24; Dec. Dig. \hookrightarrow 8.]

[Trusts \hookrightarrow 151.]

That the children were entitled to an order, that the purchasers at sheriff's sale should give security for the forthcoming of the slaves.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 195; Dec. Dig. \hookrightarrow 151.]

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*Before Wardlaw, Ch., at Fairfield, July, 1851.

Wardlaw, Ch. These bills, filed by the wife and children of William G. Raines, pray that the sheriffs of Fairfield and Lancaster may be enjoined from selling certain slaves, seized under executions against said W. G. Raines, on the ground of a separate estate in the wife, for life, to the slaves, with remainder to the children.

It appears that William Moore, then sheriff of Fairfield district, on July 7, 1828, under executions of Musco Boulware and of Robert Cathcart, against William G. Raines, sold slaves of said W. G. Raines, and conveyed by bills of sale Viny, Milly, Crecy, George, Hannah, Caroline, Lewis, Fanny and Betsy, to Musco Boulware, for the price of \$868, and Nathan, Ally, William, Henson, Joe and William, to Robert Cathcart, for \$686. On January 8, 1829, Musco Boulware, under his hand and seal, attested by W. R. Boulware, assigned the bill of sale he had received from the sheriff in the following words: "Received of Mrs. Catharine Raines, wife of Wm. G. Raines, sole dealer, \$868, the amount for which I purchased the within named negro slaves, and hereby assign this bill of sale to her, for her sole and separate use, but without further responsibility on me." On January 10, 1829, Robert Cathcart, under his hand and seal, attested by D. McDowell, assigned the bill of sale he had received from the sheriff, in the following words: "Received of Mrs. Catharine Raines, wife of Wm. G. Raines, sole dealer, \$686, the amount for which I purchased the within named negro slaves, and hereby assign this bill of sale to her, for her sole and separate use, and without further responsibility on me." It is quite clear on the proof, that Musco Boulware was paid for the negroes bid off by him at sheriff's sale, from the proceeds of cotton raised upon W. G. Raines's plantation, but marked in the name of C. Raines: and it is probable that Cathcart was paid in the same way. Without her conducting the business of a merchant, or acting otherwise than as a planter's wife, Mrs. C. Raines was

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treated as a sole *dealer. The assignments of the sheriff's bills of sale were drawn up by counsel learned in the law, but were not recorded. The visible property of Raines was sold by the sheriff in 1829, and he was regarded as insolvent until 1835, when he seemed prosperous, and obtained extensive credit, and so continued until 1847 or 1848, when he was again sold out, except as to

twelve or fourteen negroes, which he removed clandestinely from the State, leaving a large amount of executions unsatisfied. The negroes in question were all this time worked in common with W. G. Raines' other slaves.

On October 9, 1834, Nancy Boulware, mother of Catharine Raines, executed a bill of sale to said Catharine, of the slaves Milly and Mary, Hannah and four children, William, Nancy, Harry and January, in which the grantor recited as consideration, her love and affection for her daughter, and "the purpose of contributing to the support and maintenance of said daughter during the term of her natural life, and for the better support, maintenance and education of the children of said daughter, born or hereafter to be born," and conveyed said slaves with their future increase to the said Catharine Raines, "in trust for the use, benefit and behoof of the said Catharine Raines, for and during the term of her natural life, and from and immediately after her death, in trust for the use, benefit and behoof of all the children of the said Catharine Raines, equally to be divided between them; in case, however, if any of the children of said Catharine shall have died in her life time leaving issue, living at the time of her death, such issue shall take the same share of said slaves, which the deceased parent would have been entitled to, if living." This deed was drawn by counsel. It was recorded in the register's office, Fairfield, May 2, 1836. These negroes were not treated differently from the negroes that belonged to W. G. Raines. Catharine Raines, however, from 1829 to 1834, kept separate accounts with factors in Charleston, and in that interval of time, sold more than two hundred bags of cotton. The negroes conveyed by Nancy Boulware had been bought

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by her, *when they were sold under executions as the property of W. G. Raines.

The bills of sale by Boulware and Cathart to Catharine Raines, have all the material elements of a voluntary settlement by a husband embarrassed with debt upon his wife. It is demonstrated by the proof that Boulware was paid from the crop made on Raines' plantation in 1828, and that a sufficiency of means for the reimbursement of Cathart was also received by Mrs. Raines from her husband's crops; and she furnished no evidence of her having other funds. She is denominated in the assignments of these bills of sale a sole dealer, but there is no evidence that she filled such anomalous character; that she ever gave the notice required by the Acts of 1823 and 1824, (6 Stat. 213, 236;) that she ever carried on any separate trade or business whatsoever. A wife who assumes to be a sole trader, while her husband's affairs are embarrassed, and who purchases his property, must show clearly that

she had the means to make the purchases independently of her husband. In default of such showing her purchases are fraudulent. *Miller v. Tollison*, Harp. Eq. 145 [14 Am. Dec. 712]; *McMeekin v. Edmonds*, 1 Hill Eq. 292 [26 Am. Dec. 203]. Where the husband really furnishes the funds for the purchases, no matter what may be the form of the conveyance to the wife, the transaction is in substance a voluntary settlement by the husband; and the conveyance should be recorded as a marriage settlement. *Price v. White*, Car. L. J., 297 [1 Bailey Eq. 244].

The question as to the negroes embraced in the deed from Nancy Boulware depends upon different principles. So far as there is any evidence on the subject, Nancy Boulware fairly acquired title to these slaves, and for good consideration transferred them to her daughter. This conveyance is not a marriage settlement needing registry. *Banks v. Brown*, 2 Hill Eq. 565 [30 Am. Dec. 380]. The difficulty in the way of Catharine Raines is that the deed contains no sufficient expression of any intention of the donor to exclude the marital rights of W. G. Raines. There is nothing in the provision that the slaves

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should be for the use, benefit and *behoof of Catharine Raines for life, inconsistent with their being subject to his marital rights. *Tyler v. Lake*, 2 Russ. and Myl. 183; *Blacklow v. Laws*, 2 Hare, 49; *Wilson v. Bailer*, 3 Strob. Eq. 260 [51 Am. Dec. 678]. It was argued that the fact of the gift being to her "in trust" for her use, &c., was sufficient to exclude the husband. In *Tyler v. Lake*, in *Stanton v. Hall*, 2 Russ. and Myl. 175, and other cases, the gifts were to trustees, and did not impair the husband's rights; in the present case no trust is definitely created. I think the injunction granted by the commissioner, of the sale of these negroes under fi. fas. against W. G. Raines, must be countermanded, so far as the life estate of Catharine Raines is concerned.

I suppose, however, that the children of Catharine Raines take the remainder in fee of said slaves, as purchasers, after the termination of her life estate. The construction of the instrument of gift is clear, that her children were intended to take at her death as tenants in common. *Myers v. Anderson*, 1 Strob. Eq. 344 [47 Am. Dec. 537]; *Henry & Talbird v. Archer*, Bail. Eq. 535. The plaintiffs, who are children of Catharine Raines, are entitled to have security for the forthcoming of the slaves at the termination of the life estate, from those who may purchase the life estate at sheriff's sale. *Pringle v. Allen*, 1 Hill Eq. 137; *Cordes v. Ardrian*, Ib. 157.

It is ordered and decreed, that the bill be dismissed as to all matters, except the claim of the children of Catharine Raines to the slaves conveyed by Nancy Boulware upon the death of said Catharine. It is further or-

dered and decreed, that upon the sale of so many of these slaves as have been taken in execution, the purchasers shall, before delivery of the slaves, enter into bond to the commissioner of this Court, with good sureties to be approved by him, in penalties equal to twice the value of the slaves, conditioned that said slaves shall not be taken beyond the limits of this State, and that those of them then living, with any increase of the females, shall be forthcoming at the termination of Catharine Raines' life estate therein. Costs to be paid out of the sales.

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*The complainants appealed:

1. Because the Chancellor erred in deciding that the deeds made by William Moore, sheriff, to Robert Cathcart and Musco Boulware, for certain slaves, and by them assigned to Catharine Raines, for her sole and separate use, are fraudulent as to creditors, on the ground, that there was no proof of any funds belonging to Catharine Raines, to pay for the same, when from the proof it appeared that the money to pay for said slaves was made by their labor, on the lands of Mrs. Raines, secured to her sole and separate use.

2. Because the Chancellor erred in deciding that by the terms of the deed for certain slaves from Nancy Boulware to Catharine Raines, no separate estate was secured to her, when from the expressions in the deed, said slaves were conveyed expressly in trust to the said Catharine Raines, for the support of herself and education of her children, and being given in trust, this Court should protect the trust, and secure them from the creditors of the husband.

McAliley, for appellants.

Buchanan, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. The two claims presented by the plaintiffs are distinct in their origin, in the principles which govern the decision of them, and I may add, in the interests of the claimants.

1. As to the transfers of slaves from Musco Boulware and Robert Cathcart to Catharine Raines.

The instruments of conveyance transfer the title of the slaves to her, expressly for her "sole and separate use." If such independent title in her had proceeded from the gift of the grantors, or from sale by them where the purchase money had been paid from her separate funds, undoubtedly such title would have been valid, and the instruments of conveyance would need no registration. *Banks v. Brown*, 2 Hill, Eq. 565 [30 Am. Dec. 380]. And as the instruments here are formally for the separate use of the wife, and acknowledge payment by her, the defendants are

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bound to show *that they present a false appearance, and that the payment was really

made from the funds of the husband. Creditors of the husband had no just cause of complaint, unless property of the husband, liable to the satisfaction of their claims, has been improperly diverted to the support of the husband's family. The conclusion that there was such misapplication of the husband's funds, depends mainly on the assumption that the plantation, which afforded the means of payment, belonged to the husband, at least as to the usufruct. But the proof on this point is not satisfactory. It appears from the notes of evidence, that the plantation was derived from the bounty of the father and brother of the wife; and some implication that the husband had no ownership of it, arises from the fact that the creditors did not seize and sell it under their executions. It is strongly asserted before us, that it was settled to the separate use of the wife. We are little disposed to encourage appeals, on questions of fact, from a Chancellor's conclusions from the evidence; or to allow parties to be again heard after one fair opportunity of establishing their claim or defense. But in the present instance, the Chancellor who heard the cause, upon review, concurs in the propriety of another investigation for the fuller development of the facts: and such is the determination of this Court.

2. As to the slaves conveyed by Nancy Boulware to Catharine Raines.

In *Tyler v. Lake*, (6 Con. Eng. Ch. R. 452,) the trust was to pay the proceeds of real estate into the proper hands of a married woman for her own use and benefit. Lord Brougham says: "I take the principle to be thoroughly established, that Courts of Equity will not deprive the husband of his rights at law, unless there appears a clear intention, manifested by the testator, that the husband should be excluded." He further remarks: "If sufficient strength of negative words is not to be found in the gift or limitation, you are not allowed to fish about for indications of intention from other parts of the instrument." This latter remark has much force and point, but it must not be

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pressed to the *extent of making an exception as to this particular case of marital rights from the general rule of construction, that the intention is to be collected from the whole instrument. Sir James Wigram truly says, in *Blacklow v. Laws*, (24 Eng. Ch. R. 50): "Courts of Justice invariably affirm the proposition that an intended gift shall take effect, provided the Court can find in the instrument a declared intention to give, although the simple words of limitation, unaided by implication arising out of other parts of the instrument, might leave the intention uncertain."

It is argued from the consideration expressed in Nancy Boulware's deed, to provide not only for the maintenance of Catharine Raines, but for the maintenance and education of

her children, that we may infer the intention of the donor to create a trust for the immediate joint benefit of the children with their mother. If we collate the terms in the consideration with the terms of limitation, it is altogether plain that it was the intention of the donor to give not a joint estate, but the whole estate to Mrs. Raines for life, and after her death to her children. The case of the plaintiffs would not be helped by regarding the gift for the joint use of the wife and children. In *Wardle v. Clayton*, (16 Eng. Ch. R. 524,) a testator bequeathed his residuary estate to trustees, in trust, to pay the income to his wife for life, to be by her applied for the maintenance of herself and such children as he might leave at his death. The widow married again, and claimed the income for her separate use. *V. C.* Shadwell rejected the claim because she was not the sole object of bounty. It is natural and usual for a donor who is under parental obligation to the donee, to express as the motive of gift, that the donee may better support himself and those who are dependent upon him; and the expression of such motive cannot operate restrictively upon the gift.

The terms of gift or limitation in the present case create no definite trust. We have the word, but not the thing. A trust is an equitable title in property, distinct from the legal ownership thereof. But a gift to one

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in trust for himself—and a gift of *chattels to a wife is a gift to the husband—confers the whole estate, legal and equitable, upon the donee. Here no trust or confidence is reposed in the nominal trustee; no duty or obligation distinct from ownership is prescribed to her. Her legal and equitable interests are commensurate, and nothing is to be done by her legal representatives after her death for the protection of the rights of her children in remainder. The Chancellor was well justified by the precedents he cites in protecting the legal rights of the children in remainder, by requiring forthcoming bonds from the purchasers of the life estate; and no remedy more complete could be afforded to them, if we regarded their rights as equitable.

We approve the decisions of *Rice v. Burnett*, *Speers*, Eq. 579 [42 Am. Dec. 336], and *Iorr v. Hodges*, *Speers*, Eq. 593; but those cases recognize the merger of the legal and equitable estates where the trustee has no duty to perform.

The case of *Jones v. Fort*, 1 Rich. Eq. 50, so strongly pressed upon us in the argument, goes quite as far as we are willing to follow, but is distinguishable from the case in hand. There, certain slaves were given to the husband in trust for the joint use of himself and wife during her life, and at her death to be distributed among her children; and the trust was held to be effectual. But the husband was express trustee: the wife's right of

survivorship could only be protected by preventing the fusion of the legal and equitable estates; these estates were not commensurate. Chancellor Harper, in delivering the judgment, says: "As trustee, he (the husband) has an absolute estate in the property, or, as it is sometimes said, the fee; as cestui que trust he has only an estate for the joint lives of himself and wife. The legal estate is exclusively in him as trustee: he takes the equitable estate jointly with his wife."

It is ordered and decreed that so much of this case as relates to the slaves transferred by M. Boulware and R. Cathcart be remanded to the circuit Court to be heard and deter-

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mined anew; *and that the circuit decree be modified in this particular, and in other matters be affirmed.

JOHNSTON and DARGAN, CC., concurred.
Decree modified.

4 Rich. Eq. 408

GEORGE W. BOGGS and ISABELLA, His Wife, v. JOHN ADGER.

(Columbia. May Term, 1852.)

[*Guardian and Ward* ⚭39.]

In 1830 an administrator having in his hands funds of an infant, distributee of his intestate, invested the same in stock of the Bank of the United States: in 1835 a guardian was appointed for the infant, who received, from the administrator, the stock, in full of the infant's share, &c.: the Bank was in high credit until 1839, when the price of the stock sank suddenly and greatly in the market,—it finally became almost worthless;—*Held*, that the guardian was not liable for the depreciation in the value of the stock.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 170; Dec. Dig. ⚭39.]

[*Trusts* ⚭218.]

There is no rule in this State prescribing the securities on which trust funds shall be lent or invested: and where a trustee, in investing funds, acts faithfully and with common diligence and sagacity, he will not be liable if the funds be lost.

[Ed. Note.—Cited in *Sollée v. Croft*, 7 Rich. Eq. 46; *Moore v. Hood*, 9 Rich. Eq. 328, 70 Am. Dec. 210; *Snelling v. McCreary*, 14 Rich. Eq. 300; *Nance v. Nance*, 1 S. C. 221, 224; *Pope v. Mathews*, 18 S. C. 448.

For other cases, see *Trusts*, Cent. Dig. §§ 310-313; Dec. Dig. ⚭218.]

Before Wardlaw, Ch. at Fairfield, July, 1851.

William Adger, jun. died intestate in 1826, and his father, William Adger, sen., became his administrator. The estate was converted into money, and the administrator, having paid the plaintiff, Isabella, who, as widow of the intestate, was one of his distributees, her share in full, made a return to the ordinary, in June, 1830, in which he charged himself, on one side, with the share of William Law Adger, an infant son of the intestate and the

plaintiff Isabella, and a distributee of the intestate, and discharged himself, on the other side, with the purchase of a number of shares in the stock of the Bank of the United States, at \$120 a share.

The defendant was appointed by the Court of Equity, March 14, 1835, guardian of William Law Adger, and immediately after his appointment received from the administrator of William Adger, jun., the aforesaid

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shares in the stock of the Bank of the *United States, in full of his ward's interest in the estate of his father. This stock, for convenience of receiving dividends and making transfers, stood, at the time, in the name of James Adger, a merchant of Charleston of high reputation for experience, intelligence and probity; and so continued to stand until February 28, 1838, when James Adger, contemplating a trip to Europe, transferred the certificates to the defendant as guardian. James Adger testified, that soon after his appointment, defendant took the counsel of witness as to the policy of retaining for his ward the investment already made in the Bank of the United States, and of making further investments therein from accruing dividends, and other profits of the ward's estate; that witness highly recommended this stock as safe and profitable, but as the Bank of Charleston was about to go into operation, it was agreed that the defendant for his ward should subscribe for shares in that institution, and accordingly, on May 30, 1835, defendant sold out 30 shares in the Bank of the United States, at \$112.50, and subscribed for shares in the Bank of Charleston, but on the apportionment among the subscribers, from the extraordinary excess of subscriptions to the stock, received only 3 shares in the Bank of Charleston, as his allotment; and in October and November, 1835, under James Adger's counsel, he again bought 30 shares in the Bank of the United States, at \$108 and \$109.

The defendant in his first return as guardian, to the commissioner, made April 10, 1836, charged himself to his ward with 41½ shares in the stock of the Bank of the United States, and with 3 shares in the Bank of Charleston. In his subsequent annual returns, he charged himself with dividends, and discharged himself by the purchase of a few additional shares in the Bank of the United States, and other investments.

William Law Adger died June 11, 1842, aged about twenty years, intestate; and plaintiffs administered on his estate. This bill, which was for an account, was filed May 31, 1847.

Wardlaw, Ch. The question submitted to me, is whether defendant as guardian must

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be responsible to the representatives of *his ward, for the depreciation in value of the stock of the Bank of the United States, in

which a large portion of the ward's funds was invested. The defendant when appointed guardian, received such stock from the former trustee of his ward, and after an unsuccessful attempt to change the investment into stock of a Bank of the State, he continued the original investment; and the Bank of the United States became bankrupt, and the stock almost worthless.

Much denunciation was uttered, in the course of the case, against the Bank of the United States, as a foreign, political and speculating institution. The only question, in which we are concerned, is whether investment in the stock of this bank, and the maintenance of the investment, can be regarded as judicious operations, under the circumstances of this case. In England, trust funds are usually required to be invested in consols; but we have no rule prescribing the securities on which trust funds shall be lent or invested. A trustee, here, is required to act faithfully in the interests committed to him, but the general management is left to his discretion. It is well established by the copious evidence, that this bank was in high credit in this State, and its stock eagerly sought for investments by capitalists, trustees and bodies corporate, until the fall of 1839, when the price of the stock sank suddenly and greatly in the market. Long after this time the hope was entertained by astute and practical men, that the stockholders would be finally re-imbursed; and few persons acted upon the policy of selling out at the prices so suddenly reduced. The result has been the sacrifice of about three millions of capital to this State, falling even disproportionately, upon the prudent, and the circumspect. Some sagacious persons distrusted the bank long before its downfall, but they failed to infuse their suspicions into ordinary men of business.

The office of trustee is onerous in itself, and the exercise of it commonly demanded in the affairs of society; and to require from a trustee more than common sagacity and diligence, is against policy. In many of our

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cases, it has been laid down as a rule, *that a trustee is answerable for those losses only, which are occasioned by such acts or omissions, as a prudent man would not do or omit in his own affairs. *Taveau v. Ball*, 1 McC. Eq. 464; *Bryan v. Mulligan*, 2 Hill Eq. 364; *Glover v. Glover*, McMul. Eq. 153; *Odell v. Young*, Ib. 155. Upon this rule, the trustee in the present case must be excused from liability. He managed the funds of his ward as prudent men in the State managed their own affairs. In *Hext v. Porcher*, 1 Strob. Eq. 170, the liability of the trustee is placed generally upon his faithfulness; and it is justly remarked that the rule quoted above is subsidiary and illustrative. To the present defendant no intentional unfaithfulness is imputed in the discussion, nor could be im-

puted with any propriety according to the evidence. He has honestly endeavored to fulfil his duty. No negligence, no unusual mistake, has attended his management. I am of opinion, that the loss on the stock in the Bank of the United States must fall upon the estate of his ward.

It is ordered and decreed, that the commissioner of this Court take the account between the parties, upon the principles stated in this opinion; that the plaintiffs are entitled to charge the defendant with the funds received by defendant as guardian of Wm. L. Adger, on the settlement in 1835, with subsequent increment; and that defendant is entitled to be discharged as to his investment in the stock in the Bank of the United States, upon transferring the scrip, or paying its present value. Costs to be paid from the estate of William L. Adger.

The plaintiffs appealed and moved to modify the decree, on the ground:

That if the United States Bank stock, owned by Wm. Adger, sen., had been lawfully transferred, the defendant, as guardian, ought not to have received it in payment of the shares of his ward, William Law Adger, in his father's estate, and ought not to have continued said funds in said bank, or to have re-invested the profits therein; and after the charter of the Bank of the United States had expired, March 1, 1836, defendant was espe-

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cially at *fault in re-investing his ward's funds in the Pennsylvania Bank, called the United States Bank of Pennsylvania, and further in continuing the funds in said bank.

Boyce, for appellants.

Boylston, contra. The Court of Equity has always treated trustees, acting in good faith, with great tenderness. In *Knight v. The Earl of Plymouth*, a receiver had deposited money with a banker of good credit, who afterwards failed, and as he was not chargeable with any willful default or fraud, he was not held responsible for the loss of it. "Suppose," said Lord Hardwicke, "a trustee having in his hands a considerable sum of money, places it out, for the benefit of the cestui que trust, in the funds, which afterwards sink in their value, or on a security at the time perfectly good, and which afterwards turns out not to be so, was there ever an instance of the trustee's being made to answer for the actual sum so placed out? I answer, no! If there was no mala fides, nothing wilful in the conduct of the trustee, the Court will always favor him. For as a trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety, it is an act of great kindness in any one to accept of it. To add hazard or risk to that trouble, and to subject a trustee to losses which he could not

foresee, would be a manifest hardship, and would be deterring every one from accepting so necessary an office." *Dick*, 120; *S. C.* 3 *Atk.* 480. The same rule was followed in *Rowth v. Howell*, 3 *Ves.* 565. In *Wilkinson v. Stafford*, 1 *Ves. jun.* 41, Lord Thurlow held, that a trustee was not answerable for having applied the trust property, even to what turned out to be a losing adventure, if without fraud or negligence. Though an executor or trustee may be liable for negligence, it must, as Lord Keeper North observes, be very supreme negligence, 1 *Vern.* 144; it must be crassa negligentia, or gross negligence, 1 *Madd. R.* 290. When a trustee acts by other hands, either from necessity or conformably to the common usage of mankind, he is not to be made answerable for losses, *Amb.* 219. The following authorities

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*were also cited and commented upon: 2 *Story Eq. §* 1272; *Taveau v. Ball*, 1 *McC.* Ch. 464; *Bryan v. Mulligan*, 2 *Hill Ch.* 364; *Glover v. Glover*, *McC.* *Eq.* 153; *Odell v. Young*, *Ib.* 155; *Hext v. Porcher*, 1 *Strob. Eq.* 170; *The Vestry, &c., of Prince George Winyaw v. The Prot. Epis. Soc., &c., MS.* Charleston, January, 1849.

Dargan, same side, was stopped by the Court.

Buchanan, in reply.

PER CURIAM. This Court perceives no error in the decree appealed from. It is therefore ordered, that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.
Appeal dismissed.

4 Rich. Eq. 413

ANN V. HICKS v. THOMAS E. B. PEGUES et al.

(Columbia. May Term, 1852.)

[*Wills* ⇨ 634.]

Devise of property, real and personal, to C. B. in fee, "but if she should die without leaving issue living at her death" then over to W. V. in fee: W. V. died in the life time of C. B., and she then died without issue: *Held*, that W. V.'s estate in expectancy, both in the real and personal property, passed at his death to his heirs then existing, and that they and their representatives were entitled to distribution of the property when the expectancy fell in; and that the heirs of W. V. existing at the time the expectancy fell in were not exclusively entitled.

[*Ed. Note.*—Cited in *Varn v. Varn*, 32 *S. C.* 79, 10 *S. E.* 829.

For other cases, see *Wills*, *Cent. Dig. §* 1497; *Dec. Dig.* ⇨ 634.]

[*Descent and Distribution* ⇨ 17.]

Under the Act of distributions of this State, actual seisin is not necessary to enable one, having a present title to an estate, to become the stock or root of inheritance: contingent remainders and executory devises are, by that Act,

distributable among the heirs existing at the death of the person entitled to the estate in expectancy, and not among his heirs existing when the expectancy falls in.

[Ed. Note.—Cited in *Evans v. Godbold*, 6 Rich. Eq. 38; *Glover v. Adams*, 11 Rich. Eq. 267; *Blount v. Walker*, 31 S. C. 30, 9 S. E. 804.

For other cases, see: *Descent and Distribution*, Cent. Dig. § 51; Dec. Dig. ¶17.]

Before Wardlaw, Ch., at Marlboro', February, 1851.

The only question in this case arose upon the following clause in the will of Malachi N. Bedgegood:

"I give, devise, and bequeath unto my wife,

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Catharine Bedge*good, a negro man slave, named Primus, and the one-half of the remaining part of all my real and personal estate, which has not herein before been disposed of, to her and her heirs, provided she shall live single until, or should marry and leave lawful issue living at her death; but in case she should marry, and die without leaving lawful issue living at her death, I then give, bequeath, and devise the same to her for life, and no longer; and after her decease, I give, devise, and bequeath the same unto my nephew, William Vernon, and his heirs."

Catharine Bedgegood married, and died, leaving no issue. Williams Vernon died many years previously, intestate, leaving the complainant, an aunt of the whole blood, and Mary Elizabeth Hamer, an aunt of the half blood, surviving him, they being his nearest relations at the time of his death. Mary Elizabeth Hamer afterwards intermarried with one Charles Gee, and died before Catharine Bedgegood, leaving her husband and several children her surviving. The complainant in her bill claimed all the interest of William Vernon, under the foregoing clause in Malachi N. Bedgegood's will, in exclusion of the husband and children of Mary E. Hamer, on the ground, that she was the nearest relation to Vernon, at the time of the happening of the contingency upon which his interest was to vest. The defendants insisted in their answer, that Mary E. Hamer, being alive at the death of William Vernon, acquired thereby a right to one-half of the interest aforesaid, which, on her death, was transmitted to her heirs at law.

The presiding Chancellor being of opinion, that the distributees of Vernon, existing at the time of his death, were entitled to the benefit of the limitation to him, and that the complainant, who stood in the nearest relation to him at the time of the expectancy falling in, was not exclusively entitled, it was decreed that a writ of partition do issue, to allot to the complainant one-half of the interest of the said William Vernon in the real and personal estate, instead of the whole, as claimed by her bill.

The complainant appealed, on the ground,

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that being nearest *of kindred to William Vernon at the time of the expectancy falling in, she is exclusively entitled to the benefit of the limitation to him.

Dudley, Johnson, for appellant.
Inglis, contra.

Curia per JOHNSTON, Ch. Being directed by my brethren to announce the affirmation of the circuit decree, and to offer the reasons for this decision, I cannot express them better than by referring to the opinion I lately delivered in the Circuit Court of Charleston, in the case of Buist & Dawes (*a*)

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upon the same *point; a copy of which accompanies this opinion. That decision was

(*a*) GEORGE BUIST, Adm'r., v. H. P. DAWES et al.

[Wills ¶506.]

[Cited in *Evans v. Godbold*, 6 Rich. Eq. 38, to the point that heirs of the same person may be different individuals at different epochs.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1090; Dec. Dig. ¶506.]

[This case is also cited in *Blount v. Walker*, 31 S. C. 30, note, 9 S. E. 804, and distinguished therefrom.]

This cause was heard in the Circuit Court of Charleston, in February, 1852, by Johnston, Ch., upon the following case stated, and questions submitted, by counsel.

Edward Tonge devised his real and personal estate to his wife, during widowhood, with remainder, in case of her death, or marriage, to his mother, for life,—remainder to James Boone Perry for life, i. e. "the use thereof for life, and at his decease the said lands, slaves and premises shall be and is hereby vested in the male issue of the said James, (and in default of such in the issue female) surviving him; and if a general failure shall be at the death of the said James, I give said land and slaves to my cousin, John W. Sommers, on the same terms, conditions, limitations and reservations as this is made liable to, in respect to James's interest therein, in pursuance of this my will; and should there be a total failure of issue (immediate) on the decease of the said John W. Sommers, I give the said land and slaves, and the issue and increase of the female slaves to his (the said J. W. S.'s) brother, James D. Sommers, his heirs and assigns forever."

The widow married again; and testator's mother succeeded to her life estate; and James Boone Perry having died without issue, in her life time, at her death the estate passed into the possession of John W. Sommers.

James D. Sommers died in the life time of James Boone Perry and John W. Sommers, intestate and without issue.

John W. Sommers died in January, 1848, without issue, leaving a will.

At the death of James D. Sommers, his heirs at law, or distributees, were his sisters, Mary Buist and Henrietta Rowand, and his brother, John W. Sommers, all deceased.

At the death of John W. Sommers, the heirs at law, or distributees of James D. Sommers, or persons then answering that description, were and are, his nieces and nephews, Mary S. Lamb,

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(wife of Jas. Lamb.) *Martha Buist, George Buist, Rev. Ed. T. Buist, Robert Rowand, Mar-

acquiesced in by the eminent counsel concerned.

It is ordered that the decree be affirmed, and the appeal dismissed.

DUNKIN, DARGAN and WARDLAW, CC, concurred.

Appeal dismissed.

tha S. Drayton, (wife of Alfred R. Drayton,) and Mary E. Simons, (wife of Dr. Thos. Y. Simons.)

At June Term, 1848, Chancellor Dargan held that the ulterior limitations of Edward Tonge's will were valid as to the personal estate; and that James D. Sommers took a contingent interest in the same that was transmissible to his personal representative; and that, at the death of John W. Sommers without issue living, the said personal estate was distributable among them, and that those persons (parties to the bill) were to be regarded as the distributees of J. D. Sommers, who would fall within that description at the period of his death, and his or her or their legal representatives.

As to the real estate he held, that the terms of the devise created a fee conditional in James Boone Perry, and that, on his death without issue, the same reverted to the right heirs of testator, and he adjudged Ann Perry to be entitled to the same as the sole surviving heir of Edward Tonge; and he ordered that each party pay his own costs.

From this decision there was an appeal, on the following among other grounds:

That the real estate of Edward Tonge is, by his will, well devised over, on the deaths of James Boone Perry and John W. Sommers, without leaving issue, to James D. Sommers in fee.

That both the real and personal estate of testator, on the death of John W. Sommers without issue, passed, under testator's will, to Jas. D. Sommers, and are distributable among the persons answering the description of heirs or distributees of James, at the death of John, and not among those answering that description at the death of James, as decreed by the Chancellor, in relation to the personalty.

That the decree as to each party paying his own costs should be modified, several of the defendants being minors, one having filed a disclaimer, and several others having been made parties only to quiet the title to the property.

The Equity Court of Appeals, at January Term, 1849, affirmed Ch. Dargan's decree as to the personalty, but referred to the Court of Errors the construction of the will as to the real estate, and as to what estate James Boone Perry took therein under the said will, whether he took a fee conditional therein, and, if so,

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whether there *could be a limitation thereon, by way of executory devise, to John W. Sommers, and if he died without issue to James D. Sommers(b).

The Court of Errors, at January Term, 1852, merely decided that James Boone Perry did not take a fee conditional in the real estate.

The following questions remain for adjudication.

1. Whether the limitation over of the real estate in fee to James D. Sommers, on the death of John, without issue living, is valid?

2. Whether if said limitation over be good, the said real estate is to be distributed among the heirs of James, at the death of James, or the heirs of James at the death of John.

Yeadon. The English rule is clear. 3 Cruise, 412, Tit. Descent; Fearne, 561, note a; 2 Wilson, 29, Goodright v. Searle; 2 Hill, Ch. 550,

Wilson v. Freer. The Act of 1791, (5 Stat. 163,) has not altered this rule.

There is no express rule of English descents, except in the special cases where estates were to be distributed.

Hayne, contra. J. D. Sommers takes a fee. It is contingent, but it is in a person designated. It is real estate; and transmissible, assignable, inheritable. 2 Mill, 94, McDonald v. McMullan; 2 Saund. R. 388, note, Purefoy v. Rogers. He might devise or release it. By the 2d section of the Act personalty shall be distributed as realty is. 1 Hill, Ch. 268, Adams v. Chaplin; 2 id. 247, Deas v. Horry; id. 416, Edwards v. Barksdale; 2 Tuck. Bl. Append. 14, 16.

Memminger, same side. Devisable and distributable are, under our Acts, counterparts. Whatever can be devised, if not devised, is distributed.

Petigru, in reply. The Act of 1791 has not abolished the pre-existing rule. It does not destroy the distinction between realty and personalty in the following particulars: 1. The real does not go to the administrator: Aliter as to personalty. 2. Descent is still the law of real; the personal is merely transmissible. 3. Alienage and citizenship still affect descent of real. 4. The order of liability for debts is not altered. 5. The statute does not abolish the difference in construction of deeds of real and personal.

Descent—connexion of blood. Seabrook v. Seabrook, McM. Eq. 201, Act 1791, § 7 and § 9. The Act of 1791 relates to vested estates, and in that view the rule is as stated by Fearne, 559; Chancy v. Graydon, 2 Atk. 616. The estate to James's heirs is to arise only on John W. S's. death.

JOHNSTON, Ch. With much hesitation as to the propriety of taking cognizance of the questions submitted to me in this case, I have, at the urgent request of both parties, consented to hear them. My apprehension is, that those questions are properly before the Court of Errors as part of "the construction of this will as

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to the real estate," or *remain in the Court of Appeals in Equity, to be determined upon the return of the judgment of the Court of Errors.

The first question is free from difficulty. I understand the Court of Errors to have decided, that the estates of James B. Perry and John W. Sommers, and their issue,—preceding the limitation over to James D. Sommers,—are not fees conditional. Unless they are fees conditional, they must be either fee simple estates in James B. Perry and John W. Sommers, successively, or estates for life to them, with remainder to their issue in fee. In either case, the limitation over is after a fee simple, and is good, as an executory devise; for all the authorities agree that an executory devise may be limited after an estate of that character.

The second question is more difficult. James D. Sommers, to whom the estate was limited over in fee, died before the expiration of the prior estates; and the question is, whether the fee, which was limited over to him, is distributable among the heirs left by him and existing at his death, or among the heirs existing when the prior estates failed or expired.

It is tolerably plain how this question would have been decided in England.

"The rules," says Cruise,(c) "laid down in the preceding chapter respecting the descent of estates in possession do not apply to the descent of estates in remainder and reversion, expectant on an estate of freehold: because, where there is a preceding estate of freehold, the actual seisin is in the possessor of that estate, not in the person entitled to the estate in remainder or reversion. It follows, from this principle, that where a person entitled to an estate in remainder or

(b) See the case reported [Buist v. Dawes] 4 Strob. Eq. 37.

(c) 3 Cruise, Tit. 29, Descent. Ch. IV. Sec. 1.

reversion, expectant on a freehold estate, dies during the continuance of the particular estate, the remainder or reversion does not descend to his heir; because he never had a seisin to render him the stock or root of an inheritance; but it will descend to the person who is heir to the first purchaser of such remainder or reversion, at the time when it comes into possession."

Upon the same footing stand executory devises, which are not regarded as mere possibilities, but as resembling contingent remainders, in respect to the transmissibility of the interest.^(d)

But our statute of 1791 (5 Stat. 162) provides, that "where any person possessed of, interested in, or entitled unto, a real estate in his or her own right in fee simple, shall die, without disposing thereof by will, the same shall be distributed in the following manner," &c.—among persons left by the decedent, and described in the eleven sections of the 1st clause.

Chancellor Harper, in the case of *Adams v. Chaplin* (1 Hill, Eq. 269) remarks on this statute, that "it has so far altered the English law that actual seisin is no longer necessary to enable one who has a present title to an estate, to become the stock, or root, of inheritance."

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It provides for *distribution "where any person possessed of, interested in or entitled to a real estate, in his own right in fee simple" shall die intestate. "This, I suppose," says he, "would be held to apply to a reversion, or remainder, after an estate for life, or an estate tail, (if such were allowed in this country,) because such remainder or reversion is an estate of fee simple." He held, however, in the particular case before him, which related to a mere right of reverter after a fee conditional, that it was not affected by the statute, but must go as at common law; because, according to the authorities, it was no estate in the land, but a mere possibility.

Estates, such as this of James D. Sommers, although contingent, are nevertheless coupled with such an interest as to render them distributable under the Act of 1791.

"It seems now to be established," says the note to *Purefoy v. Rogers*, (2 Saund. R. 388, k,) "notwithstanding some old opinions to the contrary that contingent and executory estates and possibilities, accompanied with an interest are descendible to the heir, or transmissible to the representative of a person dying; or may be granted, assigned, or devised by him, before the contingency upon which they depend, takes effect;" and reference is made to *Willes's, Rep.* 211, *Goodtitle v. Wood*; 2 *Burrows*, 1131, *Selwin v. Selwin*; *S. C. Black. Rep.* 251; 2 *Wilson*, 29, *Goodright v. Searle*; 1 *Black. Rep.* 605, *Roe v. Griffiths*; *Moor v. Hawkins*, before Lord Northington, cited in 1 *Hen. Black.* 30, *Roe v. Jones*; and 3 *Term Rep.* 88, where *Roe v. Jones* was affirmed in *K. B.* on error; *Cas. Temp. Talbot*, 117, *King v. Withers*.

Cheves, Justice, in *McDonald v. McMullen*, (2 Mill, 94,) speaking of a limitation over to a specified person, who died before the contingency on which he was entitled to the possession, says: "It was argued that it was not a vested interest; and that, therefore, it was not transmissible. It is, perhaps, not a vested interest in the technical sense of that word. It is frequently called a possibility only. But it is nevertheless, vested in such manner as to be transmissible, and according to the later authorities transmissible by will. (*Fearne on Ex. devis.* 4th Edit. 522, 523; *Cas. Temp. Talb.* 123, *King v. Withers*; *Toml.* 205.) It is only necessary that the person to take should be ascertained and certain to make such an interest transmissible, (*Fearne*, 4th Edit. 542, 546). The point is very clear."

(d) *Goodright v. Searle*, 2 *Wils.* 29; *McDonald v. McMullen*, 2 *Mill*, 94.

If, under the English statute of wills such an interest is the subject of devise, much more is it so under our statute. The English statute enables those only to devise, "who have manors, lands, tenements, or hereditaments;" whereas our Act enables those who have lands, tenements, &c., "in possession, reversion, or remainder."^(e)

Now, our statute of distributions, in substance, proposes to distribute estates in default of their being "disposed of by will." If not disposed of by will, they shall be distributed according to that Act, which may be regarded as

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testamentum legis. It is conceded that *James D. Sommers might have devised his interests now under consideration; which is very near equal to admitting that, in default of a will on his part, those interests descended, immediately upon his death, to such distributees as he then left.

I am of opinion they did thus descend. Not that they became transmissible, and shifted from heir to heir, until the estate fell in, as in England; but that the right passed upon his death, and fixed eo instanti in his distributees, only to await a future enjoyment.

The only obstacle to an immediate descent from ancestor to heir in England in such cases was the want of seisin in the ancestor. But our statute of 1791, while it enlarges the class who are to take, effectually removes that obstacle by rendering seisin unnecessary to the inheritance.

There is a consideration, of great force, leading to this conclusion, which I have not yet mentioned: and it is that the statute, by its second clause, declares that "the personal estates of intestates shall be distributed in the same manner as their real estates are disposed of by this Act."^(f)

Now, in this case, the personal estate has been adjudged to the distributees living at the death of James D. Sommers: and it would establish a very unnecessary anomaly, if the real estate should be distributed differently.

I do not intend to say, that all distinctions between real and personal intestate estate, have been abolished by the statute. Very far from it. It is perfectly true, as has been argued, that the real goes immediately to the distributees, and the personal to the administrator. But the distribution of both is the same. The law makes them both liable for debts, and the personalty liable in the first instance; but that impediment removed, the same persons succeed to the enjoyment of the property.

It is true, also, that alienage is a disqualification to the right to distribution in the case of real estate, and not in that of personal; but that is a distinction introduced upon grounds of public policy, and does not affect the question before us. Alienage would operate as a disqualification to any particular heir, whether the inheritance be adjudged to the heirs existing at James D. Sommers's death, or at the falling in of the estate. The question before us is, which class of these heirs is to take, leaving the particular disqualifications of the several heirs entirely out of the decision, and for a separate consideration.

Another distinction between real and personal property has not been abolished by the statute of 1791: the difference of construction of deeds—or other instruments by which they are to be conveyed or assigned. This is true, as has been insisted. But what bearing has that upon the question of inheritance?

My judgment is, that the inheritance fell upon the distributees left by James D. Sommers at his death; and let the decree be drawn accordingly.

(e) *P. L.* 138.

(f) 5 *Stat.* 163.

IN THE COURT OF ERRORS

CHARLESTON—JANUARY, 1852

ALL THE JUDGES AND CHANCELLORS PRESENT.

4 Rich. Eq. *421

*GEORGE BULST, Adm'r. v. HUGH P. DAWES et alio

(Charleston. Jan. Term. 1852.)

[Wills ⚡603.]

Devise of "the use" of lands "to J. P. for life; and, at his decease, the said lands shall be, and is hereby declared to be, vested in the male issue of the said J. P., and in default of such, in the issue female surviving him; and if a general failure should be at the decease of the said J. P.," then, over:—*Held*, that J. P. did not take a fee conditional in the lands.

[Ed. Note.—Cited in *McCorkle v. Black*, 7 Rich. Eq. 410, 419; *Powers v. Bullwinkle*, 33 S. C. 300, 11 S. E. 971; *Selman v. Robertson*, 46 S. C. 269, 24 S. E. 187; *Du Pont v. Du Bos*, 52 S. C. 261, 29 S. E. 665; *Owings v. Hunt*, 53 S. C. 196, 31 S. E. 237; *Harkey v. Neville*, 70 S. C. 133, 49 S. E. 218.

For other cases, see Wills, Cent. Dig. § 1354; Dec. Dig. ⚡603.]

Upon the questions referred by the Equity Court of Appeals to this Court, (see 4 Strob. Eq. 37, 57-8.) the cause was now heard.

Yeadon, for appellants, on the first question said, the intention of the testator, if it be consistent with law, should always prevail. That the testator, here, intended to give James Boone Perry an estate for life only, is clear; and if he is held to take a fee conditional, it must be by implication—an implication which defeats the manifest intention. In England an estate tail will be implied, but that implication is always made in aid of and to carry out the intention—never to defeat it. In this State a fee conditional should never be implied, for such implication can never be made in aid of the intention. Its effect always is to defeat the intention. He cited and commented on *Scanlan v. Porter*, 1 Bail. 429; 3 Strob. Eq. 223; *Bodon v. Bedon*, 2 Bail. 231;

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Forth v. Chapman, 1 P. Wms. 666; *Sheffield v. Lord Orrery*, 3 Atk. 288; *Fonnereau v. Fonnereau*, 3 Atk. 318; 2 Ves. sen. 181; *Dodson v. Grew*, 2 Wils. 324; *Edwards v.*

Barksdale, 2 Hill, Ch. 284; *Smith v. Hilliard*, 3 Strob. Eq. 211; *Fearne*, 376. On the second question, he admitted that an executory devise could not be limited to take effect after the natural efflux of a fee conditional. For instance, if an estate be given to A. and the heirs of his body, and if at any time the heirs of the body of A. should become extinct, then to B. in fee, such an executory devise to B. would be void. But he saw no reason why an executory devise could not be limited to take effect in destruction or defeasance of a fee conditional. Suppose an estate given to A. and the heirs of his body, but if A. should die without leaving a son living at the time of his death, then to B. and his heirs.—would not the devise to B. be good? If the gift to A. were to him and his heirs, so as to make his estate a fee simple, then no one would question the validity of the limitation to B.; and no sufficient reason could be found for making a distinction between the two cases.

Memminger, contra, cited *Jesson v. Wright*, 1 Bligh, 1; and contended, first, that the estate devised to James Boone Perry was a fee conditional. Under the statute of uses to give one the use for life is to give him the land itself. By the terms of the will James Boone Perry took an estate for life. Then follows the gift to his issue. The intention clearly was to create a limitation to the issue; but the rule in *Shelley's case* comes in and declares that the issue shall take as heirs. *Fearne*, 28, 193; *Broadhurst v. Morris*, 2 B. & Ad. 1; *King v. Milling*, 1 Vent. 225; 2 Jarm. on Wills, 337, 399; *Robinson v. Robinson*, 1 Bur. 38; *Robinson v. Hicks*, 3 Bro. P. C. 180; *Hull v. Hull*, 2 Strob. Eq. 190; *Jackson v. Robins*, 16 Johns. R. 537. Secondly, that the limitation over to John W. Sommers was void, and cited *Blesard v. Shupson*, 42 Eng. C. L. R. 483; *Mary Portington's case*, 10 Coke, 42; *Fearne*, 514.

Petigru, in reply. The estate given to

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James Boone Perry *was for life only. 2 Bl. Com. 114; *Rutledge v. Rutledge*, Dud.

(a) [See dissenting opinion of Chancellor Wardlaw, post, 496.]

201. Unless issue was used by the testator in the sense of heirs, the rule in Shelley's case does not apply; and it is clear that he did not use it in that sense. On the second question he cited *Fearne*, 295; *Porter v. Bradley*, 3 T. R. 146; *Pitts v. Brown*, Cro. Jac. 590.

The opinion of the Court was delivered by

O'NEALL, J. Of the two questions, sent up to this Court by the Court of Appeals in Equity, only one will be considered, viz: Did James Boone Perry take a fee conditional? For a majority of the Court having come to the conclusion, that he did not, it is unnecessary to consider the other question, whether a good executory devise can be limited on a fee conditional?

As far back as 1831, in the case of *Bedon v. Bedon*, (2 Bail. 246,) I stated my repugnance to the raising of an estate in fee conditional, by implication. The same was repeated in 1833, in *Adams v. Chaplin*, (1 Hill, Eq. 282): and, in *Edwards v. Barksdale*, (2 Hill, Eq. 198,) in 1835, with the assent of my brother, Judge Johnson, (thus constituting a majority of the Court of Appeals,) I laid it down, that a fee conditional could not arise by implication, and if that Court had not been broken up in 1836, no question would have ever again arisen, about a fee conditional, on any other words than on a direct gift to A. and the heirs of his body, general or special.

The dissolution of that Court led to the re-agitation of many questions, which it had, with great labour and much care, sifted, examined, and, as was then supposed, settled.

The question of raising an estate of fee conditional, by implication from such words as in England would create a fee tail, was, as might be expected from Judge Harper's opinion being at variance with those of Johnson and O'Neill, the other members of the Court, soon again brought under discussion, in the tribunal, of which he was a member and an ornament, the Court of Appeals in Equity. But it received no adjudication,

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which gave it *the force of law, in that Court. It is true, in *Whitworth v. Stuckey*, (1 Rich. Eq. 404,) he reiterated the opinion which he had expressed in *Edwards v. Barksdale*, *Adams v. Chaplin*, and which, as counsel in *Bedon v. Bedon*, he had maintained before he went on the Bench, that a devise to A. for life, and if he should die without lawful issue, living at the time of his death, then over, was a fee conditional in A., and that the executory devise was void. It will be seen, however, on reading that case, that this was merely the statement of his own views, and that the decision rested upon the fact, that the purchaser of the estate, at whose instance the bill,

quia timet, was filed, was in possession, and had a good marketable title, and had, therefore, no ground of complaint, as was subsequently decided in *Vanlew v. Parr*, (2 Rich. Eq. 321.) In *McLure v. Young*, (3 Rich. Eq. 559,) the same subject was agitated, and Chancellor Johnston having held on the circuit, that a devise to C. D. for and during her natural life, and at her death to her "lineal descendants," and in the event of her dying without lineal descendants, to two of her brothers and one sister, was a fee conditional in C. D., and that her husband had an estate by the curtesy, (she having had issue, who survived her,) which exempted him from an account for rent after her death: the case, on a division in the Court of Appeals in Equity, found its way into the Court of Errors, and that Court at May term, 1851, held that C. D. did not take a fee conditional, and that her son ("the lineal descendant") took the estate, after her death, as a purchaser; and, therefore, that her husband could have no estate by the curtesy. The opinion, in that case, was delivered by Chancellor Dunkin, and certainly, both by its words and authority, goes very far to deny the doctrine, that an estate of fee conditional is ever to be implied in this State.

This glance at the previous cases decided, would, even without the case of *Williams v. Caston*, (1 Strob. 130,) leave us unfettered by decisions, as to the necessity of construing words, which in England would be held to be a fee tail, to be here a fee conditional. That case is a strong authority, in favor of

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rejecting any *such artificial rule, and places the argument, in that behalf, very much in advance of anything to be claimed, on the other side.

The whole reasoning (with due deference I speak it) seems to me to be false, which contends for an artificial rule to subvert the intention of the testator. In general a man has the right to dispose of his property as he pleases. He, in this respect, constitutes the law by which it is to be regulated. As only one member, however, of the body politic, it is his duty to make his disposition conform to the law. Hence he cannot, in a devise, create a perpetuity. For this is against the settled policy, and rules of the common law. But, with this exception, I know of no other control, which can rightfully be said to attach to a disposition by devise, in relation to the devisees, and the period at which they may succeed to the enjoyment of it. In England, the rule in Shelley's case, as it is called, has been made the means of recasting estates, so as more effectually to carry out the intention of the testator. That rule means no more, than that the words heirs and heirs of the body "are never words of purchase, and where a devise is to them, as they can only take by descent,

the whole estate must be in the ancestor." Fearne on Rem. 28, note c. By an easy transition, this rule was made, in England, to cover another class of cases, as when the devise was to A. for his life, and after his death to his issue, and then over. This was adjudged to be a descendible estate, and by the rule in Shelley's case, the whole estate was in the first taker for life, and then in his issue as tenants in tail, with remainder over. This was all very well in England, both to support their aristocratic institutions, and also to carry out the intention of the testator. Here, however, where the statute de donis never was of force, if we adopt the same artificial rule of construction, we have to apply the rule in Shelley's case to such a case, as that supposed, and make the estate a fee conditional to descend per formam doni, with the power in the tenant in fee conditional to aliene and incumber, and thus to defeat the descent, and in the very creation of the estate, to prevent the remainder over; and most probably even

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an executory *devise over, from having effect on account of its remoteness, when attached to such an estate. The case of Izard v. Izard, (Bail. Eq. 228,) is a perfect illustration of the power of the tenant over the estate in fee conditional, both as to the power to aliene and also to incumber. Mazyck v. Vanderhorst, (Bail. Eq. 48,) is full to the point, that a remainder cannot be limited on a fee conditional, and, also, that an executory devise over is, on account of its remoteness, void. If a devise to A. for life, and to his issue living at his death, and, failing such, then, over, would be adjudged a fee conditional, who would take the estate as heirs of the body? The descent is per formam doni and at common law. Our statute of distributions would not, possibly, help such a case. Would it not be a startling result, if the eldest son, as the heir, should take the whole? These consequences, whether certain or only possible, certainly are enough to make us refuse to adopt any artificial rule which so signally defeats and over-rides the intention. But it is said, we are bound to adopt it, because it is a part of the common law. I deny that it is so. For the purposes of cases like this, it is a rule adopted in England to break down the otherwise certain force of the statute de donis to perpetuate estates. Here, where the statute de donis never existed, how can it be pretended that it is a part of our common law? We only adopted it, (the common law,) so far as it comported with our situation, and institutions. In this State, since the Act of 1824, we have no necessity to appeal to the rule in Shelley's case. For unless the devise cuts the estate down to less than a fee, it is to be so regarded. There is, therefore, no artificial rule, which compels us to give a construction, against the plain meaning, to the words of the testator.

What is a fee conditional? It is such an

estate, as is to descend indefinitely, in the line of the first taker. To decide what is the estate of James Boone Perry we must see, whether the devise to him can have this effect. The words are a plain devise to him for life, and at his death the estate is to be vested in his issue male, and in default of such to his issue female surviving him, and if a general failure should be, at the decease

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of the said James, *then to his cousin John Withingham Sommers, with like limitations, and if there should be a total failure of issue, immediate on the decease of the said John Withingham, then over to James Sommers, his heirs and assigns forever.

It seems to me, that if this were adjudged to be a fee conditional, it would be subversive of every rule regulating executory devises. But before we examine it in this behalf, it would be well to test it by rules especially applicable to fees conditional. If it be a fee conditional, it is alternative, first in the male line, and, failing that at his death, in the female. How could such an estate have indefinite succession? If a son first took the estate and had a daughter, there would be an end of it in that way. For if there were also a daughter and she had a son, this would not help the matter. For, says Blackstone, (2 Com. 114,) "in case of an entail male, the heirs female shall never inherit nor any derived from them, and e converso, the heirs male, in the case of a gift in tail female." Such consequences would be enough to prevent any implication.

Mr. Fearne (on Rem. 418) tells us that an executory devise cannot be prevented, or destroyed, by any alteration whatsoever in the estate out of which, or after which, it is limited. If James Boone Perry's estate be a fee conditional, he could have aliened or encumbered it on the birth of issue, so as to defeat utterly the executory devise over, on his dying without leaving issue him surviving. Such a consequence is enough, one would think, to startle the boldest in applying an artificial rule. Indeed, it is plain, that such a result shows that the whole is an estate to James Boone Perry for life, with a good remainder to his issue, male or female, living at his death, and which words are synonymous here, with children or grandchildren, and who consequently take as purchasers, and with a good executory devise over to persons in esse. The rule very plainly is, where the estate is to one for life and to go over, in the event of dying without issue, which must take effect in the compass of twenty-one years after a life or lives in being, that the executory devise is good.

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(Fearne on Rem. *470.) In this case there is no doubt about the period—the whole is limited to the death of the first taker, then the issue were to take, then if there were no issue, the executory devise over took effect. The

term "issue" when found in a devise has no such technical meaning, as compels us, *ex vi termini*, to hold it a word of limitation, and not a word of purchase. For Mr. Fearne (on Rem. 106) tells us that "issue, in legal construction, is a word of purchase." In general whenever it is used, not as the turning point of a devise, and there is a direct gift, with such words as will tie up the meaning, so as to designate a class of children or grandchildren to take at the death of the first taker, it is a good word of purchase, and the devise is good. In this will the devise is to James Boone Perry expressly for life. There is no necessity to enlarge this estate. Indeed, I do not perceive how we can, since the Act of 1824. The words show that he was not to have a fee of any kind. It is said, by one of the Court, that a gift to A. and his issue, is a fee conditional without implication. I should be pleased to see that proved. Issue is not a word of descent; it is only by implying that the testator used it in the sense of "heirs of the body," that in England it is ruled to be enough to make an estate tail. The devise to the issue, male or female, is, in the clause of the will under consideration, peculiarly expressed; the estate at the death of James Boone Perry is declared to be "vested" in such issue. This is equivalent to a devise to the issue male and his heirs. For to be vested in him, it is necessary it should have just the effect of a devise to him and his heirs. In such a case, it is clear the words "issue male" are words of purchase. So, too, the words "surviving him" have necessarily the effect to make the terms "issue, male or female," words of purchase. For the issue, in whom the estate is to vest, must be alone those, who are found alive, at the death of the first taker, and hence are equivalent to children or grandchildren, which are always words of purchase.

But the limitation over is to a person in esse, and is to take effect at the death of the

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first taker. Beyond all doubt this is a *good executory devise. (Fearne on Rem. 468, et seq.) With all these matters clearly and fully ascertained in the devise, and thus fully sustaining every part of it, as estates created by devise, not repugnant to any known rule of law, how can we be called upon to apply an artificial rule, which is to overturn everything intended by the testator? I confess I should be slow even to yield to a known artificial rule having such an effect; but when I am called on to make it, I should feel I was doing more than the legislator would do, were I to yield to such a call. The only case to be found in the English books of an implied fee conditional is that of *Blesard v. Simpson*, 42 Eng. C. L. R. 483, and that was in copyhold. There, too, the implication defeated the executory devise over, and the testator's intention. That case has no binding effect on us. It is of an estate,

copyhold, of which we have nothing like in this State. It is a recent decision, and is, therefore, in no shape to affect us. In this State, as I have shown, we have nothing to bind us in the shape of authority to imply a fee conditional.

On the contrary the weight of our authority is against it. So, too, reason forbids its adoption. Most generally it would defeat the intention of testators, which it is our duty to carry out. So that I should never be disposed to make an estate in fee conditional by implication. Here, however, it is only necessary to say, on the words of the will, the devisee, James Boone Perry, took no such estate.

DUNKIN, Ch. and FROST, WITHERS and WHITNER, JJ. concurred.

WARDLAW, J. I join five members of the Court in saying, that under the devise in question, James Boone Perry did not take a fee conditional: and so there is a bare majority of the Court in favor of that result: but I do not maintain the leading positions which are assumed in the opinion that has been read by the President of the Court: indeed, to some of them I am earnestly opposed.

I have not time to write out my views;

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most of them are such *as are entertained by the larger portion of those members of the Court who dissent from the result, and on some points I may signify my acquiescence in the opinion which one of those members is expected to prepare.

I think that a devise to A. for life and at his death to his issue, creates a fee conditional, not by implication, but by express words.

The rule in *Shelley's case* I regard as a rule of property, wise in itself, long settled, and fully recognized by our own cases.

I can know the intention of a testator only from the words of his testament. Construction is proper to ascertain the meaning of those words, never to discover an intention outside of them. The testator's own definition, when he has given one, is decisive of the sense in which he used a word. Such definition may some times be found in the context, and some times may be supplied or aided by evidence concerning the condition of the testator, his family, his property, or other matters, which show the circumstances under which a word was used. But if there be nothing to show that words were used in a peculiar or extraordinary sense, I understand them in their ordinary sense, and give to technical words technical meaning, to technical phrases a technical effect.

A fair interpretation of the whole will, I think, shows that the devise was not, at the death of James Boone Perry, to his issue male, and in default of his issue male

to his issue female, in indefinite succession; but was, in fact, to that particular class of his lineal descendants that might be living at his death, the males to be preferred to the females of the class. The special individuals of issue thus indicated would, under our Act of 1824, have taken a fee simple.

I dissent from the intimation made by the President, that an executory devise, to take effect upon an event clearly within the prescribed time, may not be limited upon a fee conditional.

DARGAN, Ch., dissenting. The testator, Edward Tonge, devised and bequeathed his real and personal estate to his wife during widowhood, with remainder, in case of her

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death or marriage, to his mother, Susannah Tonge, during her life. He then, by way of remainder, gave to James Boone Perry the use thereof for life, "and at his decease the said land, slaves and premises shall be and is hereby vested in the male issue of the said James, and in default thereof, in the issue female surviving him: and if a general failure shall be at the death of the said James, I give said land and slaves to my cousin, John Withingham Sommers, on the same terms, conditions, limitations, and reservations as this is made liable to in respect to James's interest therein in pursuance of this my will, and should there be a total failure of issue (immediate) on the death of the said John Withingham Sommers, I give the said lands, slaves, and the issue of the female slaves, to his, the said John Withingham Sommers's brother, Jas. Sommers, his heirs and assigns forever."

The Court of Appeals in Equity referred two questions arising on the construction of this will to the Court of Errors:

1. What estate did James Boone Perry take in the lands devised to him by the will?
2. And if it should be ruled that he took a fee conditional, whether an executory devise could be limited upon such fee conditional?

A majority of this Court have held, that James Boone Perry took but a life estate in the lands: remainder to his own issue as purchasers; and, in default of such issue, remainder to John Withingham Sommers, &c. This decision rendered the other question referred unimportant in this particular case. It has, therefore, not been decided. The judgment of the majority differs so widely from what I humbly conceive to be the true construction of the will, that I feel constrained to express my dissent, and some of the grounds upon which my dissent is placed. I think I shall be able to show, that the decision, which has become at least the law of this case, is utterly at variance with all the precedents and authorities upon the subject.

I do not think it possible for any one to

rise from the study of the English cases, and English authorities of the very highest

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repute, without having adopted the conclusion, that in Westminster Hall, James Boone Perry would be considered as having taken a fee tail; a fee tail male in the first instance: and in default of male issue, a fee tail female. In order to present this question in a more striking and naked form, suppose James Boone Perry to have died, leaving issue (either male or female) surviving him, what estate would such issue have taken in England? Who can doubt that they would there have taken the estate by descent, and not as purchasers? If the issue of James Boone Perry (had he left such issue) would not have taken by descent, what becomes of the rule in Shelley's case? The rule is, "that when the ancestor by any gift or conveyance taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately to his heirs in fee, or in tail; the heirs are words of limitation of the estate, and not words of purchase." 1 Rep. 104. The rule is applied, where the words heirs or heirs of the body are used in a general sense, without such qualification as would restrict their meaning to a particular class or description of persons, other than those who would take under the canons of descent: or in the case of a fee conditional, other than those who would take as heirs of the body generally, or heirs male or female of the body. I have, in the circuit decree, given sufficient reasons why this rule, which is a rule of property, and not of construction, and which has existed as a principle of the common law for more than five hundred years, should not be violated or disregarded.

It is said that this is not a case falling within the operation of the rule; that a fee conditional cannot be implied; that the will gives the estate at the death of James Boone Perry, not to the heirs of his body, but to his issue, and that to construe the will, so as to make the estate a fee conditional, would be to create that estate by implication. I deny the correctness of every part of the foregoing propositions. I apprehend that the same rules of interpretation would apply to fees conditional, as exist in England in reference to estate's tail. "A devise

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to A. and his heirs male forever, (Baker v. Wall, 1 Lord Raym. 185.) or to A. for life, and after his death to his right heirs male forever, (Lord Ossulston's case, 3 Salk. 334.) has been held to confer an estate tail male: the addition of the word "male" as a qualification of "heirs" showing that a class of heirs less extensive than heirs general was intended. And the same construction obtains, where a devise to a person and his heirs (Slater v. Slater, 5 T. R. 335.) or

to a person simply without any words of limitation, (*Blaxton v. Stone*, 3 Mad. 123.) is followed by a devise over in case of his death without an heir male. It has even been decided that a devise to one et hæredibus suis legitime procreatis, creates an estate tail, though the addition merely describes a circumstance which is included in the definition of heir simply, an heir being ex justis nuptiis procreatus. Such was the doctrine of the early authorities, and it was recognized and followed in the more recent case of *Nanfan v. Legh*, 7 Taunt. 85,) where a devise to H. when he should attain twenty-one, "and to his heirs lawfully begotten forever, was held to make the devisee tenant in tail." 2 Jarm. on Wills, 232. In all these cases, and many others that might be cited, an estate tail was created by implication.

But in this case, no resort to implication is necessary. The will after the life estate to James Boone Perry, gives the property directly to his issue, and the word issue is a term equivalent to and convertible with "heirs of the body." "A devise to A. et semini suo, (Co. Lit. 96,) or to A. and his issue (*Nightingale v. Burrell*, 15 Pick. 104.) clearly creates an estate tail." 2 Jarm. on Wills, 236. That the word issue is equivalent to heirs of the body in questions like this, see *Broadhurst v. Morris*, 2 B. and Ad. 1; *Robinson v. Robinson*, 1 Burr. 38; *Dodson v. Grew*, 2 Wils. 322; *Edwards v. Barksdale*, 2 Hill. Eq. 196; *Whitworth v. Stuckey*, 1 Rich. Eq. 404; *Hull v. Hull*, 2 Strob. Eq. 174.

The fee conditional was an estate, which existed from the earliest periods of the English Common Law. It was originally what it was afterwards made by the statute de donis conditionalibus, incapable of alienation from

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the course of descent marked out by the terms of the gift or conveyance. But it having been ruled by the Judges of England, that when the tenant in fee conditional had issue born alive capable of inheriting the estate, he had so far performed the condition upon which he held, as to enable him to alienate, or subject it to incumbrances, the great landed aristocracy found it necessary for the preservation of their hereditary rank, wealth and influence, to restore the law, (by the interposition of Parliament) to its ancient condition. The statute de donis conditionalibus was the consequence; a law, which, however it may be looked upon by republicans, is doubtless well adapted to the state of things existing in that country, and eminently conducive to the preservation of their social and political institutions.

It was upon the estate in fee conditional that the statute de donis operated. It modified the estate as it then existed and was construed. It preserved the estate for the benefit of the issue of the grantee, and the reversion for the benefit of the donor, de-

priving the grantee of the power of alienation, and prescribed that the heirs should take the estate per formam doni. Thus, whatever estate was a fee conditional at Common Law, became under the statute de donis a fee tail; and, e converso, what would be construed an estate tail in England, must be a fee conditional wherever the Common Law prevails without the statute de donis.

This statute has never been of force in South Carolina. But the Act of 1712, which adopted the Common Law (with certain exceptions) as a code or body of laws for this State, (then a province,) has been considered as making of force such parts of the Common Law as relate to the estate in fee conditional. The estate has been judicially recognized as existing in South Carolina, by repeated decisions. The principles of the Common Law, in relation to this estate, have been enforced as rules of property. Titles have been settled, and the devolution of landed estates has taken place to a great extent, in accordance with these principles. And whenever questions of this nature have arisen, the Courts

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*have always resorted to the ancient Common Law for the principles which were to govern their decisions. It is probable that the estate was recognized as existing in the earliest period of our history. For we find decisions to this effect in the first Law and Equity Reports that were ever published in South Carolina, in which the subject was treated as familiar, and the rules applicable well settled. In *Murrell v. Mathews*, decided in 1802, 2 Bays's Rep. 397, the testator, Robert Murrell, devised the land in dispute to the plaintiff, John Jonah Murrell, (who was his son,) "and the lawful heirs of his body;" but in case he, or the lawful heirs of his body should die, without lawful heirs, he devised the estate to his grand-son, Robert Huggins, and the lawful heirs of his body forever. John Jonah Murrell had lawful issue born alive; and during the life time of such issue, he alienated the land, in fee simple, to the defendant, Mathews. In this case, all the Judges were of the opinion that John Jonah Murrell took a fee conditional in the land, and that the birth of issue, and the alienation barred the remainder-man, and all claiming under him. The title of the defendant was held to be good; and judgment rendered against him on the bond, which was given for the purchase money.

In *Cruger v. Heyward*, 2 Des. Rep. 422, Col. Daniel Heyward devised his island, Callewashie, to his son, Benjamin, but in case he died "without lawful issue, to his, (the testator's) grand-son, Daniel Heyward, and his heirs forever." It was argued at the bar, and held by the Court, that Benjamin took a fee conditional. It was a fee conditional by implication, and one in which

the word issue was considered as equivalent to heirs of the body.

The next reported case is that of Jones ads. Postell and Potter, Harp. 92. It arose under the will of Thomas Snipes, who devised the land in question to his son, William Clay Snipes, "to him and the heirs of his body forever." The Court says, in delivering its judgment, "there can be but one opinion as to the character of the estate which William Clay Snipes took under the will of Thomas Snipes. The terms used, 'to him

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and the heirs *of his body forever,' are precisely those which Lord Coke, and, on his authority, Sir William Blackstone, define as creating at Common Law a qualified or conditional fee." It was further ruled, in that case, that the tenant in fee conditional, though he had issue born, could not by a devise prevent the estate from descending per formam doni; a rule which has been followed ever since.

From this period to the present time, our reports are full of cases of this complexion. The following are some of the published cases, in which the estate in fee conditional has been recognized: in some, incidentally, and, in others, directly, by judicial decisions affecting the rights of the parties. Carr v. Porter, 1 McC. Eq. 60; Henry v. Felder, 2 McC. Eq. 330; Mazyck v. Vanderhorst, Bail. Eq. 48; Izard v. Izard, Bail. Eq. 228; Bedon v. Bedon, 2 Bail. 231; Adams v. Chaplin, 1 Hill, Eq. 267. Deas v. Horry, 2 Hill, Eq. 244; Edwards v. Barksdale, 2 Hill, Eq. 184; Whitworth v. Stuckey, 1 Rich. Eq. 404; Hull v. Hull, 2 Strobl. Eq. 190; Hay v. Hay, 3 Rich. Eq. 384. Some of these cases will be referred to hereafter in a more particular manner. Besides the published cases, there are others that have not been reported. And there is a great multitude of circuit decisions in which the rights of parties have been affected, that have never been carried before the appellate tribunals, and consequently have not found their way into the books. So that the estate in fee conditional has struck root, deeply and broadly, in our system of law, as an institution of property. To do it violence now, by undermining, or by direct assault, to rob it of its just proportions, to deny it this or that attribute, or to withhold from it those ancient rules of construction by which the estate was ascertained, would be unwise and inconsistent. It would be setting every thing afloat (as to this subject) upon a wide sea of confusion and uncertainty. We do not affect to be wiser than our predecessors, and Courts above all other places should be and are distinguished by a firm adherence to established principles. And it is certainly better in every point of

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view, unless change *be imperatively called for by a change of circumstances, to sub-

mit to principles that have been sanctioned by long usage, than for the Court to undertake the dangerous experiment of changing the old and establishing a new rule. And even where change is imperatively called for by a change of circumstances, it is better to invoke the interposition of the law-making power.

Our Courts have repeatedly said, that what constitutes a fee tail in England is a fee conditional in South Carolina. They have given this as a test, or standard, by which to ascertain when or where the fee conditional exists. And a very proper test it is; for, as has already been remarked, the statute de donis operated only upon fee conditional estates: converting them into fees tail. Without requiring any thing additional or stronger in the way of language, it furnished a different rule of interpretation of the same words. It is obvious upon the slightest reflection, that the structure of the two estates is precisely the same; and they only differ in regard to the right of alienation. I have been led into this course of remark from the fact, that the decision of the majority of the Court in this case could only have been made on a denial of this rule of interpretation as to what constitutes a fee conditional.

I will now advert again, for a brief space, to the rule in Shelley's case. In addition to its feudal origin, as has been shown in the circuit decree, there is a profound philosophy in the rule, which well adapts it to the state of modern society, and makes it an important principle in every system of jurisprudence, where it is essential to preserve a distinction between estates by descent and estates by purchase. Its policy is, "that no person should be permitted to raise in another an estate, which was essentially an estate of inheritance, and at the same time to make the heirs of that person purchasers;" 4 Kent Com. 208. The reason which recommends it to the modern legislator and jurist, is the necessity of adhering to the manifest distinctions between descent and purchase, and to prevent title by descent from being stripped of its incidents, and disguised with the properties of a purchase.

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*Harg. Law Tracts, 489. Or, as Lord Thurlow tersely and clearly expresses the same idea in Jones v. Morgan, 1 Bro. 206, whoever "takes in the character of heir must take in the quality of heir."

It was this policy, doubtless, which recommended it to the Courts of South Carolina. It was recognized in this State as early as 1795, in Dott v. Cunningham, 1 Bay, 453 [1 Am. Dec. 624], and Carr v. Porter, 1 McC. Eq. 60, was decided upon the authority of the rule. Since that case, it has uniformly been considered as of binding obligation in a case proper for its application; and many

cases might be cited to this effect. After all this, I am not a little astonished to hear learned jurists sneering at the rule as artificial and arbitrary, and one that it was desirable to get rid of by the judicial authority. I will assume, therefore, in what I shall hereafter say, that the rule is of binding force in South Carolina.

Let, then, the construction of Edward Tonge's will be squared by the requirements of the rule. He gave to James Boone Perry an estate for life, and at his decease he gave the estate to his issue. Is not this the very case to which the rule applies?

In *Robinson v. Robinson*, 1 Burr. 38, the testator gave the estate to Launcelot Hicks, during his life, "and no longer, and after his death to such son as he may leave lawfully begotten," and for default of such issue, over. It was construed to be an estate tail, and not a gift to the issue as purchasers. And Lord Mansfield said that "by law the testator could by no words make the father tenant for life, and the heirs male of his body purchasers."

King v. Burchell, Amb. 379, *Fearne* 163, is a leading case to the effect, that a devise for life, with remainder to issue male, and for want of such issue to issue female, and on failure of such issue then over, created an estate tail by virtue of the rule; and the words "to the heirs and assigns of such issue, male or female," did not prevent the operation of the rule. This case bears a striking resemblance to the one arising under Edward Tonge's will.

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*In *Dodson v. Grew*, 2 Wils. 322, a devise to one for his natural life, and after his decease to the use of the male issue of his body, and the heirs male of the body of such issue male, and for want of such issue male, then over, was held to create a fee tail.

Cases of this kind might be multiplied to an indefinite extent. There are many cases in which a gift or devise to a person for life, and after his death to the heirs of his body, or the issue of his body, have been construed as giving the first taker only a life estate, with a remainder to the issue as purchasers. But this result happens by force of the context, in which words are used, which modify and restrict the meaning of the words heirs of the body or issue, so as to make them designate a particular class of persons. In these cases, the heirs of the body as such do not take as purchasers. They take, because the words are explained to be used in a limited sense, descriptive of the individuals amongst the heirs general, who are to take.

It is clear that the rule is not violated in cases like these, because it does not apply.

In Edward Tonge's will, there is nothing in the context to control the general meaning of the word "issue." There are no words

of modification showing that the issue are to take in a way inconsistent with the usual course of devolution in the case of an estate tail, or fee conditional. He intended the issue of James Boone Perry to take in indefinite succession. He did not intend that the estate should go over to John Withingham Sommers, from the line of James Boone Perry, as long as there was any of his issue extant. If this be true, and who can doubt it, then it was a fee conditional.

It was urged with much fervor, that James Boone Perry was to take a life estate, and his issue as purchasers, because the limitation over on the failure of such issue to John Withingham Sommers, &c., restricted the words of the direct grant to the issue, so as to make them mean a particular class of issue: that is to say, issue living at James Boone Perry's death only. This is demanding as a postulate, that which remains to be

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proved. It is of course not denied, in relation to personal property, that when there is a direct grant to the issue, or heirs of the body, generally in the first place, which standing by itself, would make the limitation too indefinite and remote for the issue to take as purchasers, but which is followed by an ulterior valid limitation in favor of a third party, this subsequent limitation has the effect of restricting the generality of the terms of the gift to the issue, so as to make them mean a grant to issue living at the death of the first taker: in which case the issue would take as purchasers. That rule of construction was applied to the will of Edward Tonge as to the personal estate, by the circuit decree in this very case, and affirmed by the Court of Appeals, though both the real and personal estate was disposed of in the same words. A bequest to one and his issue, or the heirs of his body, with a limitation over on his dying without leaving issue at the time of his death, will give the issue an estate as purchasers after the termination of the estate for life of the first taker. *Read v. Snell*, 2 Atk. 642; *Lampley v. Blower*, 3 Atk. 396; *Henry v. Means*, 2 Hill, 328; *Henry & Talbird v. Archer*, Bail. Eq. 535.

But where is the authority that this circumstance alone is sufficient to warrant the same construction in reference to real estate? The words heirs of the body or issue are capable of restrictive modifications by the context, both as to the real and personal estate. This is clear. That their meaning, however, is more controllable and susceptible of explanation in another than the technical sense, when applied to the former, than the latter, is also indisputable. And what I insist on is this: that when real estate is given to one, and the issue or heirs of his body, the simple fact, that there is a valid limitation over on the event of the first taker's dying without leaving issue, or heirs of

his body, is not sufficient to make the issue or heirs of the body take an estate in remainder as purchasers, as it does in the case of personal estate. *Forth v. Chapman*, 1 P. W. 663; *Mazyck v. Vanderhorst*, Bail. Eq. 48; *Hull v. Hull*, 2 Strob. Eq. 190. This is not sufficient to qualify the technical and

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general sense of those *words. And yet it seems to me that the decision of a majority of this Court has turned in a great measure upon such a doctrine. Some of the cases go a great deal further, and decide that where real estate is given to one and the heirs of his body, or his issue, with a limitation over in the event of the first taker's dying without issue of his body living at the time of his death, still this does not qualify or restrict the general sense of the words of a direct gift to the issue, so as to make them take as purchasers.

In *Richards v. Lady Bergavenny*, 2 Vern. 324, the devise was to Lady Bergavenny for life, and to such heir of her body as should be living at the time of her death, and, in default of such issue, then over. The issue did not take as purchasers. It was held to be an estate tail.

In *Wright v. Pearson*, Amb. 358, the devise was to R. and his assigns for life, remainder to trustees to support contingent remainders, remainder to the use of the male heirs of the body of R. lawfully to be begotten, and their heirs: provided, that in case R. should die without leaving any issue of his body living at his death, then over: it was held by Lord Keeper Henley, to create an estate tail in R. *Fearne on Rem.* 126.

"Where a devise to a person and his issue, (or to him and the heirs of his body,) is followed by a limitation over in case of his dying without leaving issue living at his death, the only effect of these special words is to make the remainder contingent on the described event. They are not considered as explanatory of the species of issue included in the prior devise, and therefore do not prevent the prior devisee from taking an estate tail under it. The result simply is, that if the tenant in tail has no issue at his death, the devise over takes effect; if otherwise, the devise over is defeated, notwithstanding a subsequent failure of issue." 2 *Jarm. on Wills*, 359.

In *Whitworth v. Stuckey*, 1 Rich. Eq. 404, the devise under the will of John Baxter Fraser was to his son, "for and during his natural life, and at his death to the lawful issue of his body; and if he should die without lawful issue living at the time of his

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*death, then over. It was held, that the limitation to the lawful issue of the devisee's body served only to enlarge his estate to a fee conditional at common law, and did not give the issue a remainder as purchasers.

See *Hull v. Hull*, 2 Strob. Eq. 190, and *Hay v. Hay*, 3 Rich. Eq. 384, where the same rule of construction prevailed.

Much was said at the bar about the absurdity of a rule of construction, which as to the personalty would give the issue as purchasers an estate by way of remainder, while as to the realty, devised in the same language, and in the same clause of the will, the first taker should be considered as taking an estate in fee conditional. I cannot undertake to say how far the judgment of the majority of this Court has been influenced by this kind of argument. That, in a case where real and personal estate are given, in the same clause and language, to one and his issue, or the heirs of his body, and, if he dies without leaving issue, then over, the first taker will have a fee conditional in the real estate, and a life estate in the personalty, with remainder to the issue as purchasers, is sustained by the most conclusive authorities. The distinction is taken upon the most satisfactory grounds. It results from the different nature of the two species of property. In reference to the real estate, it comes under the operation of the rule in *Shelley's case*, which is established upon impregnable foundations of reason and authority. As to both species of property, it is obviously the intention of the testator to give an estate to the issue. Inasmuch as the real estate is descendible, the intention is satisfied, without infringing the rule in *Shelley's case* by the issue taking by way of limitation. The estate must descend to them per formam doni, unless the first taker, upon the performance of the condition, shall have alienated. But personal property not being descendible, the issue or heirs of the body, as such, could take nothing under a bequest like this. Unless they take as purchasers, the first taker must have an absolute estate. Therefore, as the rule does not apply to personal estate, and the intention of the testator would be

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otherwise defeated, the issue *are allowed, by a favourable construction in their behalf, to take as purchasers, which is the only character in which they could take at all.

Forth v. Chapman, 1 P. Wms. 663, is the leading case in the English Courts upon this point. It has been strictly followed in our Courts, in *Mazyck v. Vanderhorst*, Bail. Eq. 48, and in *Hull v. Hull*, 2 Strob. Eq. 190. Instability as to the rules which regulate the descent, and distribution of property, resulting from a change of judicial opinions, is mischievous to the last degree.

There was a disposition, in the construction of *Touge's will*, to give to the testator's intention a controlling force and effect, which, in questions of this sort, is beyond what is legitimate. The rule, that the testator's intention is to govern, is subordinate to other rules. One of these is, that where the

testator has used technical words, the technical meaning will prevail, unless he has sufficiently explained, in the context, that he has used those words in some other than the technical sense. The intention is to be carefully and patiently sought. But to seek for it, without the aid of this, and other rules, which have been sanctioned by wisdom and experience, is to embark upon the voyage of discovery without chart or compass. It would give rise to the greatest degree of uncertainty. The interpretation of no will could be known, until it had undergone judicial construction.

If it be ascertained, that the technical import of the language employed, and which is not explained in the context to have been used in a different sense, would create a particular kind of estate, then the intention of the testator in contradiction of this, is wholly unimportant. Thus, in the case of a gift to one generally, and the heirs of his body: or a gift to one for life, and at his death to the issue of his body, if it appears from an examination of all the parts of the will, that it was the testator's intention to give the estate to the first taker, and to his issue after him in indefinite succession, it is a fee tail in England, and a fee conditional in South Carolina, no matter what may have been the

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further *intention of the testator. When the primary intention to create what is considered a fee conditional is manifest, the express limitation of the estate of the ancestor to the period of his life, is utterly immaterial. And the most positive and unequivocal words restricting the ancestor's estate to the period of his life, and inhibiting its continuance beyond that period, will not affect the construction.

The express limitation of the estate to the ancestor for life, is as clear an indication, that his estate is not to be extended beyond that period, as any superadded words of negation however strong, could possibly make it. It is the gift of the estate to the issue generally, to be enjoyed by them in indefinite succession which stamps the estate as a fee conditional: the attributes of which the testator is not permitted to change, or modify, whatever may be his intention. (a) On the contrary, if an estate be given to one, and at his death to the heirs of his body, and it appears from the context, that it was the testator's intention not to give the estate to

the heirs of the body generally, but to a particular class of his heirs, namely, those who should be living at the death of the first taker, the ancestor would take but a life estate, and the heirs of his body living at his death, would take in remainder as purchasers. (*Jesson v. Wright*, 2 Bligh, 1.)

By reference to Edward Tonge's will, it will be perceived, that after the life estate given to his wife and mother, he gave to James Boone Perry a life estate, and at his decease, to his male issue, and in default of such, (that is, of such male issue,) to his issue female surviving him, &c. Is there any thing here, clearly to indicate, that the male issue were not intended to take in indefinite succession, if they took at all: for we have shown, in the preceding pages, that there being a limitation over, which as to the personal estate would be valid, is not sufficient to qualify the generality of the term "issue" when applied to real estate, so as to make it mean issue living at the death of the first taker. It was only on the default of the

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male issue, that the estate was to go *over to the issue female surviving him, (James Boone Perry.) It was not to go to the female issue, until the whole line of the male issue had run out, and this might not be until a remote period.—There are a thousand cases to show that the words "in default of issue" or "in default of such issue," mean an indefinite failure of issue. Some stress was laid upon the word "surviving" him, which was applied in the will to the female issue, and not to the issue male. This could have no effect upon the gift to the male issue. This could not be stronger than if the testator had said, upon the default of the male issue, I give the estate A. B. and C. the daughters of James Boone Perry. This clearly would not have given the estate to the male issue as purchasers: for it was to descend in the male line, until it had entirely failed, before it was to go to the female issue at all.

For the foregoing reasons I dissent from the judgment of a majority of this Court. It is calculated to produce, if it prevails as an authority, some radical changes in the rules of law on this subject, and will probably lead to much litigation.

I had intended to submit some remarks on the other question referred to the Court (of Errors.) But this opinion is already long, and any thing I might say on the other branch of the case would be merely speculative.

(a) *Robinson v. Robinson*, 1 Burr, 38; 4 Burr, 2579; 2 Wm. Bl. 698.

IN THE COURT OF ERRORS

COLUMBIA—MAY, 1852.

ALL THE JUDGES AND CHANCELLORS PRESENT.

4 Rich. Eq. *447

*MOSES S. McCALL v. JAMES S. McCALL
et al.

(Columbia. May, 1852.)

[Wills. ¶581.]

Testatrix, having sixty-four negroes, made her will by which she bequeathed sixty-two by name: of the sixty-two, sixty were properly named, and two were bequeathed by the names of Little Harry and Alonzo: she had no negroes by those names, but had four not named in the will, to wit, Little Harriet, Manza, Lydia and Tom: by a codicil she bequeathed Lydia and Tom as negroes not named in her will:—*Held*, that Little Harriet and Manza passed under the bequest of Little Harry and Alonzo.

[Ed. Note.—Cited in *Rosborough v. Hemphill*, 5 Rich. Eq. 99; *Boyd v. Satterwhite*, 12 Rich. Eq. 496; *Seafie v. Thomson*, 15 S. C. 360; *Cunningham v. Cunningham*, 20 S. C. 330; *Reynolds v. Reynolds*, 65 S. C. 394, 43 S. E. 878.

For other cases, see Wills, Cent. Dig. § 1268; Dec. Dig. ¶581.]

Before Johnston, Ch., at Darlington, February, 1851.

This case arose out of the will of the late Mrs. Hannah Sanders, of Darlington.

The testatrix died the 13th of April, 1847. By the 7th clause of her will, which was duly executed the 20th of January, 1844, she bequeathed as follows:

To Moses McCall (the plaintiff) "I give and bequeath the following negroes, to wit: Betty, August, Eliza, Philip, Little Harry and Alonzo," in trust "for the sole and separate use, benefit and behoof of Elizabeth H. Haynsworth, wife of Thomas B. Haynsworth."

The will contained a residuary clause, by which the testatrix gave one half the rest and

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residue of her estate to James S. *McCall, and directed that the other be sold, and the proceeds laid out in the purchase of negroes, for the use and benefit of the children of James M. Sanders.

It appeared at the hearing, that the testatrix employed eminent counsel to draw her will. That when her lawyer was taking notes for the draft of it, she directed him to dispose of Betty, August and Eliza, with Eliza's chil-

dren, in trust for Mrs. Haynsworth.—That Eliza was at the plantation, some 20 miles off, and had three children, named Philip, Little Harriet and Manza: that the testatrix not knowing or recollecting the names of the two latter, called in a woman servant, to give their names to the counsel.—The counsel understood her to give their names as Little Harry and Alonzo, and so drew the will, which was subsequently read and duly executed.

It also appeared that the testatrix had no negroes by the names of Little Harry and Alonzo.

The bill was to obtain such a construction or correction of the will, as would pass Little Harriet and Manza under the seventh clause.

The case was heard at Darlington, the 10th of February, 1851, and the foregoing evidence was received subject to objection.

It further appeared at the hearing, that the testatrix had, at the date of her will, sixty-four negroes. The negroes named in the different clauses of the will are sixty-two in number. Two, by the names of Lydia and Tom, whose names were omitted, were subsequently specifically bequeathed, by a codicil executed the 18th of November, 1846.

Johnston, Ch. When I heard this cause, I intended to take notice in my decree of the numerous authorities referred to by the counsel in their argument. But the already overwhelming, and continually increasing, business of this Court, has left me neither time nor strength to undergo that labor—nor is it, in my opinion, necessary.

The cases are very numerous, and, it must

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be confessed, conflicting; so much so, that it is impossible to reconcile them. Under such circumstances, it is safer to depend on principles than precedent.

There are certain leading principles, well sustained by authority, and recommended by reason and sound policy, from which Courts should never depart, let the circumstances of hardship or injustice in the particular

case before them plead as strongly as they may for the deviation.

No degree of moral rectitude in the administrators of law can compensate for that uncertainty, which they must ever introduce, when they abandon, or lose sight of, those sound principles which alone can secure justice generally and, without their guidance, vainly attempt to attain the justice of each particular case.

One great object for which Courts are instituted, is that their decisions may form rules of action and rules of property to which men may conform without the necessity of litigation. This would be entirely frustrated, by the mode of procedure indicated, even with the greatest rectitude, and the strongest judgment, on the part of the judges. But what must be the result, when bad men, untrammelled by rules, or principles, occupy the forum. Caprice and affection must dictate the law; and intolerable oppression and tyranny must usurp the place of justice.

There are well ascertained principles applicable to this case, and from these there should be no departure, notwithstanding the anomalous cases to be found here and there in the books.

One of these principles is, that where the law requires the intention of a party to be expressed in writing, you cannot dispense with the writing, and gather the intention from parol. Another is, that where a party, though not compelled by law to do it, does employ writing as the vehicle of his intention, you cannot resort to parol as a better vehicle.

The statute of 1824 imperatively requires wills of personalty to be executed, in all respects, as wills relating to realty were previously required to be made. Suppose I was to receive the evidence of mistake in the 7th clause of Mrs. Saunders's will, that would be

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very *good to prove that, that is not in the clause, which she intended to put in it. But how can I put into that clause any words, names, or provisions, which she did not insert? If I were to amend her will, in any part or in any way, I must do it upon a principle that would justify and require me to amend it in every part and in every way that parol evidence might point out. And after I had so altered the will, could I hold it up and point to her signature as proof that she had executed it, with the alterations, as required by the statute?

The evidence offered might be good to prove that no such names as Little Harry and Alonzo should be in the 7th clause of the will, being inserted by mistake. That evidence would be very good by way of avoiding the will; and, if this were the forum for that purpose, it would be worthy of consideration. But suppose I were to

strike out the names now in the clause, that would not be sufficient, unless I inserted others in their place; and the question is, can I upon parol take the names of other negroes, forming at the time I interfere with them, part of the residuum, and covered by the residuary clause of the will, and insert them in the 7th clause? Can I upon parol, transfer property from the residuary clause to any prior or specific clause? Can I upon evidence thus change the operation of the different parts of the will?

If I can, the statute of 1824 is a nullity. If I can do what is proposed, no one need hereafter trouble himself with arguments to shew the construction of a testamentary paper. All he has to do is to prove that the instrument was differently intended from what appears on its face, and then it may be altered to conform to the evidence.

Chancellor Harper, in one of our cases, discussed the same principles in relation to reforming a deed, and all his objections, in that case, arising out of the statute of frauds, are just as strong in relation to wills under the statute of 1824.

This view of the case is sufficient to dispose of it. But if we omit the statute altogether, still in my apprehension, the result must be the same.

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*It is a familiar observation that you may and should learn the exact posture of a testator's affairs at the date of his will; and that this knowledge may be obtained by parol. Certainly, the posture of a testator's property can hardly be learned otherwise than by parol. Parol is competent, therefore, to prove it. But for what purpose is this information desirable? Is it not simply to enable the Courts to apply the will to the property?

You see in the will property described so and so, and disposed of thus and thus. You learn by parol that there is property answering to the description. The will is then applied to it in the way directed. This is construction.

If there be two or more subjects to which a given provision may be applied, that one is supposed to be intended which answers most completely to the description given. But no provision can, upon any safe or sound principle, be applied to a subject which does not, in some sense, answer to the description given.

If the testator gives stock, for example, you apply his will to bank, or government stock, stock in trade, or in a joint stock company, or co-partnership, or to live stock, according as he may own one or the other. If he owns all these kinds of stocks, you look to the usages of language or to the context of the will to ascertain his intention.

If the description given in the primary, or more limited, or stricter meaning of the

words, finds no counterpart in the testator's property, but subjects are found to which the words in some other sense will apply, you apply them to these subjects. But it should be steadily observed, that it is the will of the testator, and nothing but the will, that is to be so applied. It is his words, found in his will, that are to be applied; not the words of a witness testifying what he meant or what he did not mean.

The words are to be applied by construction, and not by proof of the intention with which they were employed. If, in themselves they are capable of no construction applicable to the subject proposed, you are not to learn from any foreign source, from any witness, or from any documents not referred to

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in the will, *that the words were intended to have any operation different from what they purport.

And here I would observe, in order to show the utter incompetency of parol explanation, or parol evidence, to show what Mrs. Saunders's real dispositions were, that though if the testatrix had referred by her will to any document extrinsic to it, that would have been part of her will—a full testamentary paper in writing, in the sense of the statute; yet if her will had, in so many words, declared that her dispositions had been confided to one of her friends, who was instructed to declare and explain them by parol, this would have been no will. If such parol declaration could have no efficacy as a testament, how can parol be allowed to operate when offered by way of a testamentary explanation? A written will is the only means of displacing the law of intestacy. It is the only authority which Courts can have to treat the property of a deceased person as testate property; and must therefore be the measure of their interference with the property. The clue to the property must be found in the will itself.

The witness in this case says, the testatrix intended to give Eliza's children along with Eliza herself. If she had said so in her will, I would have given effect to it. That would have been a good bequest of the children, notwithstanding the subsequent misnaming of them. But there is nothing of that kind in the will.

Nor does it appear in the instrument that Harry and Alonzo were given as children of Eliza; or that any relation between Eliza and the negroes so named was in the mind of the testatrix. The negroes are given separately and distinctively. Suppose between the execution of the will and the death of her mistress, Eliza had borne two children, called Harry and Alonzo; or that any other wench on the plantation had borne two such children, or that Mrs. Saunders had bought or inherited two negroes bearing these names—in either of these cases, would Harriet and

Manza still pass under the 7th clause? Again, as the will is silent as to any connection between the two misnamed negroes

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*and Eliza, why are we to select Harriet and Manza particularly to supply their place? Why not take Lydia and Tom, whose names are omitted in the will, as well as these two? The truth is, there is no guide but parol, and that is incompetent.

I conclude by observing, that this is not a case, as was argued, where parol is admissible to explain an ambiguity.

Where an ambiguity exists in the terms of a will, themselves, that cannot be explained by matter dehors the will. This is, however, not a case of that sort.

Where a will, in itself plain, is rendered ambiguous by parol evidence, then its intended operation may be stated by parol.

This is supposed to be a case of the latter sort. But it is not.

Where a subject has been found among a testator's property answering in some sort, a description given by him, in one of his legacies, parol may be received to show the existence of another subject or article of property, better answering the description, and then the will is applied to that. But this is not evidence to explain the meaning or intention of the will.

A case of ambiguity, where it is lawful to explain the intention, is where the will is plain in its terms, but there are shown to exist two or more subjects equally coming within the terms. If the words of the will are not equally applicable to both, the will is applied by construction, and not by explanation, to that one most fitting to the words, and no parol evidence of intention can be received. It is only when the words are as applicable to the one as the other that ambiguity exists, (and this is the very meaning of the word.) Then parol is receivable to show which was intended; as in the familiar case, where a legacy is given to testator's son John, and he has two sons of that name; or where he gives his black horse, having two or more of that color.

This is evidently not a case fully within the principle stated. On the whole, I cannot sustain the bill: and it is ordered that it be dismissed.

The complainant appealed, on the following grounds:

First. Because the testimony of the wit-

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ness who drew the *will, and of the witness who was present at the time of instructions given, was competent and should have been received.

Second. Because, by the case made on the pleadings, the complainants were entitled to a decree for the negroes claimed by the bill, as the legacy of Mrs. Haynsworth.

The case was ordered by the Equity Court

of Appeals to this Court, where it was now heard.

Moses, for appellant, cited, on the first ground, 3 Swinh. 896, pt. 7, § 5; Stockdale v. Bushby, 19 Ves. 381; Beaumont v. Fell, 2 P. Wms. 140; Prec. in Ch. 229; Pendleton v. Grant, 2 Vern. 517; 2 Ves. 276; Selwood v. Mildmay, 3 Ves. 306; Door v. Geary, 1 Ves. 255; Hodgson v. Hodgson, 2 Vern. 593; Cuthbert v. Peacock, 2 Vern. 594; Walpole v. Cholmondeley, 7 T. R. 138; Doe de LeChevalier v. Huthwaite, 5 Eng. C. L. R. 407; Masters v. Masters, 1 P. Wms. 145; Cheney's case, 5 Coke, 68; Gorvey v. Hibbert, 19 Ves. 125; Harrison v. Harrison, 5 Cond. Eng. Ch. R. 390; Garth v. Meyrick, 1 Bro. C. C. 30; Smith v. Coney, 6 Ves. 43; Colpoys v. Colpoys, Jac. 451; Green. Ev. § 287, note; River's case, 1 Atk. 410; Roper on Leg. 494, note 9; Whitbread v. May, 2 B. & P. 593; Stephenson v. Heathcock, 1 Eden, 38; Baugh v. Read, 1 Ves. jun. 259; Doe v. Brown, 4 East, 441; Doe v. Oxenden, 3 Taunt. 147; Goodtitle v. Southern, 3 M. & S. 171; Sandford v. Chichester, 1 Mer. 653; Bradwin v. Harper, Amb. 374; Thomas v. Thomas, 6 T. R. 671; 1 Story. Eq. § 180; 2 Dana, 47; Geer v. Winds, 4 Des. 85; Hatch v. Hatch, 2 Hayw. 32; Thomas v. Stephens, 4 Johns. Ch. 607; Miner v. Boneham, 15 Johns. R. 226; Powell v. Dibble, 2 Dall. 71; Doe v. Roe, 1 Wend. 541; Ryers v. Wheeler, 22 Wend. 148; Webley v. Landstaff, 3 Des. 504; Wilson ads. Robertson, Harp. Eq. 56; Donald v. Dendy, 2 McM. 130. On the second ground he cited State v. Scurry, 3 Rich. 69.

Harlee, contra, cited Rothmaler v. Myers, 4 Des. 215; Dupree v. McDonald, Id. 209; Jackson v. Sill, 11 Johns. R. 202; Mann v. Mann, 1 Johns. Ch. 231; 3 P. Wms. 345.

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*The opinion of the Court was delivered by

WARDLAW, Ch. In ascertaining the subject of a testator's disposition, the Court may inquire into the situation of his estate, and into every material fact which is auxiliary to the just interpretation of his words, for the purpose of identifying the thing intended by the words employed.

In the present case, if the codicil had never been executed, it would appear from the will and competent evidence, that the testatrix owned sixty-four slaves, of which, excluding the two improperly named, sixty are bequeathed. If the construction of the legacy to the plaintiff were to be made in this posture of affairs, it might be doubted whether the legacy of the two negroes in question would not be made up by applying it to Tom and Lydia, as well as by applying it to Harriet and Manza; and it might be dangerous to apply it to either by parol proof.

But if the codicil afterwards made, specifically disposing of Tom and Lydia, had

been introduced originally as a clause of the will, the case would then be, that a testatrix, having sixty-four slaves, bequeaths sixty-two of them specifically and without ambiguity, and bequeaths two other slaves, but applies wrong names to them. In that condition of things, we should ascertain from the will and the evidence, that nothing was left upon which the legacy to the plaintiff in trust for Mrs. Haynsworth could operate, so as to give her the number of negroes expressly intended for her, unless we resorted to Harriet and Manza.

The bequest being of negroes, there is enough of certainty in that description to sustain the gift, notwithstanding the partial mis-description arising from the misnomer. The legacy cannot be applied to horses or to any other thing than negroes; and it should be applied to negroes, if these be found.

A description false in part may be made sufficiently certain, by reference to extrinsic circumstances, to identify the subject intended; as where a false description is super-added to one which by itself is correct and adequate. Thus, if a testator bequeath his black horse, having but one horse which was

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white; or devise his *freehold houses, having only leasehold houses; the white horse, in the one case, and the leasehold houses, in the other, clearly pass. The substance of the subject intended is certain, and if there be but one such substance, the superadded mis-description inapplicable to any subject, introduces no ambiguity. Any evidence is admissible which merely tends to explain and apply what the testator has written; and no evidence can be admitted which merely shows what he intended to write. The most accurate description of the subject of a gift in a written instrument requires identification by proof, of extrinsic circumstances; and the least accurate description which satisfies the mind of the Court of the donor's meaning, is within the same principle. If the judgment of the Court be founded upon a comparison of the terms of description employed in the written instrument with the extrinsic evidence of the identity of the subject, no attempt is made to vary a written instrument by parol evidence, nor to ascertain the intention of the donor independently of his written words. The Court does no more than to ascertain the application of the descriptive words in the instrument of gift, Wigram on Wills, pl. 9, 67, 70.

The sound doctrine on this subject is well stated in Swinburne on Wills, 895, (part 7, § 5).—"The error of the testator in the proper name of the thing bequeathed, doth not hurt the validity of the legacy, so that the body or substance of the thing bequeathed be certain: for example, the testator doth bequeath his horse Bucephalus, whereas the name of his horse" (testator having, as I understand, the example, but one horse,) "is Arundel;

this error is not hurtful, but that the legatary may obtain the horse Arundel, if the testator's meaning be certain: for names were devised to discern things: if therefore we have the thing it skilleth not for the name. The error in the name appellative of the thing bequeathed doth destroy the legacy: for example, the testator intending to bequeath a horse doth bequeath an ox, or meaning to bequeath gold, doth bequeath apparel; in both these cases the legacy is void. The

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reason of this difference is because *a proper name is an accident attributed to some singular or individual thing, to distinguish the same from other singular things of the same kind whereas names appellative do respect the substance of things, and being common to every singular of the same kind make them to differ from things of other kind or substance."

It is justly remarked by Judge Richardson, in the *State v. Scurry*, 3 Rich. 68, that "the names of slaves are vague and vary like the names often applied to other chattels."

The testatrix, in the case before us, had the right to change the names of her negroes at her will. That she exercised this right in relation to Harriet and Manza is plausibly argued from the fact that in the codicil, she bequeaths Tom and Lydia as 'two negroes not named in her said will,' and leaves the other negroes to pass by the names mentioned in the will. That she could not have intended such valuable property as slaves to pass under the residuary clause, may be inferred from the doubting manner in which she mentions the existence of any residue. She gives "the rest and residue of her estate, if there be any."

If the testatrix had owned the two slaves Harriet and Manza and no more, and had bequeathed two slaves, mis-naming them, it could hardly be doubted that the legatee would take Harriet and Manza. Yet that would not differ from the present case in principle; and should not differ in result.

Thus the construction would stand, if the codicil had formed a clause in the will originally.

But the execution of a codicil is a republication of a will; and both papers must generally be construed in *pari materia*, as if they formed but one instrument, uttered uno flatu. A testament, with all its codicils, represents the wishes of the testator concerning the disposition of his property after his death, and however numerous may be its parts, it is to be construed as one declaration of intention, uttered at the death of testator.

It is at this point, we dissent from the circuit decree. We do not assail the general doctrines of the decree concerning the admissibility of parol evidence to vary a writ-

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ten instrument; but we *suppose the Chancellor has overlooked the proposition that the will and codicil are to be construed as one, entire instrument.—His attention seems not to have been directed to this point on the circuit; even in the learned argument here, the point was barely suggested.

It may be objected that the will as it really stood originally, independent of the codicil, must, upon just reasoning, mean the same thing after the codicil as it meant before: and if it could not have been construed to refer to Harriet and Manza at the date of its execution, its meaning could not be changed by matter subsequently arising. The objection is more specious than solid. It is competent for a testator, by subsequent testamentary disposition, to declare his intention in matters previously dubious; or to interpret a prior disposition where it is not dubious: or even to declare his meaning in opposition to the plain import of the terms previously employed. All his testamentary dispositions make one testament.

It is ordered and decreed that the circuit decree be reversed in the particular above mentioned; and it is declared and adjudged that the plaintiff is entitled to the slaves Harriet and Manza.—Defendant must account for the hire of these slaves, if any accrued. Costs to be paid from the estate of testatrix.

O'NEALL, EVANS, WARDLAW, FROST, WITHERS and WHITNER, JJ., and JOHNSTON, DUNKIN and DARGAN, CC., concurred.

Decree reversed.

4 Rich. Eq. *459

*THE SO. CA. R. R. COMPANY v. JAMES JONES and J. J. KENNEDY.

(Columbia. May, 1852.)

[*Bridges* ⚭ 33.]

Charter authorizing the grantees to collect toll, at the Augusta bridge, across the Savannah river, from persons going from the South Carolina side; "but the collecting of said toll shall not subject the R. R. Company, or the community, to the payment of double toll." *Held*, not to authorize the grantees to collect toll from persons going from the South Carolina side, as long as such persons are required to pay again at a gate on the Georgia side owned by the City Council of Augusta.

[Ed. Note.—For other cases, see *Bridges*, Cent. Dig. § 76; Dec. Dig. ⚭ 33.]

By an Act of 1813 of the Legislature of South Carolina, (9 Stat. 471.) Henry Shultz and Lewis Cooper were authorized to build a toll bridge over the Savannah river, extending from this State to the town of Augusta, in the State of Georgia, and the same was vested in them, their heirs and assigns, for twenty-one years. In December, 1830, the Legislature renewed the charter then

about to expire, and re-established the toll bridge, which had been built, for fourteen years after the expiration of the said twenty-one years, in the Bank of the State of Georgia, who were represented to have become the proprietors of said bridge by legal purchase, (9 Stat. 589.) The city of Augusta subsequently became the proprietor of all the rights and interest in the premises of the Bank of the State of Georgia.

In 1814, the Legislature of the State of Georgia granted similar privileges to Henry Shultz and John McKinne, (to whom the right of Lewis Cooper had been assigned) for the term of twenty years. In 1833, the Legislature of the State of Georgia, at the instance of the Bank of the State of Georgia representing that the Bank was sole proprietor of the bridge, extended the Act of 1814 in behalf of the Bank of the State of Georgia and its assigns, for ten years from November, 1834. And in December, 1840, the Legislature of Georgia vested in the City Council of Augusta, represented to have become the purchasers of said bridge, all the powers, authorities, and privileges vested by law in the late owners of said bridge.

In 1845, a bill was filed in the Circuit

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Court of the United States in behalf of Henry Shultz against the City Council of Augusta and others, alleging certain matters to show that he was entitled to the Augusta bridge and an account of the tolls received, and praying relief accordingly. The cause was heard on demurrer, and in 1846 the Circuit Court sustained the demurrer, and ordered the bill to be dismissed; from which decree an appeal was taken to the Supreme Court of the United States. Pending this appeal, to wit, on December 17, 1848, the charter granted by the State of South Carolina expired; and on December 19, 1848, an Act was passed by which the bridge was re-chartered, and vested in Henry Shultz and John McKenne for fourteen years: rates of toll were prescribed; and the charter contained the following proviso: "that the said Henry Shultz and John McKenne shall not be allowed to charge and collect toll as aforesaid at the South Carolina end of said bridge, until the litigation now pending in the Supreme Court of the United States in relation to the said bridge, and the proceeds of the sale, shall be determined against the City Council of August." (11 Stat. 532.)

In December, 1849, this proviso to the Act of 1848 was repealed, and Henry Shultz and John McKenne were "authorized to collect the rates of toll now established by law, at the South Carolina end of the said bridge, from all persons going from the South Carolina end, but not from persons coming from the Georgia end of the bridge; but the collecting of said toll shall not subject the Rail Road Company, or the community, to the payment of double toll." (11 Stat. 615.)

After the passage of the Act of 1849, Henry Shultz died, and administration of his chattels and credits was committed to the defendants, who erected a gate on the public highway leading to the bridge, and proceeded to collect toll from the plaintiffs and all persons going from the South Carolina side, although such persons were compelled to pay again at the gate owned and kept up by the City Council of Augusta on the Georgia side.

The bill prayed a writ of injunction to

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restrain the defendants *from demanding toll of the plaintiffs and from keeping up their gate.

The case was submitted to his Honor Chancellor Wardlaw at Chambers, who made a pro forma decree dismissing plaintiffs' bill; from which decree an appeal was taken.

The Equity Court of Appeals ordered the case to this Court, where it was now heard.

Petigru, Waddy Thompson, for appellants. Bauskett, Carroll, contra.

The opinion of the Court was delivered by

DUNKIN, Ch., [who, after stating the facts and quoting, lastly, the provisions of the Act of 1849, above quoted proceeded as follows:] It seems difficult to misconceive the purpose of the Legislature in this last provision. In all charters of this character it is the great duty of the Legislature to protect the interests of the public. Corporations or individuals, applying for franchises or exclusive privileges, are usually sufficiently awake to their own interests. But while the Legislature should promote enterprises whose object is the public convenience as well as private emolument, they should adopt every reasonable precaution, that these exclusive privileges should not become instruments of oppression or annoyance. When application was made to the Legislature, in 1848, it was well known that the City Council of Augusta had a toll house on the Georgia side of the bridge, at which they received tolls from all persons, &c., passing over the bridge from the Georgia or South Carolina side. It was expressly provided that no tolls should be collected by the grantees until the Supreme Court of the United States should recognize and establish their rights against the City Council of Augusta. It will not be suggested, that under that Act, strictly provisional, the grantees had any authority to collect toll until the right had been determined by the Supreme Court in their favor. This proviso was repealed in the subsequent Act of 1849. But in lieu of it, the Act declares, not

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only that the grantees should not collect toll "from persons coming from the Georgia end of the bridge," but that the collecting of toll from persons going from the South

Central end of the bridge "should not subject the Rail Road Company, or the community, to the payment of double toll." It seems superfluous to say that this provision was not intended for the benefit of the grantees. It was to protect the travelling public, and particularly the Rail Road Company, from the annoyance and injury to which they would be subjected by the conflicting claims of the City Council of Augusta, and those who might demand toll under the authority of the Act of 1849. It is objected, that this construction renders the charter valueless. That was for the consideration of those who accepted it. It certainly was not the intention of the Legislature to subject the citizen to the payment of double toll (contrary to their express declaration,) and then leave him to the casualties and expense of litigation in order to ascertain from which party he might be entitled to redress. Happily the Act imposes no burthens on the grantees, and exacts no consideration from them. The utmost that can be said is they have not derived from the munificence of the State the advantages which they hoped and contemplated.

Many other and far more difficult and important subjects have been brought into the discussion, but upon which the Court deems it inexpedient, on this occasion, to express any judgment.

On the second ground of appeal taken by the complainants, the Court is of opinion that they were entitled to the injunction as prayed by the bill, which is ordered accordingly; and the decree of dismissal is reversed.

JOHNSTON, DARGAN and WARDLAW, CC., and O'NEALL, EVANS, WARDLAW, FROST, WITHERS and WHITNER, JJ., concurring.

Decree reversed.

The following case, YARBOROUGH & SHULTZ v. THE BANK OF GEORGIA and Others, tried before Harper, Ch., at Edgefield, June, 1842, is appended as a note to the above case:

[*Equity* 184.]

[Cited in *Myers v. O'Hanlon*, 12 Rich. Eq. 210, to the point that if defendant submits to answer he must answer fully.]

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 422-425; Dec. Dig. 184.]

HARPER, Ch. In 1813, the State of South

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Carolina granted to Henry *Shultz and Lewis Cooper, a charter for a bridge over the Savannah river, extending from this State into the town of Augusta, for the term of twenty-one years; and in the year 1814, the State of Georgia granted a charter for the same bridge for the term of twenty years. In 1816, the said Henry Shultz and John McKinne formed a partnership in the business of banking, under the name and style of the Bridge Company of Augusta. Being then the joint owners, they entered in the partnership book of the Company the bridge, valued at \$75,000, and other property, as the partnership stock, with various stipulations which it is not necessary to recapitulate. On the 21st April, 1818, the com-

plainant, Shultz, sold and transferred his interest in the partnership to Barna McKinne; conveying the bridge and other real property. The consideration for this transfer was the sum of \$62,000, in which Shultz was indebted to the firm, and which was paid by giving him credit on the books of the firm, and charging the amount to Barna McKinne. The Company became greatly embarrassed, in consequence of the failure of certain mercantile firms, with which John and Barna McKinne were connected, and they being indebted to the Bank of the State of Georgia, in the sum of \$40,000, applied to the Bank for a further advance of \$50,000. The evidence is, that in making the application to the Bank for the advance of \$50,000, the object of it is stated to be to relieve the Bridge Company, and enable it to wind up its affairs; but after the loan was effected, only a portion of the sum, perhaps two-fifths, was applied to the use of the Company. Notes were given for the advance of \$50,000, signed by John McKinne, and endorsed by Barna McKinne and James Lampkin. To secure the payment of the entire sum of \$90,000, a mortgage was executed by John and Barna McKinne, of the date of the 3d of May, 1819, of eighty negroes, the property of John McKinne; of McKinne's warehouse square, and of the bridge: conditioned to be void as to the negroes upon the payment of \$40,000, and upon the payment of the remaining \$50,000, to be void altogether. In consequence of some mistake in the corporate name of the Bank, another mortgage of the same tenor and effect was executed on the 10th June of the same year. On the 29th of May, 1819, the Bridge Bank stopped payment. Upon being apprised of this, the complainant, Shultz, who had made arrangements for going to Europe, returned and resumed his place in the firm, by some agreement with Barna McKinne, who quitted it, and took no further share in the management of its business. The evidence is, that Shultz advanced \$15,000 of his own funds, to pay the deposits in the Bank. An advertisement was issued signed by John McKinne and Henry Shultz and Barna McKinne, stating the resources of the Bank, in order to prevent the holders of the bridge bills from sacrificing them, with a notice signed by John McKinne and Henry Shultz, advertising for sale a number of negroes and the bridge, and stating that before the making of titles to the latter, the lien which the Bank of the State of Georgia had on it should be removed. By a

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deed bearing date the *first of July, 1820, Barna McKinne re-conveyed, released, and quit claimed to Henry Shultz, all his interest in the firm or its property. The mortgage to the Bank is charged by the bill to be void, by virtue of the Act of the State of Georgia, which provides that if any person unable to pay his debts, shall make "any assignment or transfer of real or personal property, stock in trade, debts, dues, or demands," in favor of any particular creditor, whereby other creditors shall be excluded, "such assignment, transfer, deed, or conveyance, shall be null and void, and considered in law and equity as fraudulent against creditors; provided, nothing in the Act contained shall prevent any person from bona fide selling any portion of his property.

In 1821, a petition was filed on behalf of the Bank of the State of Georgia, in the Superior Court for Richmond county, Georgia, praying for a foreclosure of the mortgage, and at May Term of that year a rule was issued, directed, according to the practice of that State, to John and Barna McKinne, requiring them to pay the amount of principal and interest due on the mortgage, or to be foreclosed. This having been served and no defence made, at May Term, 1822, the rule was made absolute, and the defendants

were declared to be forever foreclosed: the sum of \$69,493 was adjudged due to the Bank for their debt, principal and interest, and the sum of dollars for their costs. It was further ordered and decreed, that the mortgaged property should be sold, and the surplus, if any, paid to the mortgagors. No sale was made under this decree, as the sale was enjoined, on a bill filed by Henry Shultz, Christian Briethaupt, and others, against the Bank of the State of Georgia and others, in the Circuit Court of the United States at Savannah, for the purpose of obtaining a sale under the decree of that Court, so that a full and unencumbered title to the whole bridge might be made to the purchaser, and praying that the proceeds of the sale might be applied to the payment of the creditors of the Bridge Company, and particularly to the holders of certain judgments, founded on bridge bills. In this case, by consent of parties, an order was made for the sale of the bridge, and Freeman Walker and Christopher Fitzsimons, esquires, were appointed commissioners for the purpose of making the sale, and it was ordered that the parties should execute powers of attorney for that purpose to the said commissioners. In pursuance of this order, a power of attorney, signed by Christian Briethaupt and Henry Shultz, was executed on the 19th of January, 1822. The sale was made accordingly on the 28th of November, 1822, and the Bank of the State of Georgia became the purchaser, at the price of \$70,000. For this amount, the Bank issued scrip, which, by the order of the Court, was deposited with its clerk.

The case was afterwards certified to the Supreme Court of the United States, upon a division of opinion between the Judges of the Circuit Court, and at January Term, 1828, was dismissed for want of jurisdiction. The ground of the dismissal was, that the bill contained

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*no allegation, that the parties, plaintiffs and defendants, were citizens of different States. Upon this, a negotiation for a compromise took place. Some difficulties were experienced in the course of the negotiation, but in consequence of it, and with a view to the compromise, the cause, was, by consent of parties reinstated on the docket of the Supreme Court, and removed to the Circuit Court. The necessary amendment being made, a final decree was made by consent of all parties, on the 8th of May, 1830. By that decree, the sale made by the commissioners in 1822 was ratified and confirmed, and the Bank of the State of Georgia, declared to be "vested with a full, absolute and perfect title to the said bridge, and its appurtenances, under the said sale, freed, acquitted, released and discharged from all manner of liens, claims or incumbrances, in law or equity, on the part of the said Henry Shultz, John McKinne, Barna McKinne, Christian Briethaupt, or any other person or persons, parties to the said bill of complaint." It was further decreed, that the scrip issued by the Bank, should be cancelled and delivered up to it, and the bill dismissed as to all other matters contained in it.

This decree was entered in consequence of the compromise which had already been carried into effect by the parties to the suit. The Bank of the State of Georgia paid to Christopher Fitzsimons and Christian Briethaupt, holders of judgments, founded on bridge bills, and to the complainant Shultz, each, the sum of ten thousand dollars; in consideration of which payments, they released to the Bank all their respective rights in the bridge, or the proceeds of its sale, and all debts, dues, actions and demands whatever, in the most comprehensive terms possible. The release of Shultz, is dated the 15th Sept. 1829.

On the 15th October, 1828, the complainant Shultz, being in custody of the sheriff of Edge-

field district, by virtue of a writ of *capias ad satisfaciendum*, in order to obtain the benefit of the insolvent debtor's Act, assigned his estate and effects to Thomas Harrison, Treasurer of the Upper Division of the State, for the benefit of his creditors. The assignee declined to accept the trust. On the 2d of May, 1832, a bill was filed by John Stoney, John Magrath, and others, against the present complainant Shultz and others, which was heard by Chancellor Johnston at Edgefield, on the 19th June, 1832, and finally decided by the Court of Appeals, January, 1834. In the course of this proceeding, Ker Boyce and Thomas Harrison were appointed trustees for the creditors of Shultz, in place of Harrison, who declined to accept alone, and on the 8th December, 1830, they were made parties to the bill. The object of the bill, (indeed there were several bills which were all disposed of together,) was to obtain payment of certain demands against Shultz, out of his property, and lots of Shultz, in the town of Hamburg, and from the purchasers of lots sold by him. By the final judgment of the Court, certain rents were received, and property sold to a considerable amount, (\$70,000 as it was alleged) and it was in evidence, that a portion

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of those proceeds were applied to the *payment of judgments against Shultz, founded on bridge bills. The releases of Fitzsimons, Briethaupt and Shultz, were in evidence in that cause. The complainant, Yarbrough, was substituted trustee in the place of Harrison and Boyce, on the application of Shultz, in 1840.

By an Act of the Legislature of the State of South Carolina, of the 18th December, 1830, the charter of the bridge was renewed for a term of 14 years, and granted to the Bank of the State of Georgia, and on the 23d of December, 1833, by an Act of the State of Georgia, a similar grant was made to the same grantee, for a term of ten years.—On the 4th May, 1838, the Bank of the State of Georgia sold and conveyed the bridge and appurtenances to the defendant Gazaway B. Lamar, of that State, for the consideration of \$70,000. On the 21st January, 1840, the said Gazaway B. Lamar, sold and conveyed to the defendants, the City Council of Augusta, for the consideration of \$100,000. Both these defendants deny explicitly any notice of the assignment of Shultz, at the time of their respective purchases. There was no evidence whatever, of notice to the defendant Lamar, at the time of his purchase. Some evidence was offered of notice to the City Council of a claim of Shultz, on the bridge, before the purchase; but there was a difference as to the terms of it, by the evidence. One witness stated, that it was a notice of the claim of Shultz himself only, and that upon taking legal advice, they were assured he could have no claim. Another witness stated notice to be given of claims of his creditors. I do not consider the fact of notice to be established.

The bill charges that the sale made under the judgment of the Federal Court is null and void, the bill having been dismissed for want of jurisdiction; that the mortgage to the Bank of the State of Georgia, being void under the law of Georgia, the bridge still remains partnership property; that creditors of the partnership have an equity to be satisfied out of the partnership property, in preference to creditors of the individual partners; that the debt of the Bank is the individual debt of John and Barna McKinne; that partnership debts having been satisfied by the individual property of the complainant Shultz, he or his assignee and creditors, claiming in his right, have a right to be subrogated to the equity of the partnership creditors, whose debts have been so paid. It charges that if the sale be valid, the Bank is accountable to the complainant for the amount of the purchase money and interest. The bill

prays that the bridge may be sold, and the proceeds appropriated among the parties according to their respective rights; that the defendants may account for the income of the bridge, during the time that it has been in their possession respectively, and for general relief.

The defendants answer at length to the charges of the bill, and among other matters of defence, the Bank of the State of Georgia relies by way of pleading, on the want of jurisdiction in this Court; that being a corporation of another State, and having no property within the limits of this.

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*It might sufficiently dispose of all the matters of the present bill, to say that they are concluded by the decree of the Federal Court. All the claims now made, were made by that bill. It claimed that the proceeds of the bridge should be applied to the payment of partnership creditors, and that the defendant should account for income; and as to these matters the bill was dismissed. In the case of *Gillett v. Powell* [Speers, Eq. 142], in which I considered the subject very fully, and in which the decree was affirmed by the Appeal Court at its last sitting, I held, that the Circuit Courts of the United States, were superior Courts of general jurisdiction, whose judgments, whatever error or irregularity they contain, must be respected by all other tribunals, until arrested or reversed by themselves. I do not think it necessary here to repeat the reasoning which led me to that conclusion. It is sufficient to refer to the opinion in that case. But, in truth, what error or irregularity appears on the present judgment? The bill, as amended, makes the allegation necessary to give jurisdiction—that the parties, plaintiff and defendant, are citizens of different States. Can I go into evidence to try the truth of this allegation? And if I could, no such evidence has been offered, but rather the contrary. Or, is it supposed that I am to inquire and decide as to the regularity of the practice of the Supreme Court of the United States, by which, after having dismissed the bill for want of jurisdiction, it permitted the cause to be reinstated on the docket, and remanded to the Circuit Court for the purpose of being amended and heard? and more especially when there is no doubt that this was done by the consent of the parties to the suit. By the practice of the English Chancery, it does not review its own decrees for error, apparent on the face of them, when they have been made by the consent of parties.

But the present complainant, Shultz, and all claiming in his right, must be estopped by the power of attorney to Walker and Fitzsimons, by which the sale was authorized. It is true that the power was executed under the order of the Court; but I do not know that the complainant was in custody, so as to give it the character of a deed obtained by duress or imprisonment, nor that the liability to be attached for failing to perform the order of the Court, could constitute such duress. But in truth, the order of the Court was entered by consent. It was merely the initiative of a contract, which was afterwards carried into effect by the release and the final decree. Supposing it to be void as an order of the Court, it was still binding on the parties as matter of contract.

Then as to any right of the complainants in the bridge itself, it would be sufficient to say, that all the complainant, Shultz's, right and interest therein, had passed away by the expiration of his charter. The franchise or exclusive privilege which constituted it his property, no longer exists, and the material structure is attached to and part of the soil, and would be the property of the States, the owners of that soil, if the franchise had not been renewed to another. It was renewed to the defendant, the Bank, by both States, South Carolina and

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Georgia. It *is true, that there are cases in which the trustees of a franchise, obtaining a renewal of it in his own name to the prejudice of his cestui que trust, has been held to continue a trustee. But I cannot perceive any plausible or even imaginable ground on which the Bank could be held a trustee in this case. It claimed adversely under its mortgage, which was certainly good as against the parties to it, and all claiming under them, which the complainant, Shultz, must do if he claims at all. It was, so far as appears, for a bona fide debt. It was prosecuted as a hostile claim by the proceeding to foreclose it, in the Court of Georgia, and I think its validity established by the judgment of that Court.

The Act of the State of Georgia seems to relate only to assignments of tangible property, or choses in action, and not to the preferring of one creditor to another by payment of money. I perceive nothing in the Act to authorize a proceeding for the reclaiming of the money in case of such payment being made. So if the parties privately insolvent, should execute such mortgage, and before their absolute and avowed insolvency, should redeem the mortgage by paying the money, I perceive nothing to authorize the other creditors to pursue that money in the hands of the mortgagees. So if before any proceeding by creditors to invalidate the mortgage, the mortgagee should foreclose by the judgment of a Court; if the mortgaged property should be sold, and the money paid over in pursuance of the judgment, there seems still less ground for supposing that creditors would be at liberty to follow the money. In this case the bridge was not actually sold under the judgment of the Court of Georgia; but this was only prevented by the act of the present complainant, in obtaining the injunction from the Court of the United States. The amount of their debt was awarded to the plaintiffs by the Court of Georgia, and the bridge ordered to be sold, and equity regards that as done which is ordered to be done. It is analogous to the case of a judgment, founded on a security which was void for usury, where the confessing or the entering of the judgment was not part of the original usurious contract, but it was obtained in adversum. Though the contract were absolutely void for the usury, yet when carried into a judgment that judgment is valid against creditors of the insolvent usurious debtor, and against all the world.

Or, if it be said that the judgment of the Court of Georgia could only operate in rem as a foreclosure upon the half of the bridge lying within the State of Georgia, and could have no effect upon the moiety lying within the State of South Carolina, which is only subject to laws and tribunals of that State, then there is nothing in the laws of South Carolina to invalidate the mortgage of that portion of the bridge.

But so far as respects any right in the bridge itself, there are other conclusive grounds against complainant's claim. The defendant, Gazaway B. Lamar, purchased without notice of the claim of the assignee, or creditors of the complainant, Shultz, and purchasing from him, the City Council of Augusta would be protected as a purchaser from a purchaser without notice.

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This was determined in the case of the *City Council of Charleston v. Page, [Speers, Eq. 159,] decided at the last sitting of the Court of Appeals. But as I have intimated, I do not think the notice to the City Council sufficient. If it was the notice of the claim of Shultz himself, and not of his assignee or creditors, knowing of his release of 1829, they would irresistibly be led to the conclusion, that he could have no claim whatever.

But, indeed, I think the whole claim of the bill is founded on a misconception of the doctrine relative to the applying of partnership ef-

fects to partnership debts. It is said to be the equity of one partner to enforce such application, in order that his private property may not be made liable to partnership debts, until the partnership effects are exhausted. It is also said, that in cases of insolvency, this equity may be enforced at the instance of partnership creditors, who, through this equity of the partners, obtain the benefit of such application. But this must be taken to relate to property in the hands of the partners at the time of total and acknowledged insolvency, and when there is some proceeding to wind up the affairs of the insolvent firm. It cannot relate to property which the partners have before alienated, bona fide, as in payment of a just debt. Now, in this case, the partners had alienated before the acknowledged insolvency. As I have said, the mortgage was good and valid as against the partners themselves who executed it and all claiming under them. As to the mortgage, it was bona fide, and it is immaterial that it was executed by the parties in their individual names. Such a method of execution, especially as regards real property, is usual and proper, if not necessary. Now suppose that Barna McKinne had remained a member of the firm: had been sued on bridge bills, or other partnership debts, and compelled to pay them, is it to be supposed that he would be permitted to invalidate his own deed for the purpose of reimbursing himself? So if Shultz had not gone out of the firm, but had joined in the execution of the mortgage, and afterwards paid partnership debts, as he has done, he would stand on the same footing. But I think this is his actual predicament. By resuming his place in the firm, and accepting a re-conveyance, he has put himself, to all intents and purposes, in the place of Barna McKinne, and must be estopped by whatever would estop McKinne. He can only claim through him. He does not properly come as a partnership creditor, or the assignee of such creditor, to have a distribution of partnership assets, but as a partner who has joined in the alienation of partnership property, and then been compelled to pay partnership debts out of his own property. He was liable for the payment of those debts. This view applies equally to any claim, legal or equitable, in the bridge itself, or the proceeds of its sale.

With respect to those proceeds, there are other grounds on which the claim must be held untenable, and among these is the objection to the jurisdiction of this Court, taken by the Bank of the State of Georgia. Having no interest, legal or equitable, in the bridge itself, they have no property within the State. In the case

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of *Bowden v. Schatzell*, Bail. *Eq. 360 [23 Am. Dec. 170], it was determined that the resident of another State, having property within this State, might be made a party in Court under our Act of the Legislature, though there were not any party within the State having possession or control of the property. But it has never occurred to any one to go further and say, that a party neither found or domiciled within the State, nor having property within it, might be made amenable to our jurisdiction. It was urged in argument, that by answering to the bill, the defendants have submitted to the jurisdiction, and must abide the decree on the merits. But it is a perfectly familiar practice, that a defendant may take advantage of that which would be properly the subject of a plea, by way of pleading in his answer. This the Bank has done. When it is said that the answer overrules a plea or demurrer, it is meant that the defendant must answer fully. The object of a formal plea is to excuse the defendant from answering. He is not to shield himself from making a full answer, on the ground of the excuse which he has offered in the answer itself. These defendants might properly answer for the purpose of showing the fact, that

they had no property within the State, and were therefore not amenable to the jurisdiction. They might also properly answer, for the purpose of defending the title of their vendees. But is it not perfectly apparent, that any decree which I could make with respect to this fund would be perfectly nugatory? If I should decree the payment of the money what process could the complainant have for enforcing the decree? If I should order them to account, how could the Court enforce that order? If it were sought to enforce such a decree in the Courts of Georgia, is it probable that those Courts would recognize the validity of it?

On the ground of time in analogy to the statute of limitations. Whatever ground there may have been for regarding these defendants as mortgagees in possession, before the sale of 1822, and the fund produced by the sale as in custody of the Federal Court, they must certainly be regarded as claiming the fund adversely from the time of Shultz's release of 1829, or at all events, from the decree of the Federal Court. This decree, in effect, awards the fund to them, and has relation back to the sale of 1822. But from the time of the decree in 1830, to the filing of the present bill in 1841, more than ten years have elapsed, and if it were necessary that the assignees of Shultz should have notice of this adverse claim, they certainly had it so early as the hearing of the cause of *Stoney and Magrath* in 1832. There are various other grounds which might be considered, leading to the same conclusion, and throwing insuperable difficulties in the way of the complainant's success, but which I do not think it necessary to consider at length.

It does not appear that this fund, which was substituted for the bridge, was included in Shultz's assignment of 1828. The assignment was of his interest in the bridge itself, and though the assignee of an insolvent debtor may be authorized, under the law of this State, to recover any property or interest which the in-

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solvent has in the hands of any person *in the State, the law of South Carolina does not operate within the limits of Georgia. The assignment of a chose in action in another State, can only be made effectual as the personal act of the assignor. If this assignment were presented to a Court of Georgia, could the assignment of Shultz, of his interest in the bridge, be regarded as an assignment of money in the vaults of the Bank?

There was evidence of a previous assignment by Shultz, of all his interest in the bridge, to Gaston, of Savannah.

I could make no decree concerning this fund, without a full account of all the transactions of the Bridge Company, which could only be done by having the representative of Barna McKinne a party, as well as John McKinne. It appears, indeed, that both these were largely indebted to the concern. It appears from the testimony of William Y. Hansel, the former cashier of the Bridge Bank, that these parties had withdrawn very large sums from the firm, for the use of themselves and other firms of which they were members; which, according to the testimony of the same witness, (and I can have no doubt of the fact,) occasioned the failure of the Bridge Company. But I could decide nothing on these matters, without such full account as I have suggested. It appears that Shultz, at the time he left the Company, was indebted to it in the sum of \$63,000, for which credit was given him on the books. But on his re-entering the firm, I suppose his indebtedness was reinstated for this amount. He is *prima facie* liable to the creditors of the Bridge Company; indeed, he could not be discharged from his liability by the credit given, and this is a much larger amount than the debt of the Company, which he has shown himself to have paid.

A question might be made with regard to

the original invalidity of the mortgage. The McKinnes were previously indebted to the Bank, in the sum of \$40,000; they borrowed \$50,000 at the time, which was represented to the Bank to be for the use of the Bridge Company, and I think must be regarded as the debt of the Company. Separate property, of John McKinne as well as the bridge, was included in the mortgage. It was stipulated, that upon the payment of \$40,000, the property of McKinne should be released, and upon the payment of the remaining \$50,000 the bridge should be released. Now, whatever may be the general rule, with respect to a deed which is void in part, being void in the whole, it might well be questioned whether we should not regard these stipulations as creating separate mortgages for distinct debts, though included in the same instrument.

If, as I have supposed, the \$50,000 were the debt of the Company, the defendant, Shultz, is liable for the whole of it, and would be compelled to bring it into account, if the account which he claims should be gone into.

But it is unnecessary to pursue these topics. The case has been an embarrassing one, from the great mass of irrelevant matters, evidence, and documents, with which it has been incumbered,

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rather than from *any intrinsic difficulty with regard to the merits. I hope that an end will now be put to this long protracted litigation. The complainant is naturally disposed to think that he must have suffered injustice from having been deprived of property that was not only matter of interest, but of pride and feeling, and from having been harassed and pursued on account of his responsibilities for a Company, to the failure of which he, as I am fully satisfied, did not at all contribute. But I believe he is inclined to shift the blame from those to whom it properly belongs, on account of some recollection of early kindness, and to throw it on others who have done nothing more than to stand upon what they fairly regarded as their just rights.

It is ordered and decreed, that the bill be dismissed.

The plaintiffs appealed, on the following grounds:

1. Because the interest of Henry Shultz in the Augusta bridge has never been legally disposed of, and is now subject, in the hands of his assignee, to the claims of his creditors.

2. Because the alleged mortgage of the bridge from John and Barna McKinne to the Bank of the State of Georgia, was null and void under

the Act of the State of Georgia, referred to in the decree.

3. Because the bridge was the partnership property of the Bridge Company, and the mortgage before referred to, to secure the individual debt of John and Barna McKinne, being void it yet remains partnership property, and liable for the partnership debts; and because the creditors of Henry Shultz have the right to be subrogated to the equity of the partnership creditors, whose debts have been satisfied by the individual property of the said Henry Shultz.

4. Because the alleged decree of the Circuit Court of the United States, at Savannah, in the case of Christian Breithaupt, Henry Shultz and others v. The Bank of the State of Georgia, is of no validity, so far as the present plaintiffs are concerned, the same having been rendered after the bill had been dismissed, and after the interest of Henry Shultz, in the matters in controversy, had been assigned and transferred to his creditors.

5. Because the Bank of the State of Georgia, and the other defendants claiming under the said Bank, can derive no title to the bridge under the proceedings of the Superior Court of Richmond county, Georgia, as there never was a sale of the bridge under order of that Court; and especially is this so in reference to the South Carolina end of the said bridge.

6. Because the defendants bought with full notice of the claims of the present plaintiffs.

7. Because the Chancellor ought to have decreed that the bridge should be surrendered or sold, and that the parties account for the income.

8. Because the bridge, or at least one-half of it, being within the jurisdiction of the Court,

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and the defendants having answered, the *Court possessed ample jurisdiction of the cause, both with respect to the bridge itself and the proceeds.

9. Because the Bank of the State of Georgia, in any view, should be required to account for the proceeds of the sale of the bridge, with interest.

10. Because, upon the pleadings and the proof, the plaintiffs were entitled to recover, and because the said decree is contrary to law and equity and the evidence.

PER CURIAM. The Court concurs generally in the views of the Chancellor, and the decree is affirmed.

HARPER, JOHNSON and DUNKIN, CC., concurring.

APPENDIX

4 Rich. Eq. *475

*CHRISTOPHER WILLIMAN et al. v.
HENRY M. HOLMES et al.

(Charleston. Feb., 1850.)

[Trusts ⇨131.]

There are three circumstances necessary to the execution of a use by the statute of uses: (1) A person seized to the use of some other person; (2) A cestui que use, in esse; and (3) A use in esse in possession, remainder, or reversion. And where the use is transformed from an equitable to a legal estate, the same qualities, conditions, and limitations that were applicable to it as a use follow it in its new condition as a legal estate.

[Ed. Note.—Cited in *Foster v. Glover*, 46 S. C. 539, 24 S. E. 370.

For other cases, see *Trusts*, Cent. Dig. §§ 175, 175½; Dec. Dig. ⇨131.]

[Trusts ⇨131.]

The statute does not execute a trust, where there is some act or duty to be performed by the trustee necessary to the scheme of the trust; and which could not be performed by the trustee if the legal estate passed from him under the operation of the statute.

[Ed. Note.—Cited in *Creighton v. Pringle*, 3 S. C. 99; *Farr v. Gilbreath*, 23 S. C. 512.

For other cases, see *Trusts*, Cent. Dig. §§ 175, 175½; Dec. Dig. ⇨131.]

[Trusts ⇨131.]

The conveyance or devise of an estate to trustees, for the sole and separate use of a married woman, is not such a trust as is executed by the statute.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 175½; Dec. Dig. ⇨131.]

[Trusts ⇨131.]

Where an estate is devised to a trustee, in fee, for the sole use, benefit, and behoof of a married woman for life, and after her death for the sole use, benefit, and behoof of a person, or class of persons, who are in esse, and are sui juris, the legal estate in fee given to the trustee is cut down to an estate commensurate with the separate estate for life of the married woman, (an estate per autre vie,) which it is his duty to preserve; and the statute forthwith executes the use as to the residue in the remainder-men, concerning whose interest the trustee has no special duty to perform.

[Ed. Note.—Cited in *Howard v. Henderson*, 18 S. C. 191; *McNair v. Craig*, 36 S. C. 109, 15 S. E. 135; *Breeden v. Moore*, 82 S. C. 538, 539, 64 S. E. 604.

For other cases, see *Trusts*, Cent. Dig. §§ 175, 175½; Dec. Dig. ⇨131.]

[Trusts ⇨131.]

And so where the legal estate given to the trustee has not amplitude sufficient to enable him to perform the duties of his trust, his legal estate will be enlarged by implication to an extent commensurate with the objects and duties of the trust.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 175½; Dec. Dig. ⇨131.]

[Wills ⇨634.]

Where an estate is devised to one for life, with remainder to such persons as the tenant for life, or any other appointor shall direct and appoint, and in default of such appointment, to a person or class of persons in esse, the remainder is vested notwithstanding the interposition of the power. The estate is vested in the remainder-men, subject to be divested by the execution of the power.

[Ed. Note.—Cited in *Farrow v. Farrow*, 12 S. C. 172; *Bilderback v. Boyce*, 14 S. C. 541; *Mims v. Machlin*, 53 S. C. 9, 30 S. E. 585; *Tindal v. Neal*, 59 S. C. 15, 36 S. E. 1004; *Humphrey v. Campbell*, 59 S. C. 43, 47, 37 S. E. 26; *Ketchin v. Rion*, 68 S. C. 275, 47 S. E. 376.

For other cases, see *Wills*, Cent. Dig. § 1492; Dec. Dig. ⇨634.]

[Wills ⇨506.]

In a devise by the testator to his 'right heir at law,' the word 'heir' is *nomen collectivum*, and embraces all such persons as are entitled to take as in cases of intestacy under the statute of distributions; and the estate devised being the same as that given by law, they will be considered as taking by descent and not by devise.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1090-1099; Dec. Dig. ⇨506.]

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[Life Estates ⇨27.]

*Where an estate is sold by a decree in equity, it is sufficient to make the title good against all contingent remainders and interests, if the person who has the first estate of inheritance is a party before the Court; he being regarded as the representative of all those contingent interests that are dependent upon and are to succeed his estate. And it would seem, that, in a case where there was no vested estate of inheritance, but an estate for life, with contingent remainders and executory devises to persons not in esse, it would be sufficient if the tenant for life were properly a party before the Court. (*Bofil v. Bofil*, 3 Rich. Eq. 1 [55 Am. Dec. 627].)

[Ed. Note.—Cited in *Clyburn v. Reynolds*, 31 S. C. 113, 9 S. E. 973.

For other cases, see *Life Estates*, Cent. Dig. §§ 49, 50; Dec. Dig. ⇨27.]

[Life Estates ⇨27.]

But where there is an estate for life with a vested remainder to persons in esse, who are within the jurisdiction of the Court, a decree for a sale of the estate is not binding upon the remainder-men, and does not divest their right unless they be parties.

[Ed. Note.—Cited in *Moseley v. Hankinson*, 22 S. C. 332; *Moore v. Scott*, 66 S. C. 292, 44 S. E. 737.

For other cases, see *Life Estates*, Cent. Dig. § 49; Dec. Dig. ⇨27.]

[Trusts ⇨194.]

In cases of trust, where the trustee is seized of the legal estate in fee and is a party before the Court, there is a greater facility in giving a perfect title to the purchaser, although all the parties in interest are not before the Court,

inasmuch as the decree for sale operates upon the fee simple in the trustee, and passes that to the purchaser discharged of the equities of the *c'estui que trusts*.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 249; Dec. Dig. ⚡194.]

[*Partition* ⚡85.]

Where the Court of Equity, in the exercise of its jurisdiction, decreed the sale of an estate, and the title proved defective because some of the persons who were tenants were not parties to the proceeding; and the purchaser supposing that he had bought the entire estate greatly improved the value of some portions of the estate (water lots,) it was ordered, that the partition should be so made as to give to the purchaser the part of the estate so improved, without accounting for the improvements, the improved parts not being greater than his rightful share when he bought, and it being shown to the Court that such partition could be made without injury to the other parties in interest. (a)

[Ed. Note.—Cited in *Annelly v. De Saussure*, 12 S. C. 520; *Scaife v. Thomson*, 15 S. C. 368; *Trapier v. Waldo*, 16 S. C. 282; *Annelly v. De Saussure*, 17 S. C. 392, 393, 395; *In re Covin's Estate*, 20 S. C. 475; *Lumb v. Pinckney*, 21 S. C. 475; *Buck, Heflebower & Neer v. Martin*, 21 S. C. 592, 593, 53 Am. Rep. 702; *Johnson v. Pelot*, 24 S. C. 265, 58 Am. Rep. 253; *Hall v. Boatwright*, 58 S. C. 548, 36 S. E. 1001, 79 Am. St. Rep. 864.

For other cases, see *Partition*, Cent. Dig. § 238; Dec. Dig. ⚡85.]

[This case is also cited in *Humphrey v. Campbell*, 59 S. C. 39, 37 S. E. 26, and distinguished therefrom.]

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*Before Dargan, Ch., at Charleston, February, 1850.

(a) Note by his Honor. The question, whether compensation is to be allowed to a tenant in common, who has made improvements upon the common estate, as against his co-tenants, has been attended with much difficulty. Not to allow it, where the improvements are valuable, in many cases is highly inequitable; yet no safe rule of universal application can be laid down upon the subject. For in some cases, though the improvements may add to the permanent value of the estate, it might be undesirable, inconvenient, and even ruinous, for the co-tenant, who has not concurred in the improvements, to meet his share of the expense.

That compensation for such improvements in ordinary cases, will not be allowed, may be regarded as the settled law of South Carolina. *Thompson v. Bostick*, McM. Eq. 75; *Thurston v. Dickinson*, 2 Rich. Eq. 317 [46 Am. Dec. 56].

But the obvious hardship of depriving the tenant, who has made the improvements, of any benefit from his expenditures, and of throwing the value of the improvements into the common estate for partition, will induce the Court so to modify its decree as to let the improving tenant have the benefit of his improvements, wherever it can be done without injury to his co-tenant. The high equity to be allowed compensation for permanent and valuable improvements should prevail, wherever it can be done consistently with the rights of the other parties.

"In suits for partition," says Judge Story, (1 Story Eq. § 656,) "various other equitable rights, claims and adjustments will be

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made, which are *beyond the reach of Courts of Law. Thus, if improvements have been made by one tenant in common, a suitable compensation will be made him upon the partition; or the property on which the improvements have

Christopher Williman, by his will, dated December 26, 1813, inter alia, devised and bequeathed as follows:

"I give, devise, and bequeath unto Mary Peters, Gilbert Davidson and Margaret Bethune, and to their heirs and assigns forever, all those two houses and lots, situate on the east side of Meeting street, which I lately bought from Mrs. Gregorie; also all that wharf, situate on South Bay, and the land attached to the same; also my lands at the head of Tradd street; also all that piece or lot of land, known in the plan of the Grove Tract as No. 2, containing about twenty acres of high land and about the same quantity of marsh; also all those two plantations on Combahee, known by the names of Boston Bottom and Walnut Hill; also one moiety or half of all those two islands, situate between the Combahee and Bull rivers, both known by the name of Williman Islands, and one undivided moiety of thirteen hundred acres of marsh land adjoining them; also sixty negroes, &c., &c. In trust for the sole use, behoof and benefit of my daughter, Eliza Davidson, the wife of Gilbert Davidson, for and during the term of her natural life, and from and immediately after the

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death *of my said daughter, in trust for the sole use, benefit and behoof of the said Gilbert Davidson, should he survive my said

been made assigned to him." The same author, (1 Vol. § 655,) says: "where one tenant in common supposing himself to be legally entitled to the whole premises, has erected valuable buildings thereon, he will be entitled to an equitable partition of the premises, so as to give him the benefit of his improvements." *Town v. Needham*, 3 Paige, 546, 555.

"Courts of Equity will not only take care, that the parties have an equal share, but they will assign to the parties respectively such parts of the estate as would best accommodate them, and be of most value to them with reference to their respective situations in relation to the property before partition." 1 Story Eq. § 655.

The disposition of the Court is always to give the tenant making the improvements the benefit thereof, as far as is consistent with the equity of his co-tenants. In *Hancock v. Day*, McM. Eq. 298, it was held, that the occupying tenant of a tenancy in common is not bound to account for the rent of land rendered productive by his own labor. This case was decided on the authority of the preceding cases of *Thompson v. Bostick*, and *Kerr v. Robertson*, McM. Eq. 475. In the case last mentioned, it was held, that one tenant in common was not bound to pay rent for land that he had himself cleared and reduced to a state of cultivation. See *Lyles v. Lyles*, 1 Hill, Eq. 86 and *Volentine v. Johnson*, Ib. 49.

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*Thus, it seems to be clearly settled, that the tenant in possession, who has made improvements, is entitled to the whole of the profits resulting from such improvements, during the continuance of the tenancy in common. And it would seem to be equally clear, that where the tenant who has made improvements, has not improved more than his share, and that share with the improvements can be set apart to him in the partition without injury to the rights of his co-tenants, considered in reference to the

daughter, for and during the term of his natural life, and from and immediately after the death of the survivor of them, then in trust for the sole use, benefit and behoof of such of my children and grand-children, as the said Eliza Davidson shall, by her last will and testament, or by any deed under hand and seal executed in the presence of three or more credible witnesses, direct, limit and appoint, and in default of such direction, limitation and appointment, then in trust for the sole use, benefit and behoof of my right heir at law."

DARGAN, Ch. The very full and elaborately prepared statement of the facts, which has been furnished, and which I adopt, renders it entirely superfluous for me to preface my decree with the usual preliminary narrative. I, therefore, proceed at once to the consideration of the questions that are made in the pleadings, and that have been discussed in the argument.

The great question of the case, and an interesting and important one it is in any point of view, is whether the sale made under the decree of this Court, in the suit of Eliza Davidson v. Mary Peters and others, is valid against the remainder-men, who are the complainants in this bill, and are seeking to have that sale vacated so far as it affects their rights. In the threshold, as it were, an important preliminary problem presents itself, which it is necessary to solve. In my judgment, much depends upon the

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solution *of this question; which arises upon the construction of Christopher Williman's will. Does the devise to Eliza Davidson create a trust estate? Does the statute of uses execute the trust, and transfer the legal title to Eliza Davidson as to the life estate, on the death of the testator? And again, does the statute of uses execute the use as to the remainder-men, and transfer the legal estate in the remainder to them, before the termination of the precedent life estate?

If Eliza Davidson, had been a feme sole, there would have been specious reasons for the opinion, that the statute would have executed the uses on the death of the testator, and that she would forthwith have been invested with the legal title, discharged of the trust. But she was at that time the wife of Gilbert Davidson. And the form

state of the property as it originally stood, or as it would have stood, had no such improvements been made, the partition ought so to be made, as to give the tenant, who has spent his money, that part of the estate in which the expenditures have been made.

In the case to which these remarks are attached as a note, the occupying tenant had the additional equity of having purchased bona fide, for a valuable consideration, the fee, and was ignorant, when making the improvements, of any outstanding claim of the plaintiffs against him for a partition.

and language of the devise is peculiarly adapted for the creation of a separate estate in trust for the benefit of a married woman; and one, which the potential magic of the statute would fail to destroy. The estate is given to trustees, to whom the legal estate passes in the first instance. If it be such a trust estate as the statute would execute, it passes through and out of the trustees, eo instanti, and vests in the cestui que trusts. But if there be any thing for the trustees to do; if there be a duty imposed upon them in connexion with the trust, for the performance of which it is necessary that the trustees should remain seized of the legal estate, the statute then does not execute the use; but the legal estate abides with them until the executory trusts are performed. After the execution of the trusts, the title passes away from them, silently, and by operation of law. A trust to preserve the separate estate of a married woman, is of that class of trusts, which the statute of uses does not execute. The words of this devise, ("in trust for the sole use, benefit and behoof," &c.) are technically expressive, (if any words in relation to such a devise can be considered as technical,) of an intention to create a separate estate in Eliza Davidson.

It has been urged with much ingenuity and force, that notwithstanding the expressive form of the language, it is yet still a

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*question of intention, whether the testator really did mean to create a separate estate in Eliza Davidson. After the death of his daughter, Eliza Davidson, he gave the estate "in trust for the sole use, benefit and behoof of Gilbert Davidson, should he survive," &c. On the death of the survivor, the estate was to be held in "trust for the sole use, benefit and behoof of such of my children or grand-children, as the said Eliza Davidson shall by her last will and testament, or by any deed under her hand and seal, executed in the presence of three or more credible witnesses, limit, direct and appoint, and in default of such direction, limitation and appointment, then in trust for the sole use, benefit and behoof of my right heir." It is contended, that the testator could not have intended to create separate estates in all these remainders, and as he used precisely the same form of language in reference to them, that he did in the devise to Eliza Davidson, he could not have intended to create a separate estate in her. The argument is ingenious, but its fallacy consists in assuming, that the testator did not intend what he has expressed. He may have been ignorant that the law does not permit indefeasible estates to be enjoyed by persons who are capable of acting sui juris. He may have supposed, that among his children and grand-children, or among his heirs at law, there would be fe-

males and feme coverts, who would be protected in the enjoyment of a separate estate; and in reference to the estate which he gave to Gilbert Davidson, as well as that which he gave to his children, &c. he may have intended to make it inalienable, and not subject to debts. He may have been ignorant of his want of power to stamp such attributes upon an estate. He could not have used the word "sole" as the synonym of "several," for two of the contingent interests were given to a class. His meaning in these subsequent dispositions of the estate may be ambiguous; but so appropriate is the language of the will to the creation of a separate estate in Mrs. Davidson, that its construction ought not to be affected, by the uncertainty of his meaning, when he employs the same forms of expression in other

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and subsequent parts of his *will. He seems to have intended to sow separate estates broad cast through his will; and if some of them have fallen upon stoney ground, and have proved ineffectual, and his language in relation to them becomes ambiguous or unmeaning, it will not prevent the separate estate in favor of Eliza Davidson from taking effect, where not only is the language appropriate, but the sex, relations and circumstances of the devisee are propitious to the creation and existence of such an estate. The will then created a trust estate for the sole use of Eliza Davidson for her life, &c., which the statute of uses did not execute.

The legal estate devised to the trustees was in fee. The use was limited to Eliza Davidson for life, remainder to her husband, Gilbert Davidson, if he was the survivor, for life, remainder to such of the children or grand-children of the testator as Eliza Davidson should by will appoint and in default of such appointment, remainder to the testator's right heirs. If the estate had been given in trust, for the sole use of Eliza Davidson for life, and at her death to the use of, or in trust for some ascertained individual, and on an event that was certain, it would certainly be a vested remainder. But for the interposition of the power of appointment, there could have been no doubt that the remainder to the right heirs of the testator was vested, and not contingent. Then, the order of succession in the enjoyment of the estate, prescribed by the will, would have been thus: to Eliza Davidson for life; remainder at her death to Gilbert Davidson, if he was then living; at his death, or at her death, if she was the survivor, remainder to the right heirs of the testator. It may be doubtful whether this last is not a reversion instead of a remainder. If, by the words his "right heir," he means statutory heirs, (as I think he does,) it would be a devise of this residuum of the estate to the same persons who would be entitled

to it by law, in case of intestacy. The rule is, that if a testator devises his lands to his heirs at law, without any restriction or modification as to the enjoyment or possession, they will take by descent rather than by the devise. But it will be found immaterial in the result of this case, whether the

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limitation *to the right heirs of the testator will operate as a reversion or remainder. I will, for the present, speak of it as a remainder.

Considering it as a remainder, it is valid; for it was made to depend upon an event that must happen within the period prescribed against remoteness. If the interposition of the power did not prevent its vesting, then it was also a vested remainder; for it was upon an event certain, (the death of the survivor of Eliza and Gilbert Davidson,) and to persons in esse—the right heirs of the testator, who existed at his death as a class.

Regarding the estate given to the right heirs as a remainder, I am of the opinion that it was vested and not contingent, notwithstanding the power to Eliza Davidson to appoint among the testator's children or grand-children. The fee vested directly in the right heirs, subject to be divested by the exercise of the power of appointment. This is an abstruse branch of the law of real estate. Some of the rules are exceedingly artificial and finely spun, and some very subtle distinctions have prevailed on the subject. A question like this must depend mainly upon the authorities. On a reference to these, it will be found that there is some conflict; or rather, that there has been a change in the course of the English decisions. According to the second resolution in *Lovies' case*, (10 Rep. 78,) where the donor by an indenture limited to himself an estate for life, with the power to lease, &c., and to the use of any persons to whom he should devise any of the estate, with a remainder over in tail, &c., this, and all the subsequent remainders were held to be contingent and not to be executed till the death of the donor.

In *Walpole v. Lord Conway*, cited in the argument of *Doe v. Martin*, (4 Term. Rep. 57,) from *Barnardiston's Rep.* in Ch. 153, (and commented on by the Chief Justice,) money was directed to be laid out in lands, to be settled to the use of Lord Conway for life, remainder to his intended wife for life, remainder in trust for such child or children, and for such estates absolutely or conditionally, and in such proportions as Francis Lord Conway should appoint, and in default of such appointment, to the use of all and

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*every the daughters, younger sons, and the heirs of the bodies, &c. One of the questions which arose was whether a son of one of the daughters, who was dead, was

entitled to his mother's share. And that depended on the question whether the remainders to the daughters were contingent, or vested and liable to be divested by the appointment. Lord Hardwicke held the remainders to be contingent. He said that "Lord Conway had a power during all his life time to limit the estate among his daughters and younger sons in such manner as he thought proper, and therefore during all that time the remainder over to those children, in default of such appointment, must have been contingent."

But in *Cunningham v. Moody*, 1 Ves. Sen. 174, Lord Hardwicke held a different opinion. The analogy of that case to the one I am now considering, is very strong. There money having been agreed, on a marriage contract, to be laid out in the purchase of lands to the use of the husband and wife for life, remainder to the children in such proportions as the parents should appoint, and in default of such appointment, to all the children equally, as tenants in common and not as joint tenants; the Lord Chancellor decided that the remainders were vested. After saying that the fee was not in abeyance, he observed: "Nor does the power of appointment make any alteration therein; for the only effect thereof is that the fee which was vested, was thereby subject to be divested if the whole were appointed." This case was adjudged by Lord Hardwicke upon great consideration. And Lord Kenyon observed in *Doe v. Martin*, that the opinion of his Lordship "was peculiarly deserving of attention, because when the latter case was discussed, the former one of *Walpole v. Conway*, where he had intimated a different opinion, was strongly pressed upon him; because, too, he decided the last case at a time when he had the assistance of some of the most eminent lawyers who ever attended the bar of that Court."

Doe v. Martin, 4 T. R. 38, also furnishes a striking parallel. There, on a marriage settlement, lands were conveyed in trust to the use of the wife for life, remainder to the use

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of the husband *for life, remainder to the use of all and every the children of the marriage, or such of them, and for such estates, as the husband and wife should appoint, and for the want of such appointment, to the use of all and every the child or children equally, if more than one, as tenants in common, and if only one, then to such only child, his or her heirs and assigns forever; remainder over. The deed of marriage settlement also contained a power authorizing the settlors to revoke the uses, and to sell and convey the lands, &c. The Chief Justice, after an elaborate argument, in which the whole of the previous decisions, passed under review, following the decision in *Cunningham v. Moody*, held, that the remainders to the children were vested remainders in each child when

he or she was born, subject, however, to be divested by the parents exercising the power of appointment. *Maundrell v. Maundrell*, 7 Ves. 567; *Smith v. Lord Camelford*, 2 Ves. jun. 698; *Fearnle Con. Rem.* 226, 233; *Sug. Pow. ch. 2, 4*; *Lord Raymond*, 2 vol. 1150; *Madoc v. Jackson*, 2 Bro. C. C. 588; 10 Ves. jun. 265. The conclusion at which I arrive is, that if the right heirs of the testator were entitled to take as remaindermen, and not by reversion, the remainder was vested, subject to have been divested by the appointment; which, however, as to the property in question was not executed.

The next question which I will consider, is whether the statute of uses has executed the uses as to the estate, which the right heirs of the testator took in the property under the provisions of the will. My conclusion upon the question last considered was but a step to my conclusion upon this. I have held, that if they were entitled as remaindermen, the remainder was vested: And my opinion further is, that whether they take by way of vested remainder, or reversion, the statute executes the uses as to them, leaving in the trustees a legal estate only for the life of *Eliza Davidson*. According to this view, on the death of the testator, the trustees became seized permanently of the legal estate for the life of *Mrs. Davidson*, in trust for her sole use. The statute forthwith executed the use as to the remainder-men or

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reversioners, (as the case may be,) who at once became invested with the legal estate in fee, by way of vested remainder, to take effect in possession on the death of *Mrs. Davidson*.

The statute of uses by its express terms embraces estates in remainder and reversion. It declares "that in every such case, all and every such person or persons, &c., that have or shall have any such use, confidence or trust in fee simple, fee tail, for term of life, or for years, or otherwise, or any use, confidence or trust in remainder or reversion, shall from thenceforth stand and be seized, deemed and adjudged in lawful seisin estate and possession of, and in the same houses, castles, manor lands, &c., remainders, reversions," &c., as the grantees to uses.

"There are three circumstances necessary to the execution of a use by this statute: 1st. A person seized to the use of some other person; 2d. A cestui que use, in esse; and 3d. A use in esse in possession, remainder or reversion." 1 Cruise Dig. 412, 1 Rep. 126. When the use is transformed from an equitable to a legal estate, the same qualities, conditions and limitations, which were applicable to it as a use, follow it in its new condition as a legal estate. So that the execution of the uses in this case, in the right heirs of the testator, could not defeat the execution of the power of appointment, if *Mrs. Davidson* had thought proper to exercise it.

I have already shown that the legal estate remained in the trustees for the life of Mrs. Davidson, because it was necessary (to preserve her separate estate) that they should be seized of the legal estate for her life. The statute will not permit the trustees to take a larger legal estate than is necessary to the performance of the executory trusts imposed upon them by the will. If a larger estate than is necessary for this purpose is given to them, it will be cut down by the statute, and shaped to meet the exigencies of the case. In *Doe v. Simpson*, 5 East, 171, Lord Ellenborough said "that where the purposes of a trust can be answered by a less estate than a fee simple, a greater interest than is sufficient to answer such purpose shall not pass

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to them; but that *the uses in remainder, limited on such lesser estate so given to them, shall be executed by the statute." In *Curtis v. Price*, 12 Ves. 89, an estate in fee to the trustees was cut down to an estate per autre vie, on the ground that an estate of that duration was sufficient for the purposes to be answered. *Shapland v. Smith*, 1 Bro. C. C. 75; *Goodtitle v. Whitby*, 1 Burr. 229; *Edwards v. Symonds*, 6 Taun. 213; *Doe v. Hicks*, 7 T. R. 433; *Nash v. Coates*, 3 Barn. & Adolph. 839.

So where an estate in fee is not given to the trustees, and such an estate is necessary to the execution of the trusts, their estate will be enlarged by implication to the extent necessary. In short, it is an established rule that trustees shall hold legal estates commensurate only with the necessities of the trusts. If the estate given to them is deficient, it will be enlarged by implication. If in excess, it will be cut down by the operation of the statute of uses, and such excess will pass to those in remainder.

On looking into the will of this testator, I can discover no duties that were to be performed by the trustees, rendering it necessary for the legal estate to remain in them, beyond that of preserving the separate estate of Mrs. Davidson. It was certainly not necessary as to the remainder to Gilbert Davidson, nor as to the remainder or reversion to the right heirs of the testator. These were trusts that were executed by the statute, leaving, as I have before said, a legal estate in the trustees only for the life of Mrs. Davidson.

Such being the state of the title, and Eliza Davidson, the wife of Gilbert Davidson, being entitled to an equitable and separate estate in this property for life, and her trustees being seized of a legal estate commensurate with her equitable interest, in conjunction with her husband, who was one of the trustees, on the 21st day of November, 1817, filed her bill in this Court against Mary Peters and Margaret Bethune, the other trustees. The bill described the estate, recited the devises of the will and the limitations, charged that the estate in its then existing form

was unproductive, prayed a sale of a portion

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of the estate, and a change *of investment, and alleged that such sale and change of investment would be conducive to the interests of those entitled in remainder, as well as of the life tenant.

On the same day, Mary Peters and Margaret Bethune filed their joint answer, in which Gilbert Davidson, although a complainant, joined, and affixed his signature thereto. They admit the title as stated in the bill, and the unproductiveness of the property. They also state their belief, that if it was sold and the proceeds invested in other property, it would be advantageous to the complainant, and not injurious to those interested in the estate of Ch. Williman. And they gave their assent to the sale. The case was referred to the commissioner, (Th. Hunt,) who, on the 22d November, 1817, filed his report, recommending the sale prayed for in the bill, and stating it as his opinion that the sale would be for the benefit of the complainants, and of those interested in the reversion, or remainder of the estate of Ch. Williman. On the same day there was a decretal order confirming the report, and directing a sale by the commissioner on such terms, and at such time or times, at public or private sale, as he, by and with the advice and consent of the trustees of the complainant, may think most proper and advantageous to the trust estate. In pursuance of this order the property was sold, and conveyed by the commissioner, and this property so sold and conveyed, is the subject of controversy in this suit. The title of all the defendants has been thence derived. On the 17th November, 1820, the commissioner made a report of sales, which was on the same day confirmed. And again on the 19th February, 1821, he made a report of sales, which was also confirmed. The last report was a repetition in part of the first.

The defendants also introduced in evidence another bill in equity, and the proceedings under it; in which Eliza Davidson was the complainant. In her first bill, she had stated that her trustees had purchased for her from Henry Middleton and Henry Middleton Rutledge, a tract of land called Jenny's plantation, for the sum of \$8,000, and that they

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had given their own bond *for the purchase money, and a mortgage of the premises. One of the objects of the bill was to obtain the funds to pay for the Jenny plantation, and to confirm the purchase thereof for the trust estate, and to invest the surplus in more productive property. The bill so prayed, and the order of the Court was in conformity with the prayer of the bill. The debt contracted for Jenny's plantation was soon afterwards paid, it is presumed, with the trust funds. Jenny's plantation thus became substituted property of the trust estate.

On the 17th November, 1823, Eliza Davidson filed her bill for the sale of the Jenny plantation, and other portions of the trust estate, not embraced in the former order of sale, on the alleged ground that the property was unproductive. And she prayed that the proceeds of the sale might be invested in public or private securities, yielding a certain income, and subject to the trusts of the will. Her husband, Gilbert Davidson, was then dead. She made the two surviving trustees, Mary Peters and Margaret Bethune, defendants, and also Maria J. Williman and Harriet E. Williman, daughters of the complainant, Ch. Williman, and Elizabeth D. Bethune, daughter of the trustee, Margaret Bethune. These last named defendants were infants, and the grand-daughters of the testator. They belonged to that class of persons, in whose behalf the power of appointment might be exercised, and this was the only interest they had in the estate. Harriet E. Williman is the same person with the complainant, Harriet Ashby. On the 18th November, 1823, by an order of the Court, Ch. Williman was appointed the guardian ad litem of Maria J. and Harriet E. Williman, and Margaret Bethune was appointed the guardian ad litem of Elizabeth D. Bethune.

On the 19th November, 1823, the trustees answered, admitting the facts stated in the bill, and assenting to the prayer thereof. And the infants, by their guardians ad litem, answered, admitting their belief of the facts, and submitting their rights to the protection of the Court. The answers of the infants were informal, to the extent of wanting the

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signature of the guardians. There *was a reference to the commissioner, and a report by him, recommending a sale, followed by a decree of the Court, confirming the report, and ordering a sale of the property. By the terms of the decree, the proceeds were to be paid to Mrs. Davidson and the two trustees, to be by them invested in well secured and productive private or public securities, subject to the uses and trusts of the will. By virtue of this decree, the property was sold. But the title of none of the property sold under these last proceedings is brought in question in the case now before me. The last bill contained a recital of the proceedings under the first, and the only object which the defendants had in view, in the introduction of this evidence, was to bring home to the complainant a knowledge of the former proceedings, and of the sale; and to deduce therefrom, and from his acquiescence, an implied sanction and confirmation of the same.

Eliza Davidson, in the form prescribed by the will, executed her power of appointment in regard to various portions of the estate. The power was properly executed, and in behalf of persons falling within the class, to

which its exercise was restricted. She thus gave the Meeting street lots and the South Bay wharf to Mrs. Ashby, and the Grove plantation to Mrs. Gracie. Under the power given to her in the codicil, she sold and conveyed one-half of Williman's islands to Nathaniel Heyward. The title to this portion of the estate is not involved in the issues of this bill. The lands attached to South Bay wharf sold to I. E. Holmes and Wm. Drayton, the lands at the head of Tradd street sold to W. A. Holmes, the plantations called Boston Bottom and Walnut Hills sold to Wm. Mason Smith, are claimed from the parties defendant, in possession respectively of said real estate.

The testator left five children, who were his heirs at law at his death, namely: Eliza Davidson, the devisee for life of this property, Mary Peters and Margaret Bethune, the trustees, Harriet D. Jough, who survived her husband and left an only son and heir, Wm. F. D. Jough, who is made a defendant, and Ch. Williman, the complainant. The

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latter has conveyed all his right and *title to a portion of the property in dispute to the late James Ashby, whose widow and administratrix, Harriet Ashby, and his children, are joined as complainants in the bill. The complainants claim, that by the terms of the will, they are entitled to the whole of the property, the same being limited in default of the execution of the power "to the right heir" of the testator, and failing in that claim, they pray a partition, and to be put in possession of one-fifth part of the estate, as representing one of the five heirs of the testator.

I have thus grouped together in a summary, and I trust sufficiently perspicuous manner, the material facts bearing upon the question, whether the complainants' rights have been affected by the sale made under the decree of the Court, in the proceedings which I have described. The objection to the validity of the sale is easily stated; it is, that the complainant, Williman, and those claiming under him, are not bound by the decree, because he was not a party to the suit.

My judgment upon this question follows inductively from my decision upon the questions previously discussed. Had I considered that the trustees were seized of the legal estate in fee—that the statute had not executed the uses as to the remainder-men, and cut down the legal estate given by the will to the trustees to a mere estate for the life of Eliza Davidson, the decree would have been for the defendants. In that case I should have considered the sale valid, and to have carried the fee to the purchasers. But as it is, I think the sale was only operative to the extent of conveying the life estate of Mrs. Davidson. If the trustees had been seized of the legal estate in fee, and merely

on their own motion had sold and conveyed the same, the purchaser would have taken the fee. If the purchaser had bought without notice of the equity, he would have taken the estate discharged of the trust. If with notice, a trust would be implied against him in favor of the *cestui que trusts*. If the trustees had been seized of the legal estate in fee, then the fee would have been in parties before the Court, and the decree of the Court

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could have *operated upon that estate. For certainly the decree could affect and divest all the right and interest of the parties to the suit. When, in the case supposed, the Court orders the fee to be sold and conveyed by the commissioner, his deed carries that estate, and all the interests of the parties to the suit, precisely as if they had themselves executed the conveyance. The purchasers would take the legal estate in fee, discharged from the trusts or not, according to the equities. And I think the equities of the purchaser, in the case supposed, would be equal to those of the *cestui que trusts*, and that his legal title should prevail.

The jurisdiction of this Court over trusts is peculiar and unlimited. And when one creates a trust estate by deed or by will, it is equivalent to committing the estate to the charge, and placing it under the administration of the Court of Equity. Such is the legal effect. The power of the Court to sell trust estates is not doubted. And when such an estate is sold under its decree, the Court is one of the contracting parties; is in fact the vendor. It assures the purchaser of its power to sell, and to make good titles. The purchaser thus becomes the owner of the fee, *bona fide*, and for valuable consideration. His equity is high. Would it not be hard to affect him with notice of equities, and to charge him with trusts which the Court itself has overlooked or disregarded?

When the Court assumes the administration and orders a sale, it is its duty to protect the rights and interests of all parties related to the estate. If the Court omits to make the proper administrative orders, or the persons to whom the Court commits the management or possession of the funds, should prove unfaithful, and the fund be lost or wasted, ought that to affect the title of the purchaser? I think not. When he pays his money into Court, or into the hands of its confidential agents, that should discharge him. If the Court is the vendor, he is not bound to look to the application of the purchase money. An attempt to do so, might be regarded as an impertinence.

I will not pursue the discussion on this point farther, for as to the case before me such discussion is abstract and speculative.

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*There was no trust beyond the life estate of Eliza Davidson. And the decree of the Court on account of its jurisdiction over trusts,

could not operate on the title of the complainant, which was a vested legal title in remainder or reversion. There was no party before the Court representing either the legal, or the equitable estate, beyond the life estates of Gilbert and Eliza Davidson. The case of *VanLew v. Parr*, 2 Rich. Eq. 321, was not a case of trust estate. And there, several members of the Court of Errors, expressed the opinion that the sale was valid, though the tenants for life alone were parties to the suit. In that case, I incline to think I should have been of the same opinion. That case, however, differs from this in several important particulars. It was a case of partition, and the right of ordering a sale for this purpose, when necessary, or deemed necessary by the Court, is an incident to the jurisdiction in partition. This power is essential to the full and perfect exercise of this branch of equity jurisdiction. In this respect the practice of our Court is different from that of the English Chancery.

Another essentially different feature in *VanLew v. Parr*, is, that there the remainders were contingent and not vested interests, and the remainder-men not in esse. But in the case before me, the interest of those who were to take at the termination of the life estate was vested; and the parties not only in esse, but living within the jurisdiction of the Court. In England, the rule is, that the decree will be binding, if the person entitled to the first estate of inheritance is a party. And where the party who would be entitled to the first estate of inheritance is not in esse, it has been observed, that a decree in a suit where the tenant for life is a party, will be binding upon those who are to succeed him representatively. (*Lloyd v. Johnes*, 9 Ves. 66; *Pelham v. Gregory*, 1 Eden, 520; *Giffard v. Hort*, 1 Sch. & Lef. 409; *Reynoldson v. Perkins*, Amb. 564.) The doctrine thus laid down is not sufficiently broad to embrace the case I am considering.

In *Giffard v. Hort*, 1 Sch. & Lef. 409, Lord

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Redesdale, *speaking of the rule above commented on, observes, that "contingent limitations and executory devises to persons not in being, may, in like manner, be bound by a decree against a person claiming a vested estate of inheritance; but a person in being, claiming under a limitation by way of executory devise not subject to any preceding estate of inheritance, by which it may be defeated, must be made a party to a bill affecting his rights." This doctrine of Lord Redesdale very fully and clearly expresses what I conceive to be the rule. The principle of representation to be deduced from the authorities, may be summed up in the following legal proposition; that where the person entitled to the first estate of inheritance is a party before the Court, he is to be regarded as the representative of all those contingent interests which are dependent

upon, and are to succeed his estate; and, consequently, a decree against such a party will affect and bind those who are to succeed him. And, perhaps, the principle may be extended so far as to embrace the case, where there is an estate for life, with a contingent remainder or executory devise to persons not in esse without any vested estate of inheritance interposed; as in *VanLew v. Parr*. But where there is an estate, to one for life, with a vested remainder to persons living, and within the jurisdiction of the Court, I am aware of no decision or authority, which countenances the doctrine that a decree against the tenant for life will affect or defeat the rights of the remainder-men, they not being parties to the suit.

The Court should, and does go a great length, in sustaining a title made under its own decree. Mere irregularities or informalities are in general not sufficient to invalidate it. *Lloyd v. Johns*, 9 Ves. 37; *Bennett v. Hamil*, 2 Sch. & Lef. 575. But the decree of the Court can only operate upon the title of the parties directly or representatively before it. The principle of representation is admitted in certain cases, for the sake of convenience, and on grounds of necessity. But beyond the limits established by the cases for its application, it is not to be admitted. The language of Lord Redesdale, in the case

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last cited, **Bennett v. Hamil*, is worthy of attention. He says, after admitting that there was irregularity in the proceedings, error in the decree, and probably fraud between the parties to the suit, "but as to Hart's representatives and Hamil, the question is whether they are persons who can be affected, supposing the circumstances to be clearly true as stated; namely, that there was error in the judgment of the Court in not giving day to show cause; and error also in directing a sale under the circumstances. Now on that subject I must confess, after considering this a good deal, I think it would be too much to say, that a purchaser under a decree of this description, can be bound to look into all the circumstances. If he is, he must go through all the proceedings from the beginning to the end, and have the opinion of the Court, that the decree is right in all its parts, and that it would be impossible to alter it in any respect. The cases warrant no such opinion. On the contrary, so far as I can find, the general impression they give is, that the purchaser has a right to presume that the Court has taken the necessary steps to investigate the rights of the parties; and that it has in the investigation properly decreed a sale; then he is to see, that this is a decree binding the parties claiming the estate, that is, to see, that all proper parties to be bound, are before the Court: And he has further to see that in taking the conveyance he takes a title that cannot be impeached aliunde. He has no

right to call upon the Court to protect him from a title not in issue in the cause, and in no way affected by the decree.

The decree must be for the complainants; but not to the extent of the claim set up in their bill. The ulterior limitation of the will is to the testator's "right heir at law." In the designation of the person or the class of persons to take, the singular number is employed. The complainant, Ch. Williman, is the only son of the testator, and he claims alone to answer the description, and to represent the character of the right heir of his father, according to the English Common Law canon of descent. In a country where

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the rights of primogeniture have been *abolished, and the male and female line placed upon the most perfect equality in the distribution of intestates' estates, I am at a loss to perceive one specious reason, why under the expression, the testator's "right heir at law," the son can be considered as the person intended, rather than the daughters, even though he is the oldest child. Are they not all equally his heirs at law? Do they not equally answer the description? The language of the will must be construed with reference to the law of descents in South Carolina. My opinion, is that the word "heir" in this connection is nomen collectivum, and embraces the whole of the testator's statutory heirs. He left five children; the Christopher Williman and the Ashbys, who claim under him, are entitled to one-fifth. The heir of Harriet D. Jough, who is a defendant, is also entitled to one-fifth. The other three heirs, all of whom were parties to the suit under which the property was sold, are, in my opinion, estopped. But as they are not parties in this case, it would be supererogation to conclude any thing in regard to their rights.

There is another question which I must now decide. The lands at the head of Tradd street, purchased by W. A. Holmes, were marsh. A portion of this tract, still retained by the Holmes' family, has been at great expense filled up, converted into building lots, and thus greatly enhanced in value. It was all originally of the same value. The defendants are bona fide purchasers for a valuable consideration. They had good reasons for believing their title to be valid. Under these circumstances, they have an equity, to retain the value and benefit of their improvements. It has been satisfactorily shown to me, that in the partition of the marsh land in the possession of the Holmes' family, one-fifth thereof can be set off to the complainants, and one-fifth to the defendant, D. Jough, without encroaching upon the parts that are improved. And it is ordered that the partition hereinafter directed be made in this way, so far as regards the said marsh lands now in the possession of the Holmes' family.

It is ordered and decreed, that the com-
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 plainants are entitled to *one-fifth of the lands claimed and described in the bill, and that the defendant, W. H. D. Jough, is also entitled to one-fifth thereof, that a writ do issue to make partition thereof, and that the parties have leave to apply for orders to carry into effect this decree.

It is also ordered and decreed, that each party pay his or her own costs.

There was no appeal; the parties having acquiesced.

[The following dissenting opinion, in the Court of Errors, of his Honor Chancellor WARDLAW, in the case of BUINST v. DAWES, (ante, 421), was not furnished the reporter in time to be inserted in its proper place:]

[Ed. Note.—Cited in *Beckam v. De Saussure*, 9 Rich. 550; *McCorkle v. Black*, 7 Rich. Eq. 419; *Selman v. Robertson*, 46 S. C. 260, 24 S. E. 187.]

WARDLAW, Ch. I dissent from the opinion of the majority on the only question decided by this Court, as to the quantity of the estate taken by James Boone Perry in the land devised to him by the will of Edward Tonge. On this point I adopt the conclusion of Chancellor DARGAN, that Perry took a fee conditional at the common law, and I consider it superfluous to add to the Chancellor's reasoning, except a single observation for the sake of my own consistency. *McLure v. Young* may be considered within the exception to the rule in *Shelley's case* established by *Archer's case*, as interpreted in our case of *Myers v. Anderson*.

A second question was referred to this Court by the Court of Appeals in Equity, namely, whether there can be a valid limitation by way of executory devise upon a fee conditional? If there can be such limitation by executory devise, it is immaterial to the determination of this particular case whether J. B. Perry took a life estate or a fee conditional as the testator prescribed that the ultimate devise over should take effect, if at all, at the termination of lives in being at the date of the will. On this second question some remarks will be made.

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*In considering this question, we must keep separate the doctrines applicable to a strict remainder and to an executory devise. A remainder is defined to be a remnant of an estate in lands or tenements, expectant on a particular estate, created together with the same at one time. Co. Litt. 143, a. It follows from this definition that where a fee is first limited there is no remnant of the estate which can be limited over. A fee cannot be limited on a fee as a direct remainder. Thus, if lands are limited to one and his heirs, and if he dies without heirs to another, the latter limitation is void. So, if lands are

given to one and his heirs so long as J. S. has issue, and after the death of J. S. without issue to remain over to another, this remainder is likewise void, because the first devisee had a fee, though it was a base and determinable fee. So, anciently, before the recognition of executory devises after a fee simple, where one devised lands to the prior and convent of B. so that they paid annually to the Dean and Chapter of St. Paul's fourteen marks, and if they failed of payment that their estate should cease, and that the said Dean and Chapter and their successors should have it; it was held that this limitation over was void, because as the first devisee carried a fee, nothing remained to be disposed of. Dyer, 33, a; 1 Eq. Ca. Ab. 186, pl. 3; *Fearne*, 373. This last case was decided in the reign of Henry VIII., in the interval between the statute of uses and the statute of wills; to the combined operation of which statutes the establishment of executory devises is generally attributed. *Lewis on Perp.* 75. Yet, in a will, such limitations over, as are above mentioned, are good by way of executory devise, if dependent upon a contingency which must happen, if it happen at all, within lives in being at the time of the donation and twenty-one years, and one, or in rare cases, two periods of gestation afterwards. An executory devise has been defined to be a limitation by will of a future estate or interest in land, which cannot, consistently with the rules of law, take effect as a remainder. 1 Jarm. on Wills, 778. Without describing all the classes of limitations operative by executory devise where by law they

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cannot take effect as re*mainders, it is sufficient to mention, that by executory devise a fee may be limited upon a fee within the foregoing rule against perpetuities. No rule, however, is more clearly settled than this: that no limitation of a contingent estate shall be effectual as an executory devise, if it can possibly take effect as a remainder. That any particular limitation may operate as an executory devise, there must be a necessity for such operation in order to its taking effect at all, and an impossibility of its taking effect as a remainder under the rules of common law. But no limitation after or upon a fee, although it be a base or conditional fee, can operate effectively as a remainder; and such limitation by will, if it have any effect, must operate by way of executory devise. This is the established doctrine as to conditional fees, notwithstanding some early doubts to the contrary, both in England and in South Carolina. Co. Litt. 13, a; [*Mazyck v. Vanderhorst*] Bail. Eq. 48.

It has never been doubted since the introduction of executory devises, that a fee could be limited by executory devise upon a fee simple absolute, where there was no objection on the score of remoteness; and it is difficult to find any reason why the same doc-

trine should not be applied to a fee simple conditional. We have seen that both these classes of fees exhaust the estate, so that no remnant exists for the subject of a remainder; and both equally need the benignant aid of Courts in the interpretation of wills, in giving effect to executory devises. If a fee simple conditional be a less estate than a fee simple absolute, and yet not so reduced as to be a particular estate of freehold, which admits a remainder, there seems to be stronger reason why Courts should recognize the *ius disponendi* of testators in creating limitations over upon this estate. Littleton says: "a man cannot have a more large or greater estate of inheritance than a fee simple;" and Lord Coke, commenting thereupon, says: "this doth extend as well to fees simple conditional and qualified, as to fees simple pure and absolute. For our author speaks of the ampleness and greatness of the estate, and not of the perdurableness of the same; and he that hath a fee simple conditional or

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qualified, hath *as ample and great an estate, as he that hath a fee simple absolute; so as the diversity appeareth between the quantity and quality of the estate." Co. Litt. 18, a. The prominent distinction between these two classes of fees simple, is in the description of the heirs to which the estates respectively descend; one to the heirs general, and the other to particular heirs, of the body generally, or restricted as to sex, and as to the body that shall bear them. This of course affects the duration of the estate in the donee, and the reverter to the donor, but both are estates in fee simple of the same quantity. All the rules applying to estates in fee are equally applicable to the estate of fee conditional, as to its creation and limitation and the time of its continuance under the limitation, with the exception of the order of its descent and the right by alienation to bar the donor. 2 Prest. on Est. 320. A gift in fee conditional vests no right in the heirs of the body of the donee beyond what is common to other heirs under any form of gift. The person to whom the gift is made is tenant in fee, and as such he has the power of alienation in right of that estate immediately after it is conveyed to him; and his conveyance will estop his issue subsequently born, although it may not defeat the reverter of the donor if the condition of having issue be not performed. 2 Prest. Est. 304; Bac. Ab. Est. Tail. An estate in fee conditional is not, as was supposed in the argument, an estate for life in the first taker, capable of being enlarged if issue be born to him, but it is an estate in fee in the first taker, defeasible upon the non-performance of a condition subsequent, that issue be born to him. 2 Co. Inst. 333. A fee conditional during its continuance is the entire fee simple estate. *Adams v. Chaplin*, 1 Hill, Eq. 278, and is as

fit a subject for executory devise as a fee absolute.

The statute *de donis conditionalibus*, 13 Ed. I. C. 1, which converted fees conditional into estates tail, is not of force in South Carolina, and the estate of fee conditional at the common law has been recognized as existing here by many of our cases. In England, since the statute, an estate tail is regarded by the

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Courts *not as a full fee, but as a particular estate of freehold which is capable of supporting a remainder. A fee conditional with us will be a most anomalous estate, if we hold it to be incapable as a particular estate of supporting a remainder, and yet exhausting the fee so as to leave no remnant for a remainder; and in both aspects not the subject of executory devise—a fee and not a fee.

In *Adams v. Chaplin*, and some other of our cases, the right which abides in the donor and his heirs after a gift in fee conditional, is treated as a mere possibility of reverter, which cannot be devised. This doctrine of course assumes that a fee conditional is the whole estate; for contingent and executory estates, even a possibility clothed with an interest, are devisable. *Selwyn v. Selwyn*, 2 Bur. 1131; *Moor v. Hawkins*, 2 Eden. 342; *Roe v. Jones*, 3 T. R. 88; 1 Ves. jun. 251; 7 Ves. 300; 17 Ves. 173; 4 Kent, 511. In England, a reversion after an estate tail may be devised. *Badger v. Lloyd*, 1 Salk. 232; *Sanford v. Irby*, 3 B. & A. 654; 8 Ves. 256; but there an estate tail is a particular estate of freehold capable of supporting a remainder, and the reversion is more than a possibility. The English statutes of wills, 32 and 34 Henry VIII., authorized those persons only to devise who have an interest or estate in fee simple; our Act of 1789 gives the power to any person not under disability, "having right or title to any lands, tenements, or hereditaments whatsoever." 5 Stat. 106.

Upon the general question we are considering, we find hardly any thing as authority in the English cases. The statute *de donis*, so early as A. D. 1285, converted fees conditional in freeholds into fees tail; and the estate of fee conditional has not existed in England for nearly six centuries, except in copy-holds, (which are not within the statute,) in some few manors where, by custom, copy-holds cannot be entailed. The only case cited to us in the argument is one first heard in the Common Pleas under the name of *Doe d. Simpson v. Simpson*, 4 Bing. N. C. 333 (33 Eng. C. L. R. 373,) and afterwards in the Court of Exchequer Chamber under the name of *Doe*

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d. Blesard v. Simpson, 3 M. & G. 929, *(42 Eng. C. L. R. 483.) In this case, it was held, that a demise of copy-hold lands, in a manor where there was no custom of entail, to J. S. and his heirs, but if J. S. should die without leaving any child or children to M. B.

and her heirs, passed a fee simple conditional to J. S.—that 'child or children' were used in the sense of 'issue' generally—that copyholds being real estate, the term leaving under the distinction established in *Forth v. Chapman*, 1 P. Wms. 663, and recognized in *Mazyck v. Vanderhorst*, Bail. Eq. 48, was insufficient to restrict the contingency of J. S. dying without children, or its synonyme issue, to issue living at the time of his death, and that no remainder could be limited upon a fee conditional, and that the executory devise was too remote. Throughout the arguments and decisions, it was assumed and conceded, that an executory devise upon a fee conditional was liable to no objection peculiar to the estate, and was like every executory devise upon a fee, to be considered only with reference to the fact of remoteness. It may be remarked, too, that a fee conditional was implied in this case in the absence of technical words.

We have dicta but no authoritative decision in South Carolina upon the point in question. In *Mazyck v. Vanderhorst*, Bail. Eq. 48, it was held that a fee conditional could not support a remainder, and that a limitation over upon the determination of that estate by efflux or natural expiry, was void by reason of remoteness as an executory devise. The ruling in *Forth v. Chapman* was adopted, that the word 'leaving' would not as to real estate restrict failure of issue, otherwise indefinite, to the time of the death of the first taker. The whole discussion upon the case assumed, that there might be an executory devise upon a fee conditional, and the only dispute was whether the words of the will created an executory devise which must take effect within the time limited by the rule against perpetuities. The case is quoted in *Adams v. Chaplin*, 1 Hill, Eq. 280, and is thus interpreted by Judge O'Neill: "an executory devise over after a fee conditional, is too remote, and cannot take effect,

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unless it be accompaⁿied by such words as will restrict the failure of the heirs of the body, to a dying without leaving issue at the death of the first taker." Again, in *Bedon v. Bedon*, 2 Bail. 248, Judge O'Neill says: "if the estate of S. B. be construed a fee conditional, the estate in remainder to R. B. cannot take effect as a contingent remainder; for it would be a fee mounted on a fee, therefore void. It could not operate as an executory devise, for if the devisee took an estate in fee conditional, the limitation would be after an indefinite failure of issue capable of taking per formam doni." This is sound doctrine. A limitation by will to take effect upon the natural efflux of a fee conditional is necessarily after an indefinite failure of issue and void for remoteness; but if the objection of remoteness can be escaped, this estate, as other fees, admits of devises over.

It may be remarked in passing, that it was properly argued in *Bedon v. Bedon*, as it was determined in *Simpson v. Simpson*, that the same words in the devise over could not perform the double office of implying a fee conditional and creating an executory devise. In *Edwards v. Barksdale*, 2 Hill, Eq. 197, the same eminent Judge remarks: "I hold there can be no such thing as a fee conditional where there is a good executory devise over. When the limitation is within a life or lives in being or twenty-one years after, it cuts down and destroys the effect of a previous devise to one and the heirs of his body, by showing that the testator did not look to an indefinite succession, and that he did not intend his devisee to have all the incidents of the common law estate of fee conditional, such as the power to alien or encumber the estate," &c. "This is the only means of reconciling two rules of law: 1. That a limitation over after a fee conditional is void; 2. that a limitation over which is to take effect within a life or lives in being is good." In general this is a good exposition of doctrine, but the fault in the reasoning, as it seems to me, is in supposing that a restriction of the power of alienation in the first tenant existing upon, or subject to the performance of, the condition of having issue, destroys the fee conditional. I suppose that this error is

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the foundation of *the learned Judge's repugnance to the implication of fees conditional, in contempt of English authority. There is no reason why the qualified power of a tenant in fee conditional to alien the estate, dependant upon the birth of issue, may not be restricted by executory devise, which does not extend to a tenant in fee simple absolute having a general power of alienation, subject to an executory devise. The alienation of a tenant in fee simple absolute, with a devise over if he die without issue living at his death, is necessarily determined at his death without issue then living; and under like circumstances the alienation of the tenant in fee conditional would be determined. A tenant in fee simple absolute has a general power of alienation which may be restrained by executory devise; a tenant in fee conditional has a power of alienation subject to the performance of the condition of having issue, which may be likewise so restrained by executory devise. The power of alienation is no more an inseparable incident of one of these fees than of the other. One of the most characteristic differences between a contingent remainder and an executory devise, is, that the former may be barred, or prevented from effect by common recovery or other means adopted by the first tenant; whereas an executory devise cannot be prevented or destroyed by any alteration of the estate upon which it is limited. *Fearne*, 418. But I do not understand the argument, which

deduces from this proposition any difference, as to the point in question, between fees absolute and conditional. The indestructibility of the devise over, applicable to both estates, is an indifferent circumstance in a question as to the capacity of either estate to support a devise over.

In *Whitworth v. Stuckey*, 1 Rich. Eq. 411, Chancellor Harper treats an executory devise upon a fee conditional as dependent for its validity upon the question of remoteness. I refer to Chancellor Johnston's circuit opinion in *Hay v. Hay* [4 Rich. Eq. 378] as a judicious explanation of *Whitworth v. Stuckey*.

Without further pursuing the inquiry, I

announce my conclusion, that, upon principle

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and authority, an executory devise may *be limited upon a fee simple conditional, if within the time fixed by the rule against perpetuities.

JOHNSTON, Ch., and EVANS, J., concurred.

WARDLAW, J. I concur in so much of Chancellor WARDLAW'S opinion as holds, that an executory devise of real estate may be engrafted on a direct devise in fee conditional.

REPORTS
OF
CASES IN EQUITY

ARGUED AND DETERMINED IN THE
COURT OF APPEALS AND COURT OF ERRORS
OF SOUTH CAROLINA

VOLUME V
FROM NOVEMBER, 1852, TO MAY, 1853, BOTH INCLUSIVE

By J. S. G. RICHARDSON
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CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT COLUMBIA, SOUTH CAROLINA, NOVEMBER AND
DECEMBER TERM, 1852.

CHANCELLORS PRESENT.

HON. JOB JOHNSTON.
" BENJ. F. DUNKIN.
" GEORGE W. DARGAN,
" F. H. WARDLAW.

5 Rich. Eq. *1

*JOSEPH R. MOSS v. JOHN S. BRATTON
and Others.

(Columbia, Nov. and Dec. Term, 1852.)

[*Mortgages* ⌘ 486.]

On a bill for foreclosure by the mortgagee against the mortgagor, the purchaser of the equity of redemption, and a purchaser from him with general warranty, the Court, having all the parties before it, will make such a decree as will satisfy all equities among the defendants, arising from the case.

[Ed. Note.—Cited in *Trimmier v. Vise*, 17 S. C. 502, 503, 43 Am. Rep. 624; *Norman v. Norman*, 26 S. C. 48, 11 S. E. 1096; *McAfee v. McAfee*, 28 S. C. 224, 5 S. E. 593; *Beattie v. Latimer*, 42 S. C. 320, 20 S. E. 53; *Buist v. Melchers*, 44 S. C. 64, 21 S. E. 449; *Phillips v. Anthony*, 47 S. C. 462, 25 S. E. 294; *Brown v. Green*, 89 S. C. 328, 71 S. E. 958.

For other cases, see *Mortgages*, Cent. Dig. § 1407; Dec. Dig. ⌘ 486.]

[This case is also cited in *Fraser & Dill v. City Council of Charleston*, 11 S. C. 519, without specific application.]

Doctor McClerkin, on January 30, 1845, mortgaged to the plaintiff a tract of land to secure the payment of a single bill, and also gave to the defendant John S. Bratton, a confession of judgment, which was entered on the same day but after the execution of the mortgage. Bratton had the land levied on by the sheriff under his fl. fa., and at the sale became the purchaser. The mortgage had been duly recorded, and notice of it was given at the sale. Afterwards, on

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March 1, 1848, in consideration of \$150 to him paid, Bratton conveyed the land, with general warranty, to Hellen Hemingway.

The plaintiff obtained judgment at law on the single bill, and Doctor McClerkin being insolvent and absent from the State, he, the plaintiff, having first demanded payment of his debt from Bratton, filed this bill, April 29, 1850, against Doctor McClerkin, John S. Bratton and Hellen Hemingway, for a foreclosure of his mortgage, or payment of his debt in some other mode.

The plaintiff's claim was resisted, principally by Bratton, on the ground that the entry of his judgment was prior in time to the execution of plaintiff's mortgage. Bratton also insisted that the plaintiff's remedy, if he had any, was against the land exclusively.

The cause was first heard, at York, June, 1851, before his Honor, Chancellor Wardlaw, who ruled, that Bratton was properly a party to the bill, and held, upon the testimony, that the plaintiff had the first lien upon the land. His Honor decreed as follows:

It is ordered and decreed, that it be referred to the Commissioner to enquire and report as to the amount remaining due to the plaintiff upon the debt of McClerkin secured by the mortgage; and that, upon the coming in of that report, plaintiff may apply to the Court for a sale of the mortgaged premises, for foreclosure, and that Hellen Hemingway may apply for an attachment or execution against the co-defendant, John S. Bratton, to compel re-imbursement for any payments she may be compelled to make in satisfaction of the lien of the mortgage: costs to be paid out of the proceeds of the sale of the mortgaged premises, if sufficient, otherwise as will be hereafter ordered.

The Commissioner having reported that the amount due to the plaintiff was \$147.93, the Court, sitting for York, June, 1852, his Honor Chancellor Johnston presiding, made the following decree:

On motion of Witherspoon, complainant's

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solicitor, it is or*dered that the report made by the Commissioner in the above case and filed 15th June, 1852, be confirmed. It is further ordered, that should Doctor McClerkin fail to pay the amount of debt, interest and costs due, on or before the day of sale, then the said Doctor McClerkin is thereafter to be forever debarred his equity of redemption, and that the Commissioner of this Court do on some public sale day between this and the 1st Monday in January next, or the next convenient sale day, after giving twenty-one days notice, expose to sale the land described in the pleadings, to the highest bidder, for cash; and should the land not sell for a sufficient sum to pay the costs according to the decree of Chancellor Wardlaw, will report the sales, amount of costs and deficiency. In either event the Commissioner will report to the next Court in what manner this order has been complied with.

From this decree Hellen Hemingway appealed on the ground:

Because said decree and order directs a sale of the mortgaged premises, when it is respectfully submitted that the defendant J. S. Bratton, under the circumstances should have been decreed to pay the mortgage debt and costs, inasmuch as said Bratton, with notice of complainant's mortgage, conveyed the premises, with warranty, to the appellant, and ought not to be permitted to defeat his own title, that he may make the land pay the costs.

Smith, for appellant.

Williams, Witherspoon, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. The decree of 1852 appears to me to be hasty and inaccurate.

If McClerkin after the execution of his mortgage, had sold the mortgaged premises to Bratton, subject to the lien of the mortgage upon it, it cannot be doubted that, as between himself and Bratton, he would have had an equity to have the mortgage debt raised out of the land in the first instance, in exoneration of his own personal responsibility.

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The purchase *made by Bratton, from the sheriff, of McClerkin's equity of redemption, (as defined by the statute of 1791,) had precisely the same effect as if McClerkin had conveyed to him with notice of, and subject to, the mortgage. He bought McClerkin's right: i. e., he obtained a title to the land encumbered with the lien: and he paid for the land just so much as it was worth,

over and above the lien: and though he did not become personally bound for the mortgage debt, yet the land, in his hands, was specifically bound, so far as it might suffice, for the payment of that debt.

It appears that Bratton, after his purchase, conveyed the land, with general warranty, to Hellen Hemingway, for \$150; a sum exceeding the debt and interest due on the mortgage.

He thus received a fund to satisfy the lien; and as between himself and Miss Hemingway, was bound, by his covenant, to exonerate the land in her hands, from the encumbrance of the mortgage.

All parties being before the Court, my opinion is that such a decree should have been made as would have done complete justice in the case.

The mortgagee was entitled to all his remedies; by a decree for payment, so far as the lien of his mortgage might suffice,—and failing that, then to raise the balance out of McClerkin, his debtor. But, as between the defendants, the decree should have been such as to satisfy all equities among them, arising from the case of the plaintiff against the defendants.

Bratton should be decreed to pay the mortgage debt, in exoneration of his covenantee, Hellen Hemingway; and it is ordered and decreed that he do so; and that he be enforced to the payment by fi. fa. or attachment.

If within three months from the filing of this decree and the issue of process thereon as aforesaid, the money be not raised from Bratton, then it is ordered that the Commissioner do proceed to raise it by sale of the mortgaged premises, in the hands of Hellen Hemingway. The sale to be made for cash; after at least twenty-one days public advertisement.

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*Whatever excess may remain after said sale, after satisfying said debt, to be refunded to Hellen Hemingway.

It is further decreed, that if the plaintiff's debt be not raised in either of the above ways, he have execution or attachment against McClerkin, his debtor, for the deficiency.

It is further decreed, that Hellen Hemingway have remedy over, by fi. fa. and attachment against Bratton, for whatever sums may be raised and applied to the mortgage debt, out of the lands conveyed and warranted by him to her.

Lastly it is ordered, that Bratton, who occasioned this suit by resisting the plaintiff's mortgage, and by failing to pay over to it the price for which he sold the land, do pay the costs of this suit.

And it is ordered, that the order of June 1852 be modified according to the foregoing order and decree.

Any party to be at liberty to apply to the

Circuit Court at the foot of this decree, for any further order necessary in the case.

DUNKIN, DARGAN and WARDLAW, CC., concurred.

Decree modified.

5 Rich. Eq. 5

ELIZA A. HEXT and Others v. N. G. W. WALKER and Others.

(Columbia. Nov. and Dec. Term, 1852.)

[Execution \hookrightarrow 172.]

To a bill to enjoin execution creditors from proceeding to enforce their executions, the sheriff is not a necessary party. Notice to him of the order for an injunction is sufficient.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 523; Dec. Dig. \hookrightarrow 172.]

[Costs \hookrightarrow 212.]

Though a decree as to costs is not the subject matter of appeal, yet while the case is before the Court of Appeals, inadvertency or oversights as to costs, will be corrected there, on the suggestion, or by the consent of the Chancellor who tried the cause.

[Ed. Note.—Cited in *Stegall v. Bolt*, 11 S. C. 524; *Bratton v. Massey*, 18 S. C. 561; *Scott v. Alexander*, 23 S. C. 126.]

For other cases, see Costs, Cent. Dig. § 800; Dec. Dig. \hookrightarrow 212.]

Before Dargan, Ch., at Barnwell, February, 1852.

Eliza A. Hext, one of the plaintiffs, was the wife of Lawrence P. Hext, one of the de-

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fendants, and the other plaintiffs *were their children. The defendants were N. G. W. Walker, late sheriff of Barnwell District, William R. Halford, his successor in office, Lawrence P. Hext, and Maria Fraser and Richard C. Ashe execution creditors of Lawrence P. Hext. To the original bill Halford was not a party: he was made a party, by supplemental bill, after he had succeeded to the office.

Under the executions of Maria Fraser and Richard C. Ashe, certain slaves had been seized as the property of Lawrence P. Hext; and this bill, which claimed that the slaves had been settled to the sole and separate use of Eliza A. Hext for life, with remainder to her children, was for an injunction.

His Honor, the Chancellor, made the following decree:

It is ordered and decreed that the levy made upon the negroes in the pleadings be discharged, and that the defendants and their confederates be perpetually enjoined from selling or levying upon the said negroes, under and by virtue of the aforesaid executions, or otherwise disturbing the complainants in their enjoyment of the said negroes. It is further ordered and decreed, that the defendants pay the costs.

From this decree appeals were taken by Maria Fraser and Richard C. Ashe, but not

on the ground that there was error in the decree as to costs. Walker and Halford did not appeal.

Bauskett, for appellant.

Bellinger and Hutson, contra.

The opinion of the Court was delivered by

DARGAN, Ch. In this case the Court concurs fully in the views which the Chancellor, who tried the cause, has expressed in the circuit decree. And nothing more need be said as to the grounds of appeal taken.

But the Chancellor who rendered the decree suggests, that in decreeing costs against the defendants generally, he has inadvertently given costs against N. G. W. Walker, the ex-sheriff, and Wm. R. Halford, the present sheriff, of Barnwell District, who were formal parties, not interested in the event of the suit, and who, in the opinion of the Court,

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were not necessary parties. An order for an injunction having been made restraining the other defendants from proceeding to enforce their executions at law, notice to the sheriff would have been sufficient without making him a party on the record.

A decree as to costs is not the subject matter of appeal, nor has it been made a ground of appeal in this case. But while the case is before this Court on appeal, inadvertency or oversights as to costs, will be corrected here, on the suggestion, or by the consent, of the Chancellor who tried the cause.

In this case it is ordered and decreed, that the circuit decree as to costs be so modified, that the defendants Walker and Halford be exempt from the payment of any part of the costs; and that the other defendants pay all the costs.

As to the grounds of appeal taken before and heard by this Court, it is ordered and decreed that the same be dismissed, and the circuit decree be affirmed.

JOHNSTON, DUNKIN and WARDLAW, CC., concurred.

Decree modified.

5 Rich. Eq. 7

JOHN DUNCAN and Others v. SAMUEL DENT, Administrator.

(Columbia. Nov. and Dec. Term, 1852.)

[Executors and Administrators \hookrightarrow 104.]

An administrator keeping funds, after payment of debts, in his hands without profit, will not be excused from the payment of interest, merely because various persons claim the estate in different rights, and suits have been instituted.

[Ed. Note.—Cited in *Nettles v. McCown*, 5 S. C. 51.]

For other cases, see Executors and Administrators, Cent. Dig. § 424; Dec. Dig. \hookrightarrow 104.]

[*Executors and Administrators* ⚡473, 474.]

An allegation of defendant in his answer, made by way of defence to an ordinary bill for account, that he had kept the funds in his hands without making interest, will not throw the onus of disproving it on the plaintiff—the onus is on the defendant.

[Ed. Note.—Cited in *Barr v. Haseldon*, 10 Rich. Eq. 62; *Cloud v. Calhoun*, Id. 366; *Burnside v. Robertson*, 28 S. C. 587, 6 S. E. 843.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2052; Dec. Dig. ⚡473, 474.]

Before Wardlaw, Ch., at Richland, June, 1852.

This case came up on exception to the Commissioner's report. The report is as follows:

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"In obedience to the order of the Court, I have held a reference in the above case, and submit the following report with accompanying testimony. There is no difference of opinion as to the facts set forth and stated in the bill of complaint; both complainants and defendant, through their solicitors, concur as to the facts, and that the annual balance as appears by the return of the administrator is correct and proper; both complainants' and defendant's solicitors consent that the land should be sold, described in the bill. I therefore recommend that it is expedient to do so. The only question upon which there is a difference of opinion, or about which there is any dispute, is whether the administrator, Samuel Dent, is chargeable with interest on the annual balance in his hands under the circumstances of the case. After the payment of certain debts and deducting commissions, there was in the hands of the administrator \$3,401.10, adding one year's interest and cash received for land, leaving a balance in his hands of \$3,149.55, 20th July, 1847. Shall the administrator pay interest on that sum up to the present time? As a general rule all executors and administrators are chargeable with interest on annual balances, unless a sufficient excuse or justification is offered to discharge them. What is the excuse offered by the defendant? On the 1st of April, 1846, A. Heribmont, escheator of Richland District, notified the administrator "to hold the proceeds of the sale of the estate as well as all other monies which may come into your hands on account of said estate, subject to the claim of the trustees of the Academy of Columbia." A similar notice was served upon the administrator, 20th February, 1847, notifying him that the trustees claim the funds as escheated estate: signed W. F. DeSaussure, president of the Trustees Academy of Columbia. In addition there is evidence of different litigations, commencing 16th March, 1848, and continuing down to 1851, the period of the compromise agreement; and evidence of defendant's answer, not contradicted by proof, that after the receipt of the notices, he held the money in

his hands ready at any time to pay the same

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over to whoever should be entitled, not having used it. This is the extent of the proof offered by the defendant to discharge him from his liability. If the administrator imprudently neglected or omitted to lay out the monies in his hands he would be liable for the interest, or if he used the money, or committed any other misfeasance, or if he kept the money dead in his hands without any apparent reason or necessity, it would become negligence, and he would be chargeable with interest. An executor shall not be charged with interest under a fair apprehension of his right to it. Outstanding demands are not sufficient to discharge an executor or administrator from the payment of interest. These are well settled principles, and we have only to inquire, do the circumstances of the case and the proof justify the administrator in retaining the money in his hands? I am satisfied that the evidence is sufficient to bring him under the protection of the principles laid down. An outstanding demand would be no excuse, but two or three branches of litigation, the escheator and President of the Columbia Academy all claiming the funds, it certainly was prudent for the administrator to retain the funds in his hands, not knowing at what time, or by whom, he would be called on for the money as legally entitled to it. There is no proof that he used or that he made profit out of it; but, on the contrary, that he retained it in his hands, ready at any time to pay it over to the legal and rightful owner. The administrator is willing to account for the interest received upon notes not paid when due. I have therefore charged the administrator with the balance of interest so received, amounting to eighty dollars and fifty-four cents.

"The account will stand thus:

Balance in hands of administrator..	\$3,149 55
Add eighty dollars and fifty-four cents interest.....	80 54

Making the aggregate in the hands of the administrator.....	\$3,230 09"
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The complainants excepted to the Commissioner's report on the following grounds:

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"Because the Commissioner ought to have charged the administrator with interest on the balance in his hands from the date from which the said administrator had declined to account for interest.

Wardlaw, Ch. This case is presented to me on an exception by the plaintiff to the Commissioner's report on the defendant's accounts, because the Commissioner has not charged the defendant, as administrator, with interest on the funds in his hands, beyond the interest which the defendant admits that he has actually received. The facts and reasons upon which the Commis-

sioner acted are clearly stated in his report, to which I refer. The substance of defendant's excuse from the payment of interest, is, that having been notified by the escheator in 1846 that the estate in the administrator's hands was claimed as an escheat, he retained the funds without making profit, to meet the claim. No proceeding towards escheat was ever instituted. The only actual suits concerning the estate, were a bill filed 16th March, 1848, against the administrator, for account, by persons claiming to be next of kin of the deceased, which was compromised in 1851, (in connection with the proceeding next mentioned) and a suit, first in the Court of Ordinary and by appeal in the Court of Common Pleas, to set up a will of the deceased. This latter proceeding was instituted in April, 1850, and was terminated by compromise in October, 1851, according to which a verdict was to be found establishing the will propounded for probate, and the plaintiffs as legatees, were to receive one-third of the estate in full of their claims; the verdict was so found, and the defendant promptly paid the portion of the principal of the estate to which the plaintiffs, by the compromise, were entitled. The exemption from interest begins in November, 1846, and April, 1847, at the expiration of a year from the two sales made by the administrator; the securities for the proceeds of sale bearing interest from the dates of sales, respectively, made a year before. On the authority of *Chesnut v. Strong*, 2 Hill Eq. 150, I regard the fact as established

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*by his answer in the absence of any countervailing proof, that the defendant did retain the funds of the estate in his hands without making interest. The question in the case is, whether he was guilty of negligence, amounting to such a breach of trust as to subject him to the payment of interest, in thus keeping the funds unprofitable.

In general, trustees to whom is committed the management of estates, are liable for interest if they keep monies in their hands, without necessity from the exigencies of the estates, to meet immediate demands. 2 Wms. on Exors. 1309; Ram. on Assets, 512; *Newton v. Bennet*, 1 Bro. C. R. 359, and *Perkin's Notes*; *Littlehales v. Gascoyne*, and *Franklin v. Frith*, 3 Bros. C. R. 73 and 433; *Pace v. Burton*, 1 McC. Eq. 250; *Black v. Blakely*, 2 McC. Eq. 7; *Taveau v. Ball*, 1 McC. Eq. 459. Notwithstanding the report of the Commissioner, and the earnest and strong argument made for defendant, I am unable to conclude that any exigency of the estate under his management justified the defendant in keeping the monies dead in his hands, according to the phrase of Lord Thurlow. A mere notice to the defendant that the estate in his hands was claimed as escheated, amounted to little or nothing, when not followed by proceedings to escheat; es-

pecially when we remember that under the Act to regulate escheats (5 Stat. 46) such proceedings could not be consummated under eighteen months, if so soon. If, in this case, the actual litigation concerning the estate be held to protect the representative of the estate from interest, then every executor, administrator or other trustee, who is called to account by suit, must be saved from interest from the beginning of the suit to account. The two cases, principally relied upon in behalf of the defendant, depend on peculiar circumstances, not existing in the present case. In *Pace v. Burton*, the administrator, without being under any trust as to lands, leased certain lands of his intestate to tenants, who were sued for the recovery of the lands and mesne profits, under what proved to be a better title. It was held, that the administrator prudently kept in his

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hands the rents for the lands, to meet the damages likely to be recovered, in pending suits, from tenants to whom he was responsible, and was not liable for interest while the suits were in progress. In *Chesnut v. Strong*, the executor was exempted from interest, not actually made, upon proof that by agreement with the testator, in consequence of which he accepted the trust, he was not to be liable for interest.

Cases are not to be brought within an exception to a general rule, which are not clearly within the reasons of the exception. If a trustee do not choose to use the funds in his hands, and there be probable demands against the trust estate, it is his duty to apply to the Court, as indicated in *Black v. Blakely*, for leave to surrender or deposit the funds; otherwise, except in rare instances, it must be inferred that he has made, or ought to have made, profit from the funds, equivalent to interest. It is ordered and decreed, that the exception be sustained, and that the report be recommitted to the Commissioner for the consequent modification. I think defendant should be exempt from costs. 13 Ves. 402.

The defendant appealed and moved this Court to reverse the decree on the ground:

That the defendant is not liable for interest on the money retained in his hands as administrator of the estate of Dawson Wages from November, 1846, and April, 1847, to the termination of the proceedings instituted to establish the will of the said Dawson Wages.

Black, Arthur, for the motion, cited 2 Mad. 116; *Bail. Eq.* 460, 487; 1 McC. Ch. 247; 2 Wms. on Exors. 1309; 12 Ves. 386; 1 B. & B. 191.

Gregg, De Saussure, contra, cited 2 Hill, Ch. 377.

The opinion of the Court was delivered by

WARDLAW, Ch. We are content with the general reasoning of the Circuit decree, and

with the conclusion attained, that, granting the defendant kept the funds in his hands without profit, he must pay interest, since

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no exigency of the estate *entrusted to his management rendered it prudent that he should so retain the funds. No debt of the estate remained unsatisfied, and there was a clear balance in the administrator's hands, which was claimed by various persons in different rights. The obvious duty of the defendant, under such circumstances, was, to file a bill of interpleader against all the adverse claimants, and to pay the money into Court. If this course had been adopted, and the litigation had seemed likely to be of long duration, the Court, on the application of any of the parties, or sua sponte, might have ordered the investment of the money in securities bearing interest. Every man is presumed to know the law; and if trustees, who are in fact ignorant of the law, will act upon their blind judgments without consulting the expert, they must bear the consequences of their rashness. It may be remarked, that the answer makes no mention of the suit or suits in Equity, and the character of the litigation there was not otherwise brought to the attention of the Chancellor, than by a statement at the bar that the suits were for an account of the estate. If the fact be as now suggested, that these were suits by adverse claimants of the estate itself, this fact does not strengthen the defence, for such suits are necessarily dilatory, and if defendant did not wish to use the money, he should have paid it into Court.

The Chancellor, on circuit, in deference to some observations made in the case of *Chesnut v. Strong*, 2 Hill, Eq. 150; 1 Hill, Eq. 122, not necessary to the decision of that case treated the allegation in the answer, that defendant had kept the funds in his hands without making interest, as throwing the burden of disproof of the fact upon the plaintiff. Such is not our opinion.

This allegation, made by way of defence from the payment of interest, is not responsive to an ordinary bill for account, so as to stand for proved until rebutted by two witnesses or equivalent evidence. To announce as the doctrine of the Court, that defendants to bills of account might thus by unsupported oath relieve themselves from the charge of interest, would be to tempt to perjury by the bait of lucre: and I fear we

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should *have many answers from trustees alleging the retention of money without profit. Such defence is clearly matter in avoidance of the plaintiff's case in the bill, and like every other independent defence, must be proved. The negative nature of the statement may justify Courts in holding slighter evidence to be sufficient than is required as to most matters of defence, but certainly not

in dispensing with all proof. If a trustee show to the Court that in ordinary prudence, from the exigencies of the estate, he should have kept money on hand, this is strong evidence in support of his answer that he did so retain money, and needs little, if any, corroboration. In the present case the answer was entirely unsupported. These views are consistent with every thing decided in *Chesnut v. Strong*, although opposed to a train of reasoning there. In that case, the testator by his will in express terms allowed his executors to retain the legacies to his children, who were the plaintiffs, until the children attained the age of twenty-one years; although he did not give to the executors the interest accruing in the interval between his death and the maturity of the children. Parol evidence, (of doubtful competency,) established the existence of an agreement between the testator and executors, that they were not to be charged with interest, and that they accepted the executorship on that condition. There was also evidence, that the executors had in one instance lent money without interest, and in another had refused to accept full interest; and that they generally had the money on hand. Upon this strong evidence in support of their answer, the executors were excused from interest which they did not make, and were required to pay so much interest as they received.

It is ordered and decreed that the decree be affirmed and the appeal be dismissed.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

Decree affirmed.

5 Rich. Eq. *15

*J. M. ISON, Administrator, and Others v. JACOB ISON and THOMAS E. ISON.

(Columbia. Nov. and Dec. Term, 1852.)

[Equity ⌘340.]

Bill for settlement of an intestate's estate sought to charge the defendant with a stallion as an advancement: defendant's answer admitted the gift, and alleged that he had paid his father for the stallion:—*Held*, that defendant's answer as to the payment, was not evidence for him; and *McCaw v. Blewit*, 2 McC. Ch. 101, overruled on this point.

[Ed. Note.—Cited in *Barr v. Haseldon*, 10 Rich. Eq. 62; *Cloud v. Calhoun*, 10 Rich. Eq. 366; *Barksdale v. Hall*, 13 Rich. Eq. 188.

For other cases, see Equity, Cent. Dig. § 700; Dec. Dig. ⌘340.]

[*Descent and Distribution* ⌘96.]

Though a gift for the purpose of pleasure or amusement merely, as of a saddle horse, a buggy, &c., is not considered an advancement; yet the gift of a stallion, to be employed as a foal-getter and for profit, is an advancement.

[Ed. Note.—Cited in *Rees v. Rees*, 11 Rich. Eq. 108; *Rickenbacker v. Zimmerman*, 10 S. C. 121.

For other cases, see *Descent and Distribution*, Cent. Dig. § 394; Dec. Dig. ⌘96.]

[Descent and Distribution ⇨112.]

In ascertaining the amount of an advancement, reference should be had to the description of the chattel at the time of the gift, and the value of a chattel of that description at the death of the intestate: *McCaw v. Blewit*, 2 McC. Ch. 163, is, on this point, a leading case.

[Ed. Note.—Cited in *McLane v. Steele*, 14 Rich. Eq. 116; *Wilson v. Kelly*, 21 S. C. 539.

For other cases, see Descent and Distribution, Cent. Dig. § 421; Dec. Dig. ⇨112.]

[Descent and Distribution ⇨95.]

A distributee is not chargeable, as for an advancement, with the rent of land which the intestate had permitted him to occupy.

[Ed. Note.—Cited in *Rickenbacker v. Zimmerman*, 10 S. C. 115; *Wilson v. Kelly*, 21 S. C. 540.

For other cases, see Descent and Distribution, Cent. Dig. § 393; Dec. Dig. ⇨95.]

Before Johnston, Ch., at Union, June 1852.

This case came up on exceptions to the Commissioner's report, which is as follows:

"Your Commissioner, to whom it was referred to take into account and to report upon the receipts and expenditures of the administrators, B. W. Lee and J. M. Ison, and also to ascertain the advancements made to the distributees of Frederick Ison, begs leave to report; that the intestate died some time in the Fall of 1845, and the plaintiffs, B. W. Lee and J. M. Ison, shortly thereafter took out letters of administration, and sold the personal estate.

"A few days previous to the death of the intestate, he called all his children around him, and attempted to equalize them by advancements; and on this occasion he, by way of advancement, gave to each one of them one or more negroes, with the exception of the defendant, Jacob Ison, and charged them according to Exhibit A, in complainants' bill, with which it is understood they all, with the exception of Jacob, acquiesced at the time, and with which each one, with the same exception, is still willing to be charged.

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"*The bill charges an additional advancement of a stallion, against Thomas E. Ison, or alleges that a recovery of one Smithpeter, on a note (given by the intestate in his lifetime,) against the administrators, was for the purchase money of a stallion which Thomas E. Ison received from the intestate, and which Thomas had promised his father he would pay.

"On this subject there was no proof, except what is contained in his answer, in which he admits that he received the horse from his father as a gift, but says the gift was made to equalize him with the other children, who had all received from their father one or more horses. As to this averment in the answer, there was no proof. But the defendant states further in his answer, that he took the horse, or accepted him, on condition that he was to pay his father for him the amount his father was to pay Smithpeter, which he afterwards did; that he took

the horse with this understanding, and promised his father that he would stand him, and that if he could make any thing out of him, he would pay him the amount he was to pay Smithpeter; that he stood the horse from the date of the purchase, in 1832, for several years, and after deducting necessary expenses, and charging nothing for his trouble, he paid the proceeds to the intestate, partly in cash, and partly in notes and accounts, in the whole amounting to \$305.31½, which is more than he originally undertook to pay—that he subsequently sold the horse for \$250.

"The evidence on this point was from one witness, that he put two or three mares to the horse, and settled for the season with the intestate—that he also owed the defendant, Thomas E. Ison, ten or fifteen dollars for work on a gin, which he also paid to the old man. He proved by another witness, that in 1839 or 1840, the intestate was indebted to the witness, and that Thomas E. Ison paid him fifty or sixty dollars of the debt, or laid down his money on a table, and told his father to take what he wanted, who took the amount stated.

"Taking the case altogether, the Commissioner is not of the opinion that Thomas E. Ison should be charged with the horse.

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*Exception on the part of Jacob Ison was taken as follows:

Because the report does not charge Abram Ison and John Ison with rent of land on which they have lived and raised their families—the rent of which, as to each, was proved to have been worth thirty or forty dollars a year, and for which they should account, to do justice to the other heirs at law.

The complainants also excepted to the report on the ground,

Because the Commissioner, in making up his report, does not charge Thomas E. Ison with the price of the stallion given to him by the intestate, as he admits in his answer that he received it as a gift, and there is no proof of any payment being made by him for the said horse.

Johnston, Ch. On hearing the report of the Commissioner in this case, the exception filed by the plaintiffs, and the exception filed by the defendant, Jacob Ison, It is ordered that the exception of plaintiffs be sustained; and that the exception of the defendant, Jacob Ison, be overruled.

Thomas E. Ison appealed upon the grounds:

1. Because the answer of the defendant, admitting the advancement, but alleging payment of it, being strictly responsive to the bill, was evidence in his favor, and should have been admitted as such, and the whole taken and construed together.

2. Because his Honor erred, It is respectfully submitted, in holding, that where the defendant charges himself, by his own oath,

with a debt, his statements alleging that the same is paid, are not evidence in his favor, but must be supported by testimony independent of his own oath.

3. Because the property charged as an advancement in this case, from its nature and character, cannot rank as an advancement, in the sense in which the statute uses the word; not being given "in anticipation of what he might inherit," or "with a view to his settlement in life."

4. Because there is proof before the Commissioner, that sundry payments had been made by the defendant, Thomas E. Ison, to the intestate; and as there was no evi-

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dence or pretence of any other indebtedness, they should be held and deemed as having been made in payment of this debt; and that upon this point the case should have been re-committed to the Commissioner, to ascertain and report upon the payments made.

5. Because the acts and declarations of the intestate, done and made on the 2d September, 1845, as alleged in complainants' bill, are conclusive evidence, and amount to an admission by the intestate, that this debt against Thomas E. Ison was paid, as there was no charge raised against him at this time, which point his Honor did not advert to in his decretal order.

Jacob Ison also appealed on the ground: Because the Chancellor should have sustained his exception.

Arthur, for Thomas E. Ison.

Thomson and Jeter, for Jacob Ison.

T. N. and J. Dawkins, for plaintiffs.

The opinion of the Court was delivered by

JOHNSTON, Ch. The appeal of Thomas E. Ison is founded entirely in misconception.

This defendant, in his answer admits the gift of the stallion; and whatever he says afterwards, of payments made for him was matter in avoidance: and is not proved by the answer,—but must be established by evidence aliunde. This is the clear and well established rule on the subject. We have observed, with regret, that of late, a decision in the case of McCaw v. Blewit (2 McC. Eq. 101-2,) has been cited by the bar as authority to the contrary. However important and valuable that case may be, on other points,—on this point it is clearly erroneous, and has never been followed; and we have no hesitation in overruling it.

The question, whether a stallion is an advancement, is one of easy solution, in this case. It is admitted that gifts, or contributions, made by a father to his child, for the purpose of pleasure or amusement merely, are not, in their nature, advancements. A saddle horse, a buggy or like articles, if given with no view to profit, but merely for the

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gratification of the child, *do not come within the idea of having been bestowed on him "in anticipation of what he might inherit," or "with a view to his settlement in life."^(a) But the gift of a stallion to be employed, as in this case, as a foal-getter and for profit,—is the gift of a tangible portion of the father's estate, as so much capital: and, whatever difficulty may exist on this general head of law, in other instances, is certainly an advancement in this case.

Certainly, in ascertaining the amount of this advancement, reference should be had to the description of the horse at the time of the gift, and the value of a horse of that description at the death of the intestate. The rule is laid down in McCaw v. Blewit, (2 McC. Eq. 103-4,) which is the leading case, in this State, upon the subject; and has always been followed in subsequent cases.

The decision of the Chancellor was merely that the stallion was an advancement; not the amount to be charged for him. That is for the Commissioner, on further consideration of the report.

The Court concurs with the Chancellor in refusing to charge certain distributees, whom the intestate had permitted to occupy portions of his land, with rent, as an advancement. If he owed him for the rent it was a debt. If he charged nothing for the occupancy, (as was the fact,) the permission to occupy was a mere accommodation, and no advancement. An advancement always embraces the idea, that the parent has parted from his title in the subject advanced. But if the intestate, in this instance, had actually given the land, the statute expressly exempts the donee from accountability for the rent: much more are the parties exempt, where the whole matter was simply permissive, and the object was mere accommodation.

It is ordered that the decree be affirmed, and the appeal dismissed.

DUNKIN, DARGAN and WARDLAW, CC., concurred.

Appeal dismissed.

(a) Vide Bouv. L. Dic. Advancements, and McCaw v. Blewit, 2 McC. Eq. 102-3.

5 Rich. Eq. *20

*HESTER PERDRIAU and Others v.
HENRY H. WELLS and
Others.

(Columbia. Nov. and Dec. Term, 1852.)

[Wills 531.]

Testator bequeathed property to his wife for life, and directed the same, after her death, to be divided between Ann M., the children of his brother Peter, and the children of his sister Hester, "alive at the death of my wife, share and share alike, for and during their natural lives, and after their death to their respective

children forever. It is my will, that if the said Ann M., either of the children of my brother Peter, or sister Hester, should die in my life time, or the life time of my said wife, that the child or children of such one or more of them as may so die, take the part of their deceased parent." Peter and Hester, the brother and sister of testator, were both dead when the will was executed; at that time, and at the death of testator, there were eight children of Peter, and five of Hester, living; testator's wife also survived him:—*Held*, that, at the termination of the life estate, Ann M. and the children of Peter and Hester will take equally and per capita—the children of such as may be dead taking their parent's share.

[Ed. Note.—Cited in *Barksdale v. Macbeth*, 7 Rich. Eq. 134; *Risher v. Adams*, 9 Rich. Eq. 249; *Dupont v. Hutchinson*, 10 Rich. Eq. 2; *Tindal v. Neal*, 59 S. C. 7, 36 S. E. 1004; *Robinson v. Harris*, 73 S. C. 477, 33 S. E. 755, 6 L. R. A. (N. S.) 330.

For other cases, see *Wills*, Cent. Dig. § 1150; Dec. Dig. 531.]

Before Dargan, Ch., at Chambers, December, 1851.

Cumel Perdriau, of Sumter, the testator, died in the year 1843. His will, which was executed and dated July 15, 1842, was drawn several years before its execution, and while his sister Hester Wells was alive. She, however, had died before it was executed. The material clauses are as follows:

"First, I devise and bequeath unto my brother John Perdriau's widow, Mrs. Ann Perdriau, for the term of her natural life, the use of my winter plantation, situate in Williamsburgh District, whereon she now resides.

"Second. It is my will and desire that my negroes and other personal estate be kept together on my plantation whereon I now reside in Sumter District, and are not to be removed therefrom during the life of my beloved wife, Hester Perdriau, to whom I give, bequeath and devise the said plantation, negroes, and all other my real and personal estate, of whatever nature, description or kind, for and during the term of her natural life. I also devise, bequeath and give to my said wife one-half of the said real and personal estate to be disposed of by her, by will, but if she make no will, then to be delivered to her representatives. Her said half is not to be allotted off to her in her life time, but to be delivered after her death to her execu-

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tor or *administrator. The other half of my said real and personal estate, (given to my said wife for her life time,) I will and devise as he may think proper. But it is my wish and desire that my negroes be sold in families, that is to say, that husband and wife and young children not to be parted, but to be sold together.

"The proceeds of said sale of the said half of the estate, given as aforesaid to my wife for life, to be divided between Ann M. China, wife of John China, jr., the children of my deceased brother, Peter Perdriau, and

also the children of my sister, Hester Wells, alive at the death of my wife, share and share alike, for and during the term of their natural lives, and after their death, to their respective children forever; the parts of the females, my nieces and Ann M. China, to be to their sole and separate use. It is my will that if the said Ann M. China, either of the children of my brother Peter or sister Hester, should die in my life time, or the life time of my said wife, that the child or children of such one or more of them as may so die, take the part of the deceased parent. It is further my will that the share that my nephew, James Perdriau, may have allotted to him, be delivered to Ann L. Clark, as his trustee, to be managed for him, she giving to him such part thereof as she may deem necessary from time to time. I do hereby authorize and empower my acting executor to appoint five persons, (any three to act, if all cannot attend,) to divide my estate after the death of my said wife, and do all such other acts as may be necessary to carry this my will into full effect, as fully as if he were authorized by the Court of Ordinary or Equity."

The children of Hester Wells and Peter Perdriau, who were living when the will was executed and at the death of the testator, were Mary E. Linam, Hester Harvin, Richard F. Wells, Peter E. Wells, Warren S. Wells, Henry H. Wells, Martha P. Tindall and Lydia A. Tindall, children of Hester Wells, and James Perdriau, Hester Ramsey, Ann L. Clark, Lydia A. Evans and Mary G. Barrett, children of Peter Perdriau. Of these thirteen persons, three had died since the testator, each leaving issue, to wit, Mar-

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tha P. Tindall, *who left three children, Lydia A. Tindall, who left one child, and Mary G. Barrett, who left eight children.

The bill, which was filed by Hester Perdriau, the widow of the testator (Ann M. China and all other persons interested being parties) prayed that the slaves of testator, some eighty in number, might be sold by order of the Court; and (the said Hester Perdriau having consented to relinquish her interest for life in one-half) that the proceeds be divided, "by allotting one-half thereof to the said Hester Perdriau, as her own right and property; and the other half to the persons entitled to receive the same as at her death, in the proportions prescribed by the said will."

His Honor made an order for the sale of the slaves by the Commissioner, on credit—bonds with good sureties to be given by the purchasers:—and, in relation to the division of the proceeds, he decreed as follows:

"That on receiving the said bonds, the Commissioner do deliver over so many of the same as will equal one-half of the amount of the said sale, to the said complainant, Hester Perdriau, in full discharge

of all her right and interest under the said will, to and in all the said negro property to be sold; and that when collected, he divide the proceeds of the balance of the said bonds into three equal parts—one part thereof to be the share of the said Ann M. China; another third part thereof to be the share of, and to be equally divided between the children of the said Peter Perdriau, living at testator's death, and of the children of such of the children of the said Peter Perdriau, as may have died since the testator—the last to take, among them, the share the parent would have taken if alive; and the other third part to be the share of, and to be equally divided between the children of the said Hester Wells, living at testator's death, and of the children of such of the children of said Hester Wells as may have died since the testator, the last to take among them the share the parent would have taken, if alive."

From so much of the decree as is recited

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above, Richard F. *Wells and others appealed, and moved this Court that the same be so modified, that Ann M. China, instead of taking one-third part of said proceeds, shall take one-fourteenth part thereof; that each of the four children, now living, of Peter Perdriau, deceased, and each of the six children, now living of Hester Wells, deceased, shall take one other fourteenth part thereof; that the children of Mary G. Barrett, deceased, shall take, among them, one other fourteenth part thereof; that the children of Martha P. Tindall, deceased, shall take, among them, one other fourteenth part thereof; and that the child of Lydia A. Tindall, deceased, shall take the remaining fourteenth part thereof.

Richardson, for appellants. The only question presented by the appeal is as to the proportion in which the parties take; that is to say, Does Ann M. China take one-third, the children of Peter Perdriau one-third, and the children of Hester Wells the remaining third, as the Chancellor has decided; or do they all take equally and per capita, as the appellants contend?

It is proper, perhaps, in the first place to remark, that the recent decisions in *Templeton v. Walker* (3 Rich. Eq. 543) and *Collier v. Collier* (Id. 555) have no application whatsoever to this case. Those cases were decided on the principle, that inasmuch as the testator has himself made it necessary that resort should be had to the statute of distributions for the purpose of ascertaining the objects of his bounty, resort must also be had to the statute for the purpose of ascertaining the proportion in which they take. Here the testator has made no reference to the statute necessary. Who the children of Peter Perdriau and Hester Wells are, can be known without resort to the statute of distributions.

There is but one class of decisions which has direct application to the case now before the Court, and that is the general class, where there is a bequest or devise to a designated individual and to a class or classes of individuals. But this general class is subject to a sub-division, which, to avoid circumlocution, will be called class No. 1 and class No. 2.

Class No. 1. To this class belong the cas-

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es which fall with*in the following principle, as laid down by Chancellor Harper, in *Cole v. Creyon* (1 Hill, Ch. 319.) "If there be a bequest to an ascertained individual and to a class of unascertained individuals (to be ascertained at some future time after the death of the testator) it vests one-half in the said individual and the other half in the individuals of the class collectively when they are ascertained." To this class, in addition to the case of *Cole v. Creyon*, belongs the case of *Conner v. Johnson*, (2 Hill, Eq. 41.) *Cole v. Creyon* furnishes an illustration of the rule. There the bequest was to testator's wife for life, and after her death to Alexander Creyon and the children of Elizabeth Cole. Elizabeth Cole was living at the death of the testator. It was held, that all the children of Elizabeth Cole born after the death of the testator and before the death of the tenant for life, were entitled to come in, and that as the individuals were unascertained when the testator died, Alexander Creyon took one-half of the property bequeathed, and the children of Mrs. Cole the other half.

Class No. 2. To this class belong the cases which fall within the following rule: "If there be a devise to an individual designated by name and to other individuals designated as a class, as to A, and the children of B; or if it be to the children of A and the children of B, all the individuals take equally and per capita." Per Chancellor Harper in *Conner v. Johnson*, (2 Hill, Eq. 43.) To this class belong the cases of *Blackler v. Webb*, (2 P. Wms. 283,) *Butler v. Stratton*, (3 Bro. Ch. Rep. 367,) and *Lady Lincoln v. Pelham*, (10 Ves. 176.) *Butler v. Stratton* furnishes an illustration of the rule. There the devise was to "John Stratton and Robert Stratton and the children of Mary Patterson." Mary Patterson had four children living at the death of the testator. Held, that they all took equally and per capita.

The only remaining question seems to be, to which of these classes does the case now before the Court belong? If to class No. 1, then the decision of the Chancellor, at Chambers, was right; if to class No. 2, then

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the decision was wrong and the *appellants are entitled to have the decretal order so modified that the parties shall take equally and per capita.

It is so plain that this case belongs to

class No. 2, that it is scarcely necessary to discuss the question. Peter Perdriau and Hester Wells having both died before the testator (they were both in fact dead when the will was executed) could of course have no children born after the death of the testator, as was the case in *Cole v. Creyon*. The individuals therefore of both the classes (that is, the children of Peter Perdriau and Hester Wells) were as certainly designated and as much ascertained, at the death of the testator, by the terms of description used in the will, as was Mrs. Ann M. China herself.

But it may be said, that the expression, "alive at the death of my wife," brings this case back again within the rule of class No. 1. It should be observed that that expression applies as well to Mrs. China as to the children of Peter Perdriau and Hester Wells. To take under the will she also must be alive at the death of the tenant for life.

That expression may be held to make the remainders contingent; but the question is not, whether the remainders are contingent, but whether the individuals are ascertained. Sir William Blackstone divides contingent remainders into two classes: 1st. Where the remainder is "to a dubious and uncertain person," and 2d where it is to take effect on "a dubious and uncertain event." 2 Bl. Com. 169. At page 170 he gives an illustration of the 2d class, and it is the very case before the Court: "Where," says he, "land is given to A for life, and in case B survives him, then with remainder to B in fee; here B is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving A."

It may again be said, that, in the event of the death of a child before the tenant for life, unascertained legatees are substituted in the place of such child; but that can hardly make any difference in the construction when the same objection applies to the bequest to Mrs. China herself. Should she die

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in *life time of the tenant for life, Mrs. Perdriau, unascertained legatees, to wit, her children, take her place.

Much might be said upon the particular words of the will, and especially upon the expression "share and share alike;" but, upon the views above taken, it is submitted that the appellants are entitled to their motion.

De Saussure, for Mrs. China, cited 1 Jarm. on Wills, 277, and note, and contended, that as to the objects of a testator's bounty and the proportion in which they shall take, a will speaks from its date, or the time it is drawn. When the testator here drew his will, Hester Wells, his sister, was alive. It could not, therefore, have been known, then, but that she would have other children and survive both the testator and his wife,

the life tenant. The objects of the testator's bounty were, therefore, so far as the children of Hester Wells were concerned, unascertained at the time of the draft of the will; and, in this view, he submitted that the case was within the principle upon which the case of *Cole v. Creyon* was decided. He also contended that the words "alive at the death of my wife" did not apply to Mrs. China. That they applied to the children of Peter Perdriau and Hester Wells, only, and they, therefore, were the persons who were to "share and share alike."

Moses, for the plaintiffs.

The opinion of the Court was delivered by

JOHNSTON, Ch. Samuel Perdriau, by his last will, gave his negroes and other personal property, and the plantation on which he resided, to his wife Hester, during her natural life. And, at her death, he directed that one-half thereof be delivered to her next of kin.

The other half he directed to be sold by his executor: and that "the proceeds of said sale (of the said half of the estate)" "be divided between Ann M. China, wife of John China, jr., the children of my deceased brother Peter Perdriau, and, also, the children of my sister Hester Wells, alive at the death of my wife, share and share alike, for and dur-

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ing the term of their *natural lives, and after their death, to their respective children, forever:—the parts of the females, my nieces and Ann M. China, to be to their sole and separate use. It is my will," he proceeds, "if the said Ann M. China [or] either of the children of my brother Peter or sister Hester should die in my life time, or the life time of my said wife, that the child, or children, of such one or more of them as may so die, take the part of the deceased parent."

This bill was filed by Hester, the widow of the testator, to obtain the assent of the Court to her relinquishing one-half of the negroes,—for a sale of that half, and for a present distribution of the proceeds among the parties to whom they were bequeathed at the expiration of the life estate.

A decree to that effect has been obtained, from which no appeal is taken except upon one single point. The decree divides the proceeds of sale into three equal parts, and directs one of them to be allotted to Ann M. China, one to the children of Peter Perdriau, and one to the children of Hester Wells. The appellants contend, that Ann M. China, instead of taking one-third part of said proceeds, should take only an equal part with each of the children of Peter Perdriau and Hester Wells: (the issue of any deceased party to represent that party, according to the will.)

In my opinion the appeal is well taken.

It is a material circumstance in this case,

that at the death of the testator, Peter Perdriau and Hester Wells, his brother and sister, for whose children his will was intended to provide, were both dead: and their children were then so ascertained, that no additions could be made to their number.

If the testator, under these circumstances, had given an estate directly and unconditionally, and not suspended upon any prior estate, to Mrs. China and the children of his deceased brother and sister, it is clear that she and they would have taken each an equal share. As is said, in *Conner v. Johnson*, 2

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Hill, Eq. 43, "if *there be a devise to an individual, designated by name, and to other individuals, designated as a class: as to A and the children of B—or if it be to the children of A and the children of B—all take equally and per capita." See also *Blackler v. Webb* (2 P. Wms. 283;) *Lincoln v. Pelham*, (10 Ves. 176;) and *Butler v. Stratton*, (3 Bro. Ch. R. 367.) The latter case serves as an illustration of the rule. The devise was "to John Stratton, and Robert Stratton, and the children of Mary Patterson." Held, that they all took equally, per capita.

The combination of the name of a particular individual with classes of children, under such circumstances, cannot produce any effect other than would follow, if the bequest were simply to two or more classes of children. The division must be per capita. A case of the latter description is furnished in *Ex parte Leith*, 1 Hill, Eq. 153, where the devise was of "two shares to my deceased sons' (William and James's) children." Without much reliance on the words "equally to be divided between them," which followed; it was held, that the two shares, considered as amalgamated, were to be divided among all the children per capita.

If all the legatees be ascertained at the time of the gift, and the gift be direct and unconditional, then, taking by purchase, they must take, each, an equal share. I know of no exception to this rule, except the late cases of *Templeton v. Walker*, 3 Rich. Eq. 543 [55 Am. Dec. 646], and *Collier v. Collier*, 3 Rich. Eq. 555 [55 Am. Dec. 653]. But these cases have, in fact, no application to the principle I am now considering. Those cases proceed on the principle, that, where a testator has given to the "heirs" of a particular individual, it being necessary to resort to the statute to ascertain who the heirs are, it may be resorted to for the additional purpose of ascertaining the proportion to which the statute would entitle them:—upon the implication, that where the gift is to "heirs," the intention is to give them inheritable portions:—that the beneficiaries are to be presumed to stand in the affections of the benefactor, according to the standard to which he himself has appealed.

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*In the case before us, the testator has

imposed no necessity to refer to the statute. Who the children of his brother and sister are, can be known without resorting to it. And, indeed, whatever information we might obtain from it, in relation to a division among the children of the brother and those of the sister; it can furnish none respecting the proper division between them and Mrs. China. So that the cases I have mentioned have no application to the subject now under consideration.

I have already stated what, in my opinion, would be the proper construction, if the bequest in this case were direct and unconditional.

The bequest is, however, not of that character. It is limited upon a prior life estate; and it is conditioned upon the remaindermen surviving the life tenant. Owing to this circumstance, it has been supposed to fall within the principle of *Cole v. Creyon*, 1 Hill, Eq. 311 [26 Am. Dec. 208].

I do not think it comes within the principle of that case.

There, after a life estate given to the wife of the testator, the bequest was to Alexander Creyon and the children of Elizabeth Cole,—testator's married niece, who survived him.

There are words indicating that the division was to be made equally between them: which perhaps were too little regarded in the decision. But it is not necessary to attend to that. It is the leading principle adjudged, which we are now to ascertain and apply.

It was held in that case, that Creyon was entitled to one-half of the estate, and that the other half was divisible between all the children of Elizabeth Cole who came in esse before the expiration of the prior life estate.

The reasons given for this decision were,—that Creyon, being a person named and not described, took a vested interest in the remainder, at the death of the testator: but that Mrs. Cole's children, taking by descrip-

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tion as children, from the necessity *of the case, could take only a contingent interest, their number being incapable of being ascertained until the death of the life tenant. This difficulty arose from the period of division being postponed until that event: because the law is familiar, that where a class of described persons are to take on a future event, all who can bring themselves within the description, at that time, are equally entitled to take. There was a contingency, therefore, as to the children, but not as to Creyon;—by which their interests, and not his, were affected. Again: there was a diversity between the parties, in respect to the time when their titles accrued. The parties could not take as joint tenants, because the right of Creyon vested in interest at the death of Hicklin, the testator, while that of the children remained contingent until the death of Hicklin's widow.

But, as I read the will of Perdriau, there is no interest of a remainder-man that is not subject to equal contingency. The difference between Creyon and Mrs. China is, that his was a certain and uncontingent interest from the death of the testator; her's is subjected to the same contingencies as to surviving the life tenant as are applicable to the children. All the conditions which are applied by Perdriau to his brother's and sister's children, he applies also to Mrs. China. The persons who are to take, are to take life estates only with a limitation to issue, and the females, including Mrs. China, are to take separate estates; and contemplating that they might not be alive at the death of his wife, which he had at first view imposed as a condition, (and, adding what occurred to him;—i. e., that they might possibly die in his own life, so as to occasion a lapse,) he provides that, in either of those events, their children, if they left any, should take in their place; not by way of remainder to their life estates, but as substitutes,—and, in that case, absolutely.

The reasons of the decision in *Cole v. Creyon* (viz. the fact that there was a fixed and certain interest in one party and a contingent interest in the others, rendered it necessary to distinguish between them,) do not apply here.

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*When, on the face of the will, I see not only that all parties are put upon the same footing, but are to "share and share alike," I do not perceive any ground to doubt, that the distribution should be made, as contended for in the ground of appeal.

It is ordered, that the decree appealed from be modified according to this opinion; and that in all other respects it be affirmed.

DUNKIN and WARDLAW, CC., concurred.
Decree modified.

5 Rich. Eq. 31

MARY RIDDLE v. JOHN RIDDLE, Administrator, and Others.

(Columbia, Nov. and Dec. Term, 1852.)

[*Executors and Administrators* ⇨221.]

A charge for board made by an administrator against infant distributees, who resided with him, he being their uncle, rejected on the proof.

[Ed. Note.—Cited in *Crosby v. Crosby*, 1 S. C. 347, 348, 349; *Exchange Banking & Trust Co. v. Finley*, 73 S. C. 429, 53 S. E. 649.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 901-903½, 1858, 1861-1863, 1865, 1866, 1871-1874, 1876; Dec. Dig. ⇨221.]

[*Executors and Administrators* ⇨313.]

The plaintiff, a distributee, having been unreasonably tardy in the assertion of her right, interest not allowed her during the time she resided with the administrator.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1271; Dec. Dig. ⇨313.]

[*Executors and Administrators* ⇨470.]

An ex parte return to the ordinary in which an administrator strikes a balance against the estate, is not such an act as will give currency to the statute of limitations in his favor.

[Ed. Note.—Cited in *Crosby v. Crosby*, 1 S. C. 346; *Renwick v. Smith*, 11 S. C. 304; *Fricks v. Lewis*, 26 S. C. 239, 1 S. E. 884; *Montgomery v. Cloud*, 27 S. C. 192, 3 S. E. 196; *Ariail v. Ariail*, 29 S. C. 94, 7 S. E. 35.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2016; Dec. Dig. ⇨470.]

Before Wardlaw, Ch., at Kershaw, June, 1852.

The decree of his Honor the Circuit Chancellor is as follows:

Wardlaw, Ch. James Riddle died in May, 1826, leaving a will by which he directed his whole estate to be sold, and made the following disposition of the proceeds: "the moneys of the same to remain in the hands of my executors to accumulate the maintenance and support of my two children, John Riddle, my son, and Mary Riddle, my daughter, that is I, the executor, do bind myself for the welfare of John and Mary Riddle, that is to bring them up in a decent manner as the

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abi'littes of the case will admit, with common education, free from want, bound or bondage, till they arrive at the age of twenty-one. The moneys to be vested in the hands of the executors for support without extravagance; and when the said John and Mary come to the age of twenty-one, the balance of said moneys to be equally divided between the said John and Mary Riddle." The executors appointed by the testator declined to act; and John Riddle, brother of testator, became administrator with the will annexed. He sold the whole estate of the testator on September 27, 1826, for \$335. Immediately after the death of their father, the two children, John, then nine or ten years old, and Mary, then four or five years of age, began to reside in the house of their uncle, John Riddle, and remained there until the death of John on March 23, 1832, and Mary's departure without leave in January, 1836. The children were poorly maintained and educated, and they labored according to their strength in the service of their uncle; but both were young, and John puny, so that their services were not very valuable. Whether the services of the children were equivalent to their board, and whether the administrator originally intended to charge them for board, are the principle questions in the case. On October 28, 1833, the administrator made his first and only return of expenditures, in which he sets forth no payment of money except \$8, but charges each of the children for board at the rate of \$47 a year; and in this way exhausts the assets of the estate and makes himself a creditor to the excess of \$109.42.

On August 12, 1835, the defendant, John

Riddle, conveyed his whole estate to James W. Cantey, in trust to sell the same at his discretion and pay all the debts of the grantor; then to permit the children of grantor to have certain specified uses of the estate during the life of the grantor; and upon his death to divide the residue equally among the children of grantor. It was admitted that the trustee had sold the estate and delivered the securities for the purchase money to the Commissioner of this Court, under certain proceedings not distinctly brought to my notice.

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*John Riddle, the administrator, died insolvent, before June, 1848.

The plaintiff, Mary Riddle, has received the grant of the administration of her brother John. In her own right, and as administratrix and sole distributee of her brother John, she filed the original bill in this case, January 9, 1846, against John Riddle as administrator (and against his sureties, who were not made parties regularly,) for an account of her father's estate. The administrator answered that he had exhausted the estate according to his return above mentioned, and he relied upon the statute of limitations. The matters of account was referred to the Commissioner, and that officer took evidence, and at June term, 1847, made a report, in which, submitting to the Court whether the administrator was entitled under the circumstances to charge board, he expressed the opinion, that, if the administrator was entitled to charge board, the estate of the testator would be exhausted, nay brought in debt to the administrator.

The plaintiff filed exceptions to this report, insisting in various forms that the administrator gratuitously supported the children, that their services were equal to their maintenance, and that he was not authorized to exceed their income in his expenditures for maintenance. For lack of time or some other reason, this report and these exceptions were not considered at June term, 1847, and in 1848 the administrator died; and at June term, 1848, the case of the plaintiff was marked abated. At June term, 1850, the plaintiff filed a bill of revivor and supplement, in which she charged the death and insolvency of the administrator, and that his estate was unadministered unless by the Ordinary as a derelict estate, and also set forth the execution of the trust deed aforesaid by John Riddle, and made the Ordinary, and the trustee, James W. Cantey, parties to the suit. The Ordinary answered that John Riddle left no estate independent of that in the trust deed, and the trustee answered admitting the facts above mentioned as to the trust deed, and suggesting that the beneficiaries of the trust, the children of the grantor, were necessary parties.

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*In this state the case was presented for

my determination. I think there is nothing in the suggestion that the beneficiaries of the trust deed should be made parties. The legal estate is clearly in the trustee and he sufficiently represents the beneficiaries.

The defendants have not proved a state of facts in which the bar of the statute of limitations is applicable. It does not appear that the plaintiff had attained full age more than four years before she filed her original bill, and although there was considerable delay in filing the bill of revivor, this may be excused on the consideration that there was no representative of John Riddle's estate. There is no irreparable breach of continuity in the suit.

The main controversy between the parties is as to the claim of the administrator to absorb the whole estate in the maintenance of the legatees. In general, one entrusted with the management of the estate of an infant, cannot exceed the income in providing maintenance for the infant, without the previous leave of the Court or upon some sudden emergency. But a different rule may be established as to a particular estate by a testator or other person creating the trust. The will in the present case is drawn inartificially and is obscure, but as I construe it, particularly that the monies shall be vested in the executors for the support of the legatees, and that the balance shall be divided, some discretion in expending the corpus of the estates in maintenance of the children is given to the executors; and I suppose the administrator on the will succeeded to the authority of the executors in this respect. The awkward phrase, to accumulate the maintenance, has the same bearing. Still the trustee is bound to show that he has exercised such discretion judiciously; and a more liberal construction of his conduct should be made where he has expended the corpus of the estate in payments to others, than where he claims to retain it for maintenance furnished by himself. Wherever a father or other near relative of the infants is the trustee, in such case, he should show distinctly

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ly his purpose to charge for maintenance; or maintenance before such manifestation may be justly inferred to be afforded gratuitously. If the trustee exact from the infants all such labor and service as they are capable of rendering, the inference is especially strong that he expected no compensation for board beyond their services. *Booth v. Sineath*, 2 Strob. Eq. 31. In the present case the trustee did not manifest his purpose to charge his wards for board, until seven years after their residence with him began and after the death of one of them, and he availed himself of their labor to the full extent of their capacity. Much contrariety of evidence exists on the naked question, whether their services on the whole were equivalent to their board—but setting aside the testi-

mony of the daughters and sons-in-law of the administrator, who have an interest in the matter, the clear preponderance is in the affirmative of the question. But a circumstance remains to be mentioned which seems conclusive of the matter. The administrator repeatedly declared that he had invested the funds of his testator in the purchase of a negro woman, for the reason, that the increase of the slave would afford more profit to the children than interest on the money, and according to one witness, said, the children, when they attained full age, should have the negroes or the money at their option.

These views lead me to the conclusion that the administrator's claim for board should be rejected. On the other hand there has been unreasonable tardiness in the assertion of the plaintiff's right; and as the allowance of interest is to some extent a matter for judicial discretion, I am of opinion no interest should be allowed to plaintiff until after January, 1836, when she left her uncle's house.

It is ordered and decreed, that the Commissioner re-state the account on the principles of this opinion. Parties have leave to apply for any other orders which may be necessary, to the execution of the decree. Costs to be paid out of the estate.

The defendants appealed and now moved this Court to reverse the decree or to modify the same upon the grounds:

1. Because his Honor should have allowed

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ed compensation to *John Riddle, the administrator, for board and maintenance, clothing, &c.

2. Because the claim was barred by the statute of limitations, and especially the claim of complainant as administratrix of her brother John.

The complainant also appealed on the ground, that the decree should have allowed complainant interest on the fund in the hands of the administrator, arising from the sales of the property under the will, from the time the money from the sales became due, or the expiration of twelve months after administration.

Kershaw, for defendants, cited White and Tud. Lead. Cas. 164.

Clinton, for complainant, cited Harp. Eq. 224; McM. Eq. 275.

The opinion of the Court was delivered by

DUNKIN, Ch. In reference to the complainant's ground of appeal, and the first ground of appeal on the part of the defendants, this Court is entirely satisfied with the views and the conclusions of the Chancellor.

Assuming that the legal representative of John Riddle, the elder, is now before the Court, and relied upon the plea of the statute of limitations, in the same manner as

the intestate did, it seems to the Court that it was properly overruled. John Riddle was the administrator cum testamento annexo of his brother James Riddle, under whose will the plaintiff claims. He was a direct, technical trustee, and, as such, could never avail himself of the statute so long as that relation subsisted. If the complainant had not filed a bill for account until June, 1850, she would be entitled to relief unless the defendant could establish some act on his part purporting to be a discharge of his trust, or unless such a length of time had elapsed as would authorize the Court to presume the demand satisfied. The latter is not suggested, and the position would be obviously untenable from the condition of the parties.

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Nor could it, with *more reason be surmised that he had done any act purporting to be a discharge of his trust. It is true that, after the death of plaintiff's brother (a minor,) and when the plaintiff was about eleven years of age, the administrator made his first and only return to the Ordinary. It did not purport to be, and could not be, a settlement of the estate, or a discharge of the duties which he had assumed when he undertook to execute the will of his brother. If an ex parte return to the Ordinary, in which an executor or administrator strikes a balance against the estate, should be regarded as a discharge of his trust, from which time the statute would run against a bill to account, it would be an alarming disclosure, as well to creditors as to legatees and distributees of the deceased. But the defendants have not insisted on this; nor is any other act of discharge suggested. The complainant was not bound to file her bill within four years after she arrived of age, and could only be precluded by such lapse of time as would bar in any other case of direct trust. Whatever was due to the complainant constituted a debt at the time of the execution of the deed to J. W. Cantey, who, thereby and by the express provisions thereof, became a trustee for the creditors of John Riddle, and, for the reasons stated, the statute could not avail him against the complainant's demand.

It is ordered and decreed, that the decree of the Circuit Court be affirmed and the appeal dismissed.


JOHNSTON, DARGAN and WARDELOW, CC., concurred.

Decree affirmed.

5 Rich. Eq. *38

*MARTHA JACKSON, by Next Friend, v. SAMUEL McALILEY et al.

(Columbia. Nov. and Dec. Term, 1852.)

[Equity  397.]

The Commissioner having in his hands, as receiver, certain funds, to a share of which a

married woman was entitled as tenant in common, without any order of Court paid out her share to her husband, she not joining in the receipt:—*Held*, that the payment was unauthorized; and that the Commissioner was bound to account to the wife for her share. Per Dargan, Ch.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 861; Dec. Dig. ☞397.]

[Equity ☞397.]

A Commissioner having a fund in his hands as received, must keep it until ordered to pay it out; if he pays it out without an order, he cannot exonerate himself without showing, that he paid it to one, who, if application had been made to the Court, would have been entitled to receive it under its sanction. Per Dargan, Ch.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 861; Dec. Dig. ☞397.]

[*Husband and Wife* ☞10.]

A husband's marital rights do not attach on the undivided interest of his wife in a fund in the custody of the Court. Per Dargan, Ch.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 38; Dec. Dig. ☞10.]

[Equity ☞404.]

Where a decree is made overruling defendant's defence and ordering him to account, additional evidence to show that defendant is not liable to account cannot be offered at the reference. Per Dargan, Ch.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 886-892; Dec. Dig. ☞404.]

[Equity ☞413.]

An order confirming the annual report of the Commissioner upon a fund in his hands, does not conclude the parties interested in the fund. Per Dargan, Ch.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 927-930; Dec. Dig. ☞413.]

[Equity ☞410.]

Where grounds of exception to a Commissioner's report state matters which are objections, not to the report, but to the decree ordering the reference, the Chancellor should refuse to decide them; nor will the Court of Appeals decide them on appeal from the decree on the report; the appeal should be from the decree ordering the reference.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 905-919; Dec. Dig. ☞410.]

[Equity ☞396.]

A Commissioner paying out money during his term of office to one not entitled to it, *held* bound to pay interest from twenty days after he went out of office—that time being allowed him, by the Act of 1840, within which to turn over the fund to his successor.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 860; Dec. Dig. ☞396.]

Before Dargan, Ch., at Chester, July, 1849.

Dargan, Ch. This bill has been filed by Martha Jackson, through her next friend, Dr. C. Thorn, against her husband, William Jackson, and Samuel McAliley, the late Commissioner in Equity of this Court.

The complainant is one of the children of Rebecca Barber, to whom Daniel Green, by his last will and testament, bequeathed one-half of his personal estate. The complainant's share of said personal estate, was the one-twelfth part. John M. Barber, the complainant's father, was, by proceeding in this

Court, appointed the guardian of all his children, including the complainant. His children were six in number. John Peay and James B. Pickett were the sureties on the

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guardian*ship bond of the said John M. Barber. Peay and Pickett filed a petition in this Court, asking to be relieved from their liability on the guardianship bond, or that Barber might be required to give new sureties, or to surrender his trust, and to account for and deliver the whole of his wards' estate to some other person, by the Court for that purpose to be appointed.

At February term, 1831, an order was made in the case of Pickett and Peay v. John M. Barber, as follows: "It is ordered and decreed, that the letters of guardianship granted to the defendant as the guardian of his minor children, be revoked, and that he be compelled to account before the Commissioner for his guardianship, and deliver over the estate of his children into the hands of the Commissioner of this Court, unless he accounts fully before the Commissioner and gives new security, to be approved by the Commissioner, for the faithful discharge of his duty, on or before the first day of January next." John M. Barber failed to give the required security. His guardianship became unconditionally revoked, and on the 19th January, 1832, he surrendered certain negroes, the property of his wards, to the Commissioner in Equity. These negroes were hired out by the Commissioner for two or three years; and the negroes themselves, in proceedings in this Court for partition among the children of Rebecca Barber, have been divided, and the portion of said negroes assigned to the complainant, has been settled by a decree of this Court to her sole and separate use, &c.

On the 7th February, 1832, the said John M. Barber, surrendered into the hands of the Commissioner in Equity, in obedience to said order, choses in action belonging to his children, which the defendant, Samuel McAliley, says, amounted, with interest calculated up to that time, to \$3,390.55. The defendant, Samuel McAliley, in his answer and exhibit, sets forth the amount of cash which he has received on account of the children of Rebecca Barber, the late wards of John M. Barber. The statement is informal, imperfect and confused. From the statement of his an-

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swer and exhibit, I understand that he *has received upwards of \$6,000, on account of all the wards. But whether there is any thing more due or unpaid, is not stated, but I suppose that there is, from what the defendant says, in regard to the understanding between himself and William Jackson, when he paid over certain of those monies to him.

There has been no order or decree of the Court dividing or distributing the choses in

action, or the funds arising therefrom, among the children of Rebecca Barber. Yet the defendant, acting as Commissioner or receiver, has undertaken to distribute this fund on his own responsibility, and to pay certain claims and expenses, with which he supposed it to be chargeable, and has also made large unauthorized payments to the husband. In doing this, he has assumed the responsibility of paying it out rightfully, and as this Court would now order it paid, if no such payment had been made by the Commissioner. The Commissioner has no right to pay money which has come into his hands by virtue of his office, except under an order or decree of the Court. If he pays without this sanction, he always pays on the peril of the right person receiving it. In the case of the funds being the estate of a married woman, there is a peculiar impropriety in paying it to the husband, without the order or direction of the Court. She has an equity for a settlement out of it, and the fund is to be retained for that purpose, until the wife shall have an opportunity of making her election, either of asserting her right to a settlement, or of waiving it. If she had joined in executing the receipt, it would have been a different case—that would have been a waiver. But the complainant has never waived her equity for a settlement. It remains as perfect now as it ever was. Though the money has, for the most part, been paid to the husband, it has been wrongfully paid, and the Court will consider it still in the hands of the defendant, the said Samuel McAliley. The order under which he received the fund, gave him no authority to pay it out to any person. *Yeldell v. Quarls*, Dnd. Eq. 57; *Wardlaw v. Gray*, 2 Hill, Eq. 644.

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*The defendant, as the administrator of James McAliley, sets up a judgment in favor of the estate of his intestate, against the fund or estate to which Martha Jackson is entitled from the estate of Daniel Green. The judgment is against the husband, William Jackson. The claim is disallowed; and it is so ordered and decreed.

It is ordered and decreed, that the payments made by the said Samuel McAliley to William Jackson, out of the funds of the complainant in his hands, are null; and that the said Samuel McAliley do account for said funds, as if said payments, or any other payments, had never been made.

It is further ordered and decreed, that the Commissioner report all costs and expenses with which the share of the complainant, in the said funds, is chargeable. It is also ordered and decreed, that the Commissioner inquire and report what amount of estate, belonging to the complainant, has been collected by the said Samuel McAliley, and also what remains to be collected. It is also ordered and decreed, that the whole of the es-

tate of the complainant, in the hands of the said Samuel McAliley, already collected, and which remains to be collected, be settled to the sole and separate use of the said complainant for life; remainder to her issue; and if she should die without leaving issue living, for the use of the said William Jackson. In the distribution among issue, the issue of any deceased child to represent the parent.

It is further ordered and decreed, that the estate of the complainant be paid over to her trustee, Dr. C. Thorn. It is further ordered, that the costs and expenses of these proceedings, be paid out of the funds of the trust estate.

In obedience to the order of reference contained in the foregoing decree, the Commissioner submitted his report, dated May 26, 1852, as follows:

This bill is filed by the complainant, one of the legatees of Daniel Green, deceased, claiming an account and payment of her share of certain choses in action, and of the hire of

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certain *slaves, transferred under an order of this Court by John M. Barber, her former guardian, to the defendant, Samuel McAliley, Esq., at that time Commissioner in Equity for Chester District. The defendant in his answer, sets forth a statement of the various sums received by him, and of the payments made by him, for expenses of the fund, and to William Jackson, the husband of the complainant, in right of his said wife. The Court, at July term, 1849, ordered that the payments so made to William Jackson, are null; and the defendant is required to account for said funds, as if such payments, or any other payments had never been made. It was further ordered, that the Commissioner report all costs and expenses with which the share of the complainant in said fund is chargeable, and that he also inquire and report what amount of estate belonging to the complainant has been collected by the said Samuel McAliley, and also, what remains to be collected.

At the reference held in the case, the complainant's counsel offered in evidence to charge the defendant, the exhibit filed with his answer, which contains a statement of the amounts received by him.

The defendant, McAliley, offered various payments made by him, as follows:

Receipt of Wm. Jackson, dated January 28, 1833, for	\$100 00
Receipt of Wm. Jackson, dated December 12, 1833, for	100 00
Receipt of Wm. Jackson, dated January 22, 1834, for	150 00
Receipt of Wm. Jackson, dated February 3, 1834, for	240 00
Receipt of Wm. Jackson, dated July 2, 1834, for	50 00
Receipt of Wm. Jackson, dated January 13, 1835, for	250 00

Two notes of Wm. Jackson, for hire of negroes of the Barber children:

One for 1833, due 1st of January, 1834.	\$27 00
" " 1834 " " " 1835.	60 00
Receipt of Col. James Gregg, Counsel fee, Sept. 7, 1837.	50 00
Receipt of Com'rs. in Partition, March 18, 1835.	8 00
Receipt of W. F. DeSaussure, Counsel fee, July 2, 1833.	25 00

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*Receipt of Clarke & McDowell, Counsel fee, November 3, 1833.	100 00
Receipt of J. McCreary, Taxes, May 17, 1833.	8 25
Receipt of Jno. Ferguson, Witness, June 21, 1833.	1 00
Receipt of J. McCreary, Taxes, May 13, 1834.	13 00
Receipt of J. Ferguson, keeping negroes, and Auctioneer June 31, 1835.	10 00
Receipt of J. Ferguson, Dec. 29, 1832.	2 50

The defendant also offers in evidence his report made at July Term, 1834, in which he credits himself with the payment of \$550, to William Jackson.

On the minutes of the Court at that term is the following order:

"Exparte, } Report of money
 "The Minor Legatees of } received and paid
 Danl. Green, deceased } away.

"The Commissioner having read his report of monies received and paid away, as received of funds of said legatees, and the same having been examined by Mr. McDowell, solicitor for the legatees, and no objection having been made to the same, ordered that the same be confirmed.

Henry W. DeSaussure."

"July 4, 1834."

The report at June Term, 1835, on the same subject, is also confirmed by order of the Court. The complainant objects to the payments to William Jackson, as well as to his notes, offered by the defendant, as having been already decided by the Court.

An important question arises here, whether or not the defendant is chargeable with interest on the various sums received by him. It is insisted by his counsel, that he is not so chargeable, or at least only from the filing of the bill—that he is a public officer, not liable to pay interest, or be sued, until a demand is made upon him; and that no demand was made, before the filing of the bill. It is further said, that the husband of Mrs.

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*Jackson has received the money, and had the use of the negroes for the benefit of her and her family, and that he has a right to use the interest of the fund; and, further, that no order having been made to distribute the fund, the Commissioner had no right to be accountable for the interest until such order is made. The complainant insists, on the other hand, that the defendant was a trustee for her, and that he has wrongfully paid away the money to another, and that he must therefore account to her for the interest. Feeling doubts on the subject, I have made the account in the alternative, so that

it may be confirmed in any view the Court may take. There is nothing said in the Chancellor's decree, on the matter of interest.

All the other receipts, (exclusive of Wm. Jackson's) were for payments made to counsel, witnesses, &c. The defendant also claimed credit for a counsel fee to P. E. Pearson, Esq., of \$50, for which he produced no receipt, but for which he had claimed a credit in his reports to the Court, already referred to.

[The report here contained a statement of the amount received by the defendant, and of monies paid out by him, excluding the payments to Wm. Jackson, and the payment to P. E. Pearson, and concludes as follows:]

If the complainant is entitled to interest, as she contends, there is due to her, on the first day of July, 1852, the sum of eighteen hundred and eighty-two dollars and sixteen cents from the defendant, Samuel McAliley.

The bill in this case was filed May 24, 1849. If the complainant is entitled to interest only from the filing of the bill, there will be due to her, the sum of nine hundred and seventy-eight dollars fifty-five cents, on the first of July, 1852.

By the decree of the Court, made at July Term, 1849, there was found due to the complainant, the sum of \$956.66, on the 1st day of July, 1846, from the estate of James Barber, and from the sureties of John M. Barber.

The negroes assigned to Mrs. Jackson, in the partition of the slaves bequeathed by Daniel Green, were settled, by order of the Court, on her, to her sole and separate use.

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*The Chancellor having directed in his decree, that the fund due to the complainant from the defendant, should be paid to her trustee, Dr. Chas. Thorn, the Commissioner suggests to the Court, that Dr. Thorn has removed permanently from this State, and is now residing, as he is informed, in the State of Mississippi.

No application has been made for the appointment of another trustee in his stead.

The fund due in this case, as well as that due from James M. Barber's estate, and the sureties of John Barber, is ordered by the Chancellor to be settled on the complainant.

The defendant, Samuel McAliley, excepted to the report of the Commissioner, on the following grounds, to wit:

1. Because the Commissioner erred in not allowing a payment of fifty dollars made to P. E. Pearson, Esq., as solicitor for complainant and others, in the case of Peay & Pickett against the same, the receipt for which payment was lost or mislaid, the said sum being paid as a counsel fee, and reported to the Court and approved of, and the same being, also a moderate fee, considering the questions involved and the amount recovered.

2. Because the Commissioner erred in

charging the defendant with the sums reported to the Court, and which after examination by counsel for the said complainant and others, was approved of and confirmed by the Court.

3. Because the Commissioner erred in charging the defendant with the hire of negroes, of which the complainant had the service and labor.

4. Because the Commissioner erred in allowing any interest in said account against the defendant.

5. Because the complainant having the whole of her property (except that in controversy) settled upon her, no future settlement should be made, and the payment to her husband was right and proper.

The case was heard on the exceptions before Johnston, Ch., at June sittings, 1852, who made the following decree:

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*Johnston, Ch. On hearing the report of the Commissioner in the above case, filed 26th day of May, 1852, and exceptions filed thereto by defendant, Samuel McAliley; It is ordered and decreed, that the first exception be sustained by the consent of plaintiff's solicitor. The second and fifth exceptions are overruled, the report being in conformity with a previous decree of this Court. The third exception is overruled, being founded on an error in fact, no negro hire being charged in the report. The fourth exception relates to interest. The Commissioner has not decided the question, whether interest should be charged; and if any, at what time the fund should commence to bear interest. The money was paid into the hands of Mr. McAliley, while he was Commissioner of this Court, and in pursuance of its order. During the time he was Commissioner, he is not chargeable with interest, but when he went out of office it was his duty to have turned over the money to his successor, and not having done so, he has held the money as a private individual, and no demand other than the legal requisition was necessary to render him liable for interest, and he should be charged with interest from twenty days after he went out of office; and let the report be amended in conformity with the principles here laid down.

It having been suggested to the Court, that Charles Thorn, the trustee of Martha Jackson, has left the State and abandoned his trust.

It is ordered and decreed, that the defendant pay into the hands of the Commissioner of this Court, the amount which may be found due, in conformity with the principles of this decree: That it be referred to the Commissioner of this Court, to ascertain and report whether Charles Thorn has left the State, and if so, to report upon the fitness of some person to be appointed trustee, who may apply for said appointment; and

when the said appointment is regularly made, the Commissioner is hereby directed to pay over the fund here referred to, to said trustee, and the same is to be vested in him for the separate use of the said Martha Jackson, during her life, and at her death, to be divided amongst her issue.

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agreeably to the statute of distributions; and if the said Martha should leave no issue living at her death, then to Wm. Jackson, her husband, freed from all further trusts.

It is further ordered, that it be referred to the Commissioner of this Court, to ascertain and report what would be a reasonable counsel fee for complainant's solicitor in this case.

The defendant, Samuel McAliley, moved this Court to modify the decree of Chancellor Johnston, on the following grounds, to wit:

1. Because the Chancellor erred in not sustaining the second exception to the Commissioner's report, which is: "Because the Commissioner erred in not allowing the defendant credits for monies paid by him to William Jackson, the husband of the complainant, and which payments are reported specially to the Court, and which payments after the examination of solicitors of complainant and others, were confirmed by the express order of the Chancellor."

2. Because the Chancellor erred, in not sustaining the fourth exception of the defendant, which is: "That the Commissioner should not have allowed any interest on the money in his hands, which had been paid to the husband of complainant."

3. Because the Chancellor erred in not sustaining the fifth exception of defendant, which is, "Because the complainant having had her whole property, excepting the amount in controversy, settled upon her, no additional settlement should have been made, and especially so, in as much as her husband had received the same, and she had had to a certain extent the benefit thereof."

4. Because the Chancellor erred in directing a settlement, without first having ordered a reference to inquire into the propriety of the settlement.

M. Williams, for appellant.
Rutland, contra.

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*The opinion of the Court was delivered by

DARGAN, Ch. I think it will scarcely be doubted that a Commissioner in Equity has no authority to pay over monies that have come into his hands as a receiver without the order of the Court. His whole duty, unless otherwise ordered and directed, is simply to receive and safely to keep the fund. Such fund is in fact in the safe keeping of the Court itself, which is obliged to use the

personal instrumentality of its officers in the performance of this duty. What right has the Commissioner to apply or distribute funds that are in the charge of the Court, and which are in his hands only as a depository?

If a Commissioner, under these circumstances, undertakes to pay out monies, he assumes the responsibility of paying it out to the right person,—to the person who would be entitled to receive it, if it was done in a formal manner under the sanction of the Court. His unauthorized payments would not be permitted to have the effect of defeating the rights of the parties, or varying or modifying them in any way. These are propositions that will hardly admit of dispute.

The fund in question was the estate of the complainant Martha Jackson, the wife of the defendant, William Jackson. It was a fund derived from her equitable choses, placed in the hands of the defendant McAliley for collection and safe keeping.

I refer to the circuit decree for the manner in which the estate of the complainant in this fund originated, and in which it came into the possession of the said Samuel McAliley. It was her unascertained, undivided interest or share in certain choses in action derived from the estate of Daniel Green, to which she was entitled as tenant in common with her five brothers and sisters. There was not, and never has been any decree making a partition of the fund, or severing the rights of the parties. In *Verdier v. Hyrne*, 4 Strob. 463, it was decided by the Court of Errors, that, where a married woman was possessed of a slave as tenant in common with one or more other persons, the marital rights did not at-

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tach, there being no partition. And *this, though the tenants had a vested legal estate in common, and though there had been a decree for partition in the wife's life, which had not been made before her death.

It is not disputed, that the complainant, Mrs. Jackson, had a right to a decree for a settlement when this fund first came into the hands of the defendant as the receiver, under the order of the Court. Nor could it be disputed, that, if the fund still remained in the hands of the defendant, she would, at this day, be entitled to the same decree.

It is said, however, that the share of the fund to which the complainant is entitled, has for the most part, if not altogether, been paid over to the complainant's husband by the defendant: and that, although this has been done without the order of the Court, or any waiver by the wife of her equity, the marital rights have thereby attached.

But the Commissioner, as I have before stated, has no right to pay out monies in his hands without the order of the Court. If he does, it is at his own peril; and upon

the responsibility of paying it out to the right parties, and in such manner and on such conditions as the Court would have ordered it paid. The rights of the parties are not to be defeated, varied, or modified, by such unauthorized and illegal payments.

Upon this, and similar reasoning, the Circuit Court, at July term, 1851, decreed that the payments by McAliley to William Jackson were null, and that the complainant was entitled to a settlement of the fund; and that McAliley pay over to her trustee, her share of the said fund, as if the payments to Jackson had never been made. The decree also referred it to the Commissioner to report upon the accounts.

At a subsequent stage of the proceedings, (when the case was before the Commissioner on reference,) the defendant offered some further evidence in opposition to the right of the complainant for a settlement. The Commissioner has reported this evidence. It consists of extracts from the minutes of the Court for July term, 1834, and other documents which are of record.

The Commissioner in his annual report at

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that term, on the *estate of the infant legatees of Daniel Green, states an account, in which he credits himself with \$550 as paid to William Jackson. On the minutes of the Court is an order in words as follows:

"Ex parte

The minor Legatees of Daniel Green, de-	} Report of monies received and paid away.
ceased.	

The Commissioner having read his report of monies received and paid away, as received of the funds of the said legatees, and the same having been examined by Mr. McDowell as solicitor for the legatees, and no objection having been made to the same, ordered that the same be confirmed.

(Signed) Henry W. DeSaussure.

July 4, 1834."

A similar report at June term, 1835, was also submitted and confirmed.

It is contended, that the rights of the complainant are thus concluded (as to the extent of the charges made for payments to Jackson in these reports,) by the judgment of the Court.

The first objection to the evidence is, that it was not submitted at the proper time. The bill and answer made the question directly, as to the right of the complainant to a settlement. The Court heard and decided this question. The Commissioner was ordered to "report all costs and expenses with which the share of the complainant in said funds is chargeable." He was also ordered to "report what amount of estate belonging to the complainant has been collected by the said Samuel McAliley, and also what remains to be collected." The evidence which has been cited, was foreign to the inquiry with which the Commissioner was charged:

and bore upon a question which had already been adjudicated.

But the evidence, if it had been brought forward at the proper time, would, if admissible at all, have been perfectly inconclusive. It was an *ex parte* proceeding, in which the Commissioner alone was a party. The com-

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plainant was not a party, *nor was she represented by any one. It is recited in the order, that the report had been examined by Mr. McDowell, "solicitor for the legatees." It does not say that Mr. McDowell assented; but that no objection having been made, the report was confirmed. It does not appear, that Mr. McDowell was the solicitor of the complainant, or of the infant legatees, in reference to their matters of account with the Commissioner; or that it was necessary for them to have a solicitor, after their funds had come into the safe keeping of the Court.

It is as well for me to state here, broadly, (for there seems to be some misapprehension upon the subject,) that these annual reports and accounts which the Commissioner is required to make, conclude nothing, as to the rights of the parties whose estates or funds they purport to give an account of. They are the *ex parte* reports of the Commissioner, and commit no body but himself. Their object is to communicate information from the Commissioner to the Court, and to any party who may be desirous of looking into his administration. It is intended as a check upon the Commissioner. But after all that a Chancellor can do in supervising the annual returns of the Commissioner, it affords but a very imperfect check, and a very inadequate security. I might say much more upon this subject, but I forbear.

All that I have said, in vindication of the decree of July term, 1851, has but little pertinency to the issues now before this Court. No appeal has been taken from that decree. In pursuance of the decree the Commissioner has held his reference, and at July term, 1852, he submitted his report. The cause came before the Court at that term, on this report and the exceptions.

The defendant made the same opposition to the complainant's claim for a settlement, in the form of exceptions to the report, that he had previously made on the circuit trial, and which had been decided against him. In addition to these, he excepted, that \$50 paid as a fee to P. E. Pearson, had not been allowed as a credit on his accounts. The

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complainant's soli*citor withdrew, on the last circuit trial, his objection to this item as a credit; and it was allowed. Thus that question was disposed of.

The defendant also excepted to the report, because the Commissioner, in stating the accounts, had charged interest against him. This question as to interest, was the

only new issue in the case,—the only point that had not been previously adjudged.

The Chancellor who last heard the cause (on the report and exceptions,) very properly declined to review, and decide any of the matters that had been adjudged by the preceding decree. To have done so, would have been to entertain appellate jurisdiction. And in the same way, his successor might have been called upon to consider and reverse his decision. It is needless to pause here, for the purpose of shewing the utter absurdity of any other rule than that by which the Chancellor was governed.

The Commissioner, in his report, stated the interest account in two ways. He stated it first, on the supposition that the complainant was entitled to recover interest from the time the defendant had received the fund; which was the 7th February, 1832. Stating the account in this way, he found a balance due the complainant on the 1st July, 1852, of \$1,882.16. On the supposition that the complainant might not be entitled to interest, except from the filing of the bill, which was the 26th May, 1849, the Commissioner has stated the interest account in that way. Stating the account on this principle he finds a balance due to complainant, 1st July, 1852, of \$978.55. The defendant excepted to the report for allowing interest at all.

Thus the case was presented to the Chancellor; who, adopting neither of the alternatives presented by the Commissioner's report, decreed that the defendant was liable for interest from the time he went out of office.

This is an appeal from that decree. The grounds of appeal are as follows: 1. "Because the Chancellor erred in not sustaining the second exception to the Commissioner's report, which is: because the Commissioner

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erred in not allowing the defend*ant credits for monies paid by him to William Jackson, the husband of the complainant, and which payments are reported specially to the Court, and which payments after the examination of the solicitor for complainant and others was confirmed by an express order of the Court."

The third ground of appeal is, "because the Chancellor erred in not sustaining the sixth exception of the complainant, which is, because the complainant having had her whole property, except the amount in controversy, settled upon her, no additional settlement should have been made; and especially so, inasmuch as her husband had received the same, and she had, to a certain extent, the benefit of it."

It is perfectly obvious that the errors charged in these two grounds, of appeal are errors (if they be such) which are imputable only to the first decree; and from which, as to these grounds no appeal has been taken.

The Chancellor who presided at the last trial, and heard the cause on the report and exceptions, did not affect to decide the questions involved in these two grounds of appeal. He neither affirmed, nor denied the propositions of the appellant. He only sought to carry out and to enforce a previous decree in the cause; which he found upon the record, which, as a judicial order, was binding upon him, and which was irreversible, except by way of appeal. If the decree had in his judgment been erroneous, (which I feel authorized to say was not the case,) he would not, and could not, have reversed or modified it. No error is imputable to his decree on this account. But the appeal should have been from the first decree, of which the appellant in this respect makes no complaint.

The second ground of appeal is, "because the Chancellor has erred in not sustaining the fourth exception of the defendant to the Commissioner's report; which is, that the Commissioner should not have allowed any interest on the money in his hands which had been paid to the husband of the complainant."

This Court concurs in the decree of the

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Chancellor as to the *interest. For, assuming the first decree to be correct in ordering a settlement of the fund, (and for the purposes of this appeal trial, and until said circuit decree is reversed, this must be assumed,) the first default which the defendant committed in respect to this fund, was when he failed to pay it over to his successor, on his retirement from office, as by law he was required to do.

A Commissioner in Equity is not liable to pay interest on money which has come into his hands as a receiver or simple depositary. He is required to receive, and forbidden to pay out, or to invest, on his own mere motion. In such cases it would be unjust to charge him with interest—which, if it were allowed, would consume all his profits. But if he is ordered to pay out, and a demand is made by one authorized to receive; if he is ordered to invest a fund, or to make any appropriation or disposition of it, either by the law, or by a special order of the Court, and omits to perform his duty, he is, and should be, liable for interest. There is an express provision in the Act of 1840, which requires all Masters and Commissioners in Equity to pay over the monies in their hands to their successors in office. For the purposes of this case, the fund must be considered as in the hands of the defendant, when he retired from office; and his omission to pay it over to his successor, as by law required, subjects him to liability for interest from that time.

It would not be wise to hold, that the honest errors of public officers should shield them

from liability for the losses which fall upon others, as the consequences of those errors. In the first place it would be impossible to determine, whether the error was unintentional or otherwise. And an imperative public policy would forbid the existence of such a principle. High official functionaries, who set themselves up as qualified to perform the duties, and to administer the affairs of their offices, for which they are supposed to receive an adequate remuneration, must be held to a strict accountability. Their correct deportment, and the manner in which they discharge their duties, vitally affect the in-

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terest and well-being of the whole *community. To them, of all others, must the legal maxim apply, that they must be presumed to know the law. Honest errors, more or less, are incident to and inevitable in all officers. But the stipends are supposed to be sufficient to afford a just remuneration for the labors, and a reimbursement for their losses and risks. If this is not the case, it is the folly of the incumbent to have taken the office.

It is ordered and decreed, that the appeal be dismissed, and that the circuit decree be affirmed.

JOHNSTON and WARDLAW, CC., concurred.

Decree affirmed.

5 Rich. Eq. 55

JOHN McKINNE, JAMES JONES and JOSEPH J. KENNEDY v. THE CITY COUNCIL OF AUGUSTA.

(Columbia. Nov. and Dec. Term, 1852.)

[Corporations [§665](#); Courts [§12](#).]

Bill by plaintiffs, owners of a charter, from South-Carolina, of the Augusta bridge over the Savannah river, against the City Council of Augusta, in Georgia, owners of a charter of the same bridge from the State of Georgia, for an account of tolls collected by the defendants, and for an injunction to restrain them from collecting more than one moiety of tolls, and also from collecting any tolls whatever at a new bridge which they had built in violation of plaintiffs' charter: it was averred in the bill, that of so much of the Augusta bridge as lay within the territorial limits of South-Carolina, the plaintiffs were the owners, and it was incidentally stated that the defendants owned some lots in Hamburg, in this State:—Plea to the jurisdiction, because the defendants were non-residents of South-Carolina, sustained.

[Ed. Note.—Cited in *Hurt v. Hurt*, 6 Rich. Eq. 118; *Howard v. Cannon*, 11 Rich. Eq. 25, 75 Am. Dec. 736.

For other cases, see *Corporations*, Cent. Dig. § 2600; Dec. Dig. [§665](#); *Courts*, Cent. Dig. § 36; Dec. Dig. [§12](#).]

Before Dunkin, Ch., at Edgefield, June, 1852.

The bill stated, that the river Savannah is the boundary between the States of South-Carolina and Georgia; that the sovereignty

and territorial jurisdiction of each State extend, usque ad filum medium aquæ, to the

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central line of the river, as your orators are advised, and that the said States have no convention to regulate the exercise of their respective jurisdictions over the waters of the said river, in respect to bridges, ferries, and such other privileges, but, as your orators are advised, the grants or charters for bridges or ferries from either of the said States, have effect over so much of the said river as lies within the territorial jurisdiction and no further.

That by an Act passed on the 17th day of December, 1813, the State of South-Carolina granted to Henry Shultz and Lewis Cooper, their heirs and assigns, for the space of twenty-one years, the exclusive privilege of building a toll-bridge over so much of the Savannah river within the State of South-Carolina as lies between Campbelltown Ferry above, and the Sand-bar Ferry below Augusta, and of receiving at the same, certain legal tolls, and prohibited, under the penalty of five thousand dollars, the building of any other bridge, and the keeping of any ferry or other convenience for crossing the said river, except for private use, within those limits, as in and by the said Act, reference being thereunto had, will more fully, and at large, appear—that soon after the passing of said Act, the said Lewis Cooper assigned his interest in the said charter to your orator, John McKinne, and the State of Georgia, by an Act passed on the 9th of November, 1814, granted a like charter to the said Henry Shultz and your orator, John McKinne, their heirs and assigns for twenty years, as in and by the said last mentioned Act, published and printed under the authority of the State of Georgia, will more fully appear; and that in pursuance of the privileges and powers thus vested in them, the said Henry Shultz and John McKinne, with much skill and cost, built the bridge over the Savannah river, between the said Campbelltown and Sand-bar Ferries, known afterwards as the Augusta bridge, having fully complied with all the terms and conditions of the said charters, as your orators believe, and that during the continuance of the said charters, The Bank of the State of Georgia, a body politic and corporate under the law of Georgia, with capacity to take and hold real estate, under

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*certain restrictions, came into the possession of the said bridge and the receipt of profits and tolls thereof.

That your orators are informed and believe that at the erection of the said bridge, the soil upon which rested its abutment and landing on the South-Carolina side of the said river; as also the land lying on the river for some distance, both above and below the abutment of the said bridge, was parcel of a tract of land that belonged to the heirs

of one Isaac Fair, who had died intestate seized thereof in fee, and leaving him surviving, a widow, Lucilla, who afterwards intermarried with John B. Covington, and two children, John H. Fair and Jane Caroline Fair, who afterwards intermarried with George Anderson; that the said Henry Shultz afterwards purchased the one undivided fourth-part of the said tract of land in fee, and having obtained from the State of South-Carolina the loan of \$50,000, for which the said J. B. Covington became bound as one of his sureties, the said Shultz and Covington for the securing the payment of the said money, each executed a mortgage of his respective portion of the said land—that the said debt remaining unpaid, certain proceedings were afterwards instituted in the Court of Equity for the District of Edgefield, to which all the persons in interest were made parties, to procure partition of the said tract of land, as well as foreclose the said mortgages—that, at the June term, 1830, of the said Court, a decree in the said cause was pronounced foreclosing the said mortgages and providing for the partition of the said land, and for that purpose directing that it should be sold—that in pursuance of said decree, the said tract of land was divided by the Commissioner, into six lots or portions, and sold by him on the first Monday in August, 1830, in separate lots—that at that sale the Hon. Baylis J. Earle, being duly authorized thereunto, purchased, for the State of South-Carolina the four lots on the said river, according to the Commissioner's division of the said land, which included as well the spot upon which rested the abutment and landing of said bridge on the South-Carolina side of the said river, as also the land im-

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mediately *adjoining, and lying upon the said river, both above and below the said bridge, and that thereupon a deed of conveyance of the said four lots or portions of the said land was duly executed by the Commissioner to the said B. J. Earle, for and on behalf of the State of South-Carolina; that the said B. J. Earle afterwards, to wit, on the 24th of December, 1830, on behalf, and as the duly authorized agent of the State of South-Carolina, executed a deed conveying in fee to Samuel Hale, then the President of the Branch Bank of the State of Georgia in Augusta, certain "lots and ground, near the end of the said bridge," lying in the town of Hamburg, being parcel of the four lots purchased by the said B. J. Earle as aforesaid, and described in his deed to the said Samuel Hale, as follows:—That is to say, "one lot or parcel beginning on the bank of Savannah river, at low water mark, on the South-Carolina side, at the termination of Covington-street, thence north along the eastern line of Covington-street to lot No. 326, thence along the southern boundary of the said lot to John Fox's line, thence along the said line

to the river, thence along the margin of the river to the beginning, embracing the lots No. 327, No. 328, No. 329, and No. 330, as laid down in the original plan of Hamburg; also, lot number fifty-four, as laid down in the said original plan, bounded by Market-street on the north, Covington-street on the east, Bay-street on the south, and by lot 53 on the west; also, so much ground as lies immediately south of the last mentioned lot, between Bay-street and the river, and having the same east and west boundaries; and also a piece or parcel of ground situated within Covington-street, as laid down on the original plan, of the following dimensions, to wit, extending from the margin of the river at low water mark to the southern line of Market-street, and bounded by east and west lines of the width of the Augusta bridge, running the course of Covington-street to the said southern line of Market-street, it being understood that the last piece or parcel is to be used, held and enjoyed solely and exclusively for the purpose of the bridge abutment and a

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highway;" and that the *said Samuel Hale afterwards, to wit: on the 27th December, 1830, by deed duly executed, conveyed to the said The Bank of the State of Georgia in fee all and singular the "lots and ground" purchased by him as aforesaid, describing the same in the identical words of the description thereof contained in the deed of conveyance executed to him by the said B. J. Earle as aforesaid.

That the State of South-Carolina by an Act passed on the 18th December, 1830, granted to the said The Bank of the State of Georgia, by the style and addition of the President and Directors of The Bank of the State of Georgia, their successors and assigns, a renewal of the said charter of the said bridge for the further space of fourteen years from the 17th of December, 1834, with all the exclusive rights, privileges and immunities extended and allowed to the former proprietors of the said bridge, under the charter of 1813, as in by the said Act, reference being thereto had, will more fully appear: And that the State of Georgia, by Act passed on the 23d December, 1833, granted to the said The Bank of the State of Georgia an extension of the said charter of 1814 for the further space of ten years from 9th November, 1834, with a reservation of the right of chartering any other bridge at or near Augusta, and for greater particularity and exactness, your orators crave leave to refer to the said Act, printed and published under the authority of the State of Georgia.

That all and singular the "lots and ground" conveyed by B. J. Earle on behalf of the State of South-Carolina to Samuel Hale, and by him to the said The Bank of the State of Georgia as aforesaid, were, on the 4th May, 1838, by deed duly executed, conveyed in fee

by the said The Bank of the State of Georgia to Gazaway B. Lamar, and that the said G. B. Lamar, at or about the same time, obtained from the said The Bank of the State of Georgia a conveyance and transfer of all its interests and estate in the said bridge, and the franchises and privileges in respect thereto, derived from the said charters from the States of Georgia and South-Carolina, and that on the 21st of January, 1840, the

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said *Gazaway B. Lamar, by deed duly executed, sold and conveyed to The City Council of Augusta, a body politic and corporate under the law of Georgia, all and singular the said "lots and ground" in the town of Hamburg, purchased by him from The Bank of the State of Georgia as aforesaid, and all his interest and estate, however derived, in the said bridge and in the franchises and privileges belonging to him in respect thereto; that the "lots and ground" in the town of Hamburg conveyed by the deed from The Bank of the State of Georgia to the said Gazaway B. Lamar, are therein also described in terms identical with those employed in the deed from B. J. Earle to Samuel Hale as aforesaid, and that almost literally the same description of them is adopted in the said deed from G. B. Lamar to the said The City Council of Augusta, by whom the same are still held and owned; and that by an Act passed on the 23d December, 1840, the Legislature of Georgia confirmed the purchase of the said bridge made by the said The City Council of Augusta as aforesaid, and granted them thenceforth the exclusive privilege of building and keeping up bridges across the Savannah river at Augusta, within the corporate limits of the said city, (which were by the said Act extended on the north over the said river to the boundary line between that State and the State of South-Carolina,) with power to collect the toll then authorized by law in relation to the said bridge, but with the proviso that nothing in the said Act contained should be so construed as to impair the right, title, claim or interest of any person or persons in and to the said bridge, as in and by the said Act, printed and published by the authority of the said State, reference being thereto had, will more fully appear.

That by an Act of the Legislature of South-Carolina, passed the 19th December, 1848, the said bridge across the Savannah river was rechartered and vested in the said Henry Shultz and your orator, John McKinne, their heirs and assigns, for the term of fourteen years, with certain rates of toll therein prescribed, with the proviso, however, that the South-Carolina Railroad Company should be authorized to construct a bridge across

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the *Savannah river at any point at or near Hamburg for the transportation of freight and passengers on the said road, and that

the said grantees, Shultz and your orator, McKinne, should not be allowed to charge and collect toll as aforesaid at the South-Carolina end of the said bridge, until the litigation then pending in the Supreme Court of the United States in relation to the said bridge and the proceeds of its sale, should be determined against the said The City Council of Augusta, and that afterwards by an Act of the Legislature of South-Carolina, passed the 19th day of December, 1849, the restrictions imposed by the Act of 1848, as to the collection of tolls at the said bridge, was repealed, and the said Henry Shultz and your orator, John McKinne, were thereby authorized to collect the rates of toll established by the Act of 1848, at the South-Carolina end of the said bridge, from all persons going from the South-Carolina end, but not from persons coming from the Georgia end of the said bridge; and it was thereby also enacted that the collecting of said toll should not subject the Railroad Company, or the community, to the payment of double toll; all of which will more fully and at large appear by reference to the said Acts of 1848 and 1849.

Your orators further show unto your Honors, that on the 21st March, 1851, articles of agreement in writing, between the said Henry Shultz and your orator, John McKinne, were duly executed by the parties thereto, under their hands and seals, whereby, among other matters not material in this behalf, your orator, John McKinne, bound himself, upon payment to him by the said Henry Shultz of the sum of fifteen hundred and twenty dollars, with the Georgia lawful interest, on or before the first day of May, 1852, to execute to him, the said Shultz, or such person or persons as he, in writing, might direct to receive the same, a quit claim conveyance and release of all your orator's, McKinne's, right, title, claim and interest in and to the said bridge, and the franchises, privileges, monies and profits belonging thereto, of every description, and from whatever source derived; that the said agreement

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is not yet, *but soon will be consummated by the payment of the purchase money on the one side, and the execution of the quit claim deed on the other side.

That on the 12th of September, 1851, the said Henry Shultz, by deed duly executed, conveyed, among other things, to your orators, James Jones and Joseph J. Kennedy, all his, the said Shultz's, title, interest, and estate, in and to the said bridge, and the charters thereof granted by the Act of the Legislature of South-Carolina of the 19th of December, 1848, amended by the Act of the 19th of December, 1849, as aforesaid, with all the rights, hereditaments and appurtenances thereto appertaining, to be had and held by them in fee for the persons and purposes therein mentioned, with the reservation of the use

and enjoyment of the same during the term of his natural life.

That the said Henry Shultz departed this life intestate, on the 13th day of October, A. D. 1851, being a resident of the District of Edgefield at the time of his death, and that your orators, James Jones and Joseph J. Kennedy, being creditors of the said Henry Shultz, afterwards obtained from the Ordinary of the said district the grant of the administration of his estate.

That the charters of the said bridge conferred by the State of Georgia in 1814, upon the said Shultz and your orator, McKinne, and in 1833 upon The Bank of the State of Georgia, were not granted until like charters, and with identically the same rates of toll, had been obtained by the same grantees respectively from the State of South-Carolina; and it is respectfully submitted that the tolls authorized by the charters from the States of South-Carolina and Georgia to the said Shultz and McKinne, and The Bank of the State of Georgia, respectively, were undoubtedly designed to be tolls for passage over not one-half merely, but the whole length of the said bridge; that the said charters from the State of Georgia did not confer upon the grantees thereof the right to collect the tolls therein specified, in addition to the tolls prescribed in the charters from the State of South-Carolina to the same grantees, but, on the contrary, were intended to

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confirm and give full *effect to the grant of tolls contained in the charters from the State of South-Carolina; that such has been the uniform construction of the said charters by the respective grantees thereof, and those claiming under them, for at no time did they ever assume to sever or apportion the tolls thereby authorized, by charging, claiming, or taking one part thereof for passage over one-half, and the other part thereof for passage over the other half of the said bridge; but always and invariably exacted but one toll for the privilege of passing over the entire length of the said bridge, and that the Act of 1840 of the State of Georgia, which permits the City Council of Augusta to collect the tolls then authorized by law, should be held to have empowered them to exact the whole of such tolls only so long as they should continue invested with the franchise of taking toll in respect to the whole bridge.

That since the expiration of the charter granted by the State of South-Carolina to The Bank of the State of Georgia as aforesaid, the said The City Council of Augusta have continued and still continue to exact and collect substantially the same rates of tolls as before, without any abatement; and that since the 19th December, 1848, as your orators are informed, large sums have been received by them for such tolls, amounting in the aggregate to the sum of one hundred thousand dollars or more, and your orators

respectfully submit that by the Act of the Legislature of South-Carolina of 1848, the said Shultz and your orator, McKinne, became invested not merely with the franchise conferred thereby in respect to so much of the said bridge as is within the territorial limits of that State, but also with the full title, property and ownership in and to the material structure of that portion of the said bridge, for and during the term of fourteen years then next ensuing; that although the grantees under the last mentioned charter were restricted temporarily from collecting tolls at the South-Carolina end of the said bridge, such restriction did not avoid or take away their title and property in said bridge and in the franchise in respect thereto grant-

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ed to them by the said charter. Nor *yet did it abridge or impair their legal remedies (by suit at law or in Equity,) to recover their fair and just proportion of such tolls, against any person or persons who had actually collected and received the same; nor, least of all, did it amount to a release or assignment of their interest in the same to the said The City Council of Augusta; that since the 19th of December, 1848, the said The City Council of Augusta have been practically in the possession and enjoyment of all and singular the property and interest in the said bridge and the franchise in respect thereto granted by the Act of the Legislature of South-Carolina of that date, to the said Shultz and your orator, McKinne; that the effect of the said charter of 1848 was to constitute the said Shultz and McKinne substantially co-tenants with the said The City Council of Augusta, in respect to the tolls of the said bridge, collected and received by them since the 19th of December, 1848, and that your orators are entitled to have an account of the said tolls, and to be paid their fair and equitable proportion thereof.

That on the 3d day of February, 1852, your orators, Jones and Kennedy, claiming under the said Henry Shultz, as aforesaid, erected a toll gate, and proceeded to collect at the South-Carolina end of the said bridge the tolls established and allowed by the said Act of 19th December, 1848, as amended by the said Act of 19th December, 1849, and that thereupon the said The City Council of Augusta, as your orators are informed, raised the rates of toll exacted by them at the Georgia end of the said bridge, to the maximum limited by the said charter from the State of Georgia to the said The Bank of the State of Georgia, with purpose to annoy, hinder and disturb your orators in the collection and enjoyment of their said legal tolls as your orators believe, and by a formal resolution published and announced that their said high rates would be discontinued when and as soon as your orators should forbear to collect their said tolls at the South-Carolina end of the said bridge; that

for some sixteen days, during which your orators collected the tolls authorized by their said charter, the said The City Council of

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*Augusta persisted in exacting the increased rates of toll above mentioned at the Georgia end of the said bridge, thereby driving off the custom of passengers and produce, and greatly reducing the profits which your orators would therefrom have received had the said rates been reduced one-half as they should have been, or been permitted to remain even at their former standard; and although by an arrangement between your orators and the South-Carolina Railroad Company, your orators are, at present, forbearing to exact tolls at the said bridge—the said South-Carolina Railroad Company undertaking to be responsible therefor to your orators, if their right to collect such tolls should be adjudged valid—yet this arrangement is but temporary, being limited to the 1st day of June next, and your orators apprehend and verily fear, that when and as soon as they shall again begin to collect their tolls at the said bridge, the said The City Council of Augusta will again resort to their device of exacting and collecting the said excessive rates of toll at the Georgia end of the said bridge, with the same view of annoying, hindering and disturbing your orators in the exercise and enjoyment of their just rights in this behalf.

That by the said Act of 19th December, 1848, your orators are advised, the former charter for the said bridge granted by the State of South-Carolina to the said The Bank of the State of Georgia, was renewed and extended in favor of the said Shultz and McKinne for the term of fourteen years, with all the exclusive privileges conferred by that Act and by the original charter of 1813 therein referred to; that the Act of the State of Georgia, granting as hereinbefore mentioned to the said The City Council of Augusta the exclusive privilege of building and erecting and keeping up bridges across the Savannah river, cannot impair the grant from the State of South-Carolina to the said Shultz and McKinne, nor confer any authority to build in or over that part of the Savannah river between Campbelltown and Sand-bar Ferries, which lies within the sovereignty and territorial jurisdiction of South-Carolina, in derogation of the Acts of that State of 1813 and 1830, and 1848, hereinbefore men-

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tion*ed. But the said The City Council of Augusta, under color of the last mentioned Act of the State of Georgia, have undertaken to build, and have recently actually built, a bridge from the Georgia shore, at or near the foot of Mill-street in Augusta, not to any island in the Savannah river, but over the whole stream of the said river, to a point on the opposite bank of the said river; with-

in the territorial limits of South-Carolina, between the Campbelltown and Sand-bar Ferries, and within two miles of the bridge of your orators: that the said new bridge is not meant nor designed as a private bridge for the use of the individuals now composing the said The City Council of Augusta, but it is in operation distinctly and avowedly as a public toll bridge; that by the direction of the said The City Council of Augusta, the same rates of toll have been demanded and taken for passage over the same as at the Georgia end of the other and lower bridge before mentioned, and as if for the purpose of evading the jurisdiction of the law of the State of South-Carolina, the said tolls are demanded and taken exclusively at the Georgia end of the said bridge; that independent of the express prohibition in the charter of your orators against such a bridge, its erection is unlawful, because the said new bridge is so near the established and chartered bridge of your orators, as inevitably to reduce greatly the profits, and perhaps even destroy the value of the latter bridge, by drawing off and diverting the custom of passengers and produce, and yet no permission has been granted by the Legislature of South-Carolina, expressed by Act or otherwise, for the erection of any such new bridge; and that the penalty of five thousand dollars would be a very inadequate satisfaction for the injury which your orators will, in all probability, sustain from the violation of their said charter, which the said The City Council of Augusta have perpetrated as aforesaid.

That during the life time of the said Henry Shultz, before the building of the new bridge was begun, and whilst the said The City Council of Augusta were advertising the public that proposals for the construction

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of the said new bridge were in*ited, and would be received by them—that is to say, in the month of August, A. D., 1850, the said Henry Shultz, by public advertisement, over his own signature, inserted in two of the daily papers published in the city of Augusta, gave to the said The City Council of Augusta formal notice of his rights under the said charter, granted by the State of South-Carolina to himself and your orator, McKinne, and forewarned them against carrying into execution their said contemplated enterprise; but the remonstrances and warnings of the said Shultz were utterly disregarded. And your orators further show unto your Honors, that your orators, Jones and Kennedy, before they proceeded to assert their rights, under their said charter, by the collection of tolls at the South-Carolina end of the said bridge, opened a communication with the said The City Council of Augusta, in the hope that by a sale and transfer to them of your orators' interest in the said bridge, or by some other

proper arrangement, all disputes between them and your orators might be avoided, but the said The City Council of Augusta did not, nor would recognize your orators as having any property or interest whatever in the said bridge—all which actings and doings of the said The City Council of Augusta are contrary to equity and good conscience, and tend to the manifest injury of your orators. In tender consideration whereof, and forasmuch as your orators are without adequate remedy in the premises, save in this Honorable Court, where alone such matters are properly cognizable and relievable. To the end, therefore, that the said The City Council of Augusta may, upon oath, true, direct and perfect answer make to all and singular the matters and things hereinbefore set forth and alleged, and that as fully as though the same were here repeated, and they thereunto particularly interrogated, and in especial that the said The City Council of Augusta may set forth and exhibit the deeds of conveyance hereinbefore referred to from the said B. J. Earle to Samuel Hale, from Samuel Hale to The Bank of the State of Georgia, from the Bank of the State of Georgia to Gazaway B. Lamar, and from the said G. B. Lamar to the said The City

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Council of Augusta, and that the *rights of your orators under their charter from the State of South-Carolina may be set up and asserted in respect to the tolls of the Augusta bridge, received by the said The City Council of Augusta since the 19th December, 1848, and that they may be required to discover and set forth the aggregate amount of such tolls received by them since the date last mentioned, and what proportion thereof has been received from persons passing from the South-Carolina to the Georgia end of the said bridge, and that they may be required to set forth and discover what was the amount of said tolls received by them from the 19th December, 1848, to the 19th December, 1849, and what the amount thereof received from the date last mentioned to the 13th October, 1851, and what the amount thereof received from the date last mentioned to the 3d February, 1852, and what the amount thereof received from the date last mentioned to the coming in of their answer. And that an account may be taken of all and singular the said tolls so received by them since the 19th December, 1848, and that they may be ordered and decreed to pay to your orators such fair and equitable proportion thereof as your orators may appear to be justly entitled to, under their said charter, and that they may be adjudged to be entitled to receive and collect for passage over the Augusta bridge, from the South-Carolina to the Georgia bank, no more than one moiety of the tolls prescribed in the charter granted by the State of Georgia to The Bank of the

State of Georgia in 1833, and that they may be restrained and enjoined from exacting and receiving, in future, any larger or greater proportion of such tolls; and that they may also be restrained and enjoined from collecting and receiving tolls for passage over the said new bridge across the Savannah river, and that they may be constrained wholly to discontinue and abandon the use of the said new bridge and that the same may be ordered to be closed and shut up, and from allowing any person or persons to use the same for passing or going to or from one bank of the said river to or towards the other side within the jurisdiction of the State of South-Carolina, and that such other and

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further relief may *be extended to your orators as their case, upon the whole, may seem to require, and to equity may belong.

May it please your Honors to grant to your orators not only your writ of injunction to restrain and prevent in future the said The City Council of Augusta, their servants, agents, bailiffs and attorneys, from exacting and receiving for passage over the Augusta bridge, from the South-Carolina to the Georgia end thereof, any larger or greater proportion than one moiety of the tolls prescribed by the charter granted by the State of Georgia to The Bank of the State of Georgia, as aforesaid, and from collecting or receiving any tolls whatever for passage over their said new bridge, and from using or allowing the same to be used by any person or persons whatever for passing from one bank or side of the said river to or towards the other and opposite bank or side thereof, within the jurisdiction of the State of South-Carolina, so that the same may be entirely and effectually closed and shut up, but also your writ of subpoena, &c.

Notice having been published, in pursuance of an order made by the Commissioner, that the defendants demur, plead or answer to the bill within three months, the following plea was filed by the defendants:

This defendant by protestation not confessing or acknowledging all or any of the matters and things in said complainants' said bill mentioned, to be true, in such manner and form as the same are therein and thereby set forth and alleged, doth plead to the jurisdiction of this Honorable Court, and says: That the defendant ought not to be required to plead unto the matters and things charged in said bill, and that this Court has no authority to decree thereon against this defendant; because this defendant, says, that this defendant is a Municipal Corporation, created by and existing in the State of Georgia, and is not and never has been within or resident of the State of South-Carolina. All which this defendant avers to be true, and pleads the same to the jurisdiction of this

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Honorable Court, and humbly demands *the

judgment of this Court, whether the defendant ought to be compelled to make any answer to the said bill of complaint, and humbly prays to be hence dismissed, &c.

(Signed) The City Council of Augusta,

By Wm. E. Dearing, Mayor.

Dunkin, Ch. This cause was heard on the bill, and plea to the jurisdiction submitted on behalf of the defendants. The counsel for the complainants declined to argue the question, and the Court is therefore unprepared to anticipate the views which they may have entertained.

The general rule of this, as well as every other well regulated tribunal, is, that only parties resident are amenable to the jurisdiction of the Court. The exception to the rule, both at Law and Equity, is, that absent persons, interested in property within the jurisdiction, may be subjected to the cognizance and decree of the Court in reference to such property. It seems at one time to have been supposed, that the Act of 1784, may have extended the jurisdiction of this Court in reference to persons residing beyond the limits of the State. But more than a quarter of a century ago, this Act was construed and explained in *Winstanley v. Savage*, 2 McC. Eq. 435. It was there held, that the Act of 1784, "was not meant to introduce so new and dangerous a principle as the one contended for. It merely meant to regulate the proceedings in cases where non-residents could be made amenable to the jurisdiction of the Court by holding property within it." It is believed that this construction has not since been called in question, and the decision was fully recognized, and the rule re-affirmed in *Garden v. Hunt*, Chev. Eq. 42.

It is admitted that the defendants are non-residents, and the averment of the bill is, that they have no title to any part of the property in controversy within the State of South-Carolina. The principal relief sought by the bill is to have the defendants restrained and regulated in the collection of tolls, as they are now in the habit of col-

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lecting them on the Georgia side of the *river. It was once said by a Lord Chancellor, "I shall never make an order merely in terrorem which is to be effective only against the ignorant, or those who do not inquire into the extent of my jurisdiction. I shall make no order but such as every man is bound to obey on pain of contempt." 12 Eng. C. C. R. 44. Now suppose this Court should enjoin Wm. E. Dearing, the defendant, from collecting toll, or restrain him from demanding more than a certain amount, in what manner could the order be enforced, or how could the defendant be subjected to the penalties of contempt? The most stringent attachment would be mere brutum fulmen to a party beyond the reach of the arm of the Court.

The bill prays an account of tolls hereto-

fore collected on the Georgia side of the river; and, suppose a decree to be rendered against the defendant for an ascertained sum, what could it avail the plaintiffs in this State, against a defendant, who has neither person to be attached, nor property out of which it might be levied under the process of this Court? And if suit were instituted in Georgia, founded upon the decree, although the judgment would be conclusive upon every other matter, the question of jurisdiction is always open to inquiry, and this inquiry would be fatal to the efficacy of the whole proceeding, against a citizen of Georgia. Assuming then the averments of the bill to be true, the Court is of the opinion that the defendants are not amenable to the jurisdiction of this Court, and that the plea must be sustained, and the bill dismissed.

It is so ordered and decreed.

The plaintiffs appealed from the decree, and moved for its reversal upon the grounds:

1. The decree is erroneous in assuming that the defendants have no property within the jurisdiction of the Court, as the bill contains a distinct averment of their being the owners of four lots or parcels of land in the Town of Hamburg, with a full description of the boundaries thereof, and a precise recital of the derivation of their title thereto.

2. The "principal relief" sought by the bill

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was to have an *account of the tolls received by the defendants at the Augusta bridge since 19th December, 1848, and an injunction against their collecting tolls at their new or upper bridge, or using or allowing to be used the latter bridge for passage across the river; and the decree errs in supposing the bill to be otherwise.

3. The objection to the jurisdiction of the Court rests upon no sufficient grounds; and the defendants' plea, it is respectfully submitted, ought to have been overruled.

Bauskett, Carroll, for appellants, cited 7 Stat. 210; Kinloch & Phillips v. Meyer, Sp. Eq. 427; Bowden v. Schatzell, Bail. Eq. 360; Story Conf. Laws, § 549.

Miller, Petigru, contra, cited Miller v. Miller, 1 Bail. 242; 5 Geo. R. 83; Mitf. Pl. 33; 1 Bl. Com. 60; 2 Thom. Coke, 18; 2 Bl. Com. 91.

The opinion of the Court was delivered by

DUNKIN, Ch. It is true that the bill prays an account of tolls collected, since December, 1848, by the defendants, but this is consequent only upon the adjudication which the Court is prayed to make, that the defendants are entitled to receive and collect, for passage over the Augusta bridge, no more than one moiety of the tolls prescribed by the Georgia charter of 1833; and to this intent the complainants pray a writ of injunction, to restrain and prevent in future the

defendants from exacting and receiving, for passage over the Augusta bridge, from the South-Carolina to the Georgia end thereof, more than one moiety of the tolls prescribed by the charter of 1833, and from collecting any tolls whatever on the new bridge, which they are charged to have erected at Mill-street, or from allowing the same to be used, "so that the same may be entirely and effectually closed and shut up."

At the hearing, the counsel for the complainants declined to argue the question arising on the plea to the jurisdiction, and the Court could only infer that the positions assumed were those which the counsel for the defendants had discussed, and upon these the judgment of the Court was pronounced.

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*It is now said, that it appears from the bill itself, that the defendants held property in the State of South-Carolina, and that it was intended to maintain the jurisdiction on that ground. It is by no means certain that any such averment is made in the bill. It is very certain it is not set forth as a ground upon which this Court should assume jurisdiction against the defendants, nor did the Court receive any intimation to that effect. The subject matter in controversy is the Augusta bridge, properly so called, and the newly erected bridge at Mill-street. The complainants rely on the Act of 1848, as vesting in them the bridge, and the exclusive right from Campbelltown Ferry above, to the Sand-bar Ferry below, Augusta,—by which Act (aver the complainants) they "became invested, not merely with the franchise conferred thereby in respect to so much of the said bridge as is within the territorial limits of the State, but also with the full title, property and ownership in and to the material structure of that portion of the bridge." In the narrative part of the bill it had been stated, that the abutment and landing of the bridge on the South-Carolina side of the river were upon parts of four lots of land in the town of Hamburg—that Gazaway B. Lamar, having a charter of the bridge from the State of South-Carolina, until 1848, and being also owner of these lots, on the 21st January, 1840, conveyed the charter and the lots to the defendants. The complainants then aver the re-charter to themselves in 1848, and thence insist on their exclusive right to restrain the defendants from interfering with their property or privileges. It may answer the purpose of an argument to say, that the defendants are averred to have property in South-Carolina; but it has been, on another occasion, strenuously contended, that not only the franchise, but the structure of the bridge, including the abutments and landing, pass with the charter, and the proviso in the deed from Judge Earle, under whom defendants are alleged to derive title, was urged in support of the argument. What is then averred to be

the property of the defendants within the State of South-Carolina, which is to give the Court cognizance of this cause? Upon a

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strict examination, it may be they *have a title to so much of the four lots as is not occupied by the abutment of the bridge and the landing. Of course, that is not the subject matter of controversy, but must be admitted to be the undisputed property of the defendants. Can this give the Court jurisdiction so as to authorize the impleading of the absent defendants, and the adjudication of their rights upon the matters presented? It is in accordance with the first principle of justice that no person shall be condemned until he has been heard. And, as a general rule, no Court should pass on the rights of those not within their jurisdiction. To this rule there are exceptions, or rather qualifications, equally well recognized; some arising from the provisions of the statute law, and others from the practice of Courts. Among the latter are proceedings in Admiralty, which act in rem, and whose proceedings are conclusive upon the subject matter within their jurisdiction. Courts of Common Law entertain jurisdiction against an absent defendant by proceedings in attachment, under the custom of London or by statute. But it is well settled that the judgment in attachment has no effect beyond the property attached. "If those goods, credits and effects are insufficient to satisfy the judgment, and the creditor should sue an action on that judgment, in the State where defendant resides, to obtain satisfaction, he must fail; because the defendant was not personally amenable to the jurisdiction of the Court rendering the judgment." Such is the language of Chief Justice Parsons, in *Bissell v. Briggs*, (9 Mass. R. 468.) See also *Story Confl. Laws*, § 549. We have also an Act of Assembly which authorizes proceedings where one of several executors is absent from the State; and the Act of 1823 gives a remedy in case of the absence of one of several parties to a joint contract. But both Acts provide, that the interests of the absent party shall not be affected. The attachment Acts do not extend to Courts of Equity. But it has been the practice, both in England and in this country, to entertain suits in relation to property within the jurisdiction, although some of the parties interested in the subject matter reside beyond the jurisdiction of the

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Court. Mr Mitford says: "A *suit may affect the rights of persons out of the jurisdiction of the Court, and consequently not compellable to appear in it. If they cannot be prevailed upon to make defence to the

bill, yet, if there are other parties, the Court will, in some cases, proceed against those parties." "But if the absent parties are to be active in the performance of a decree, if they have rights wholly distinct from those of the other parties, the Court cannot proceed to a determination against them." Mitf. Pl. 33. This Court is in the familiar habit of entertaining proceedings in partition where a portion of the defendants are beyond the limits of the State. It has also, in some instances, taken cognizance where the complainant has a plain legal demand against an absent defendant who has property in this State, but which, from its peculiar position, is not subject to the ordinary process of attachment. Such is the case of *Kinloch & Phillips v. Meyer*, administrator, *Speers' Eq. 428*, which was a proceeding against the administrator of an intestate and an absent distributee, to subject the interest of the latter to the payment of a debt; and so of the case of *Bowden v. Schatzell*, *Bail. Eq. 369* [23 Am. Dec. 170]. It cannot be supposed that in this case the complainants have a plain legal demand against the defendants, or any demand at law; much less is it averred that the property of the defendants in this State, whatever it may be, is not subject to a writ of attachment.

The complainants do not ask the aid of this Court to subject the defendants' property in this State to the satisfaction of a claim, much less is it averred that such property is the subject matter of controversy. They claim certain exclusive rights to toll, &c. under the charter of 1848, and they ask the assistance of this Court in enforcing them against the absent defendants. As well might a bill be filed in Georgia for a divorce against a defendant resident in Charleston, who happened to own a water lot in Augusta; or a Tennessean be impleaded in the Court of Equity of South-Carolina, for the specific performance of an agreement in relation to real estate in Chattanooga, because the complainant had been fortunate enough to find a bale of the defendant's cotton in its transit

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through this State. There is *avowedly no precedent for the proceedings of the complainants in this case, and they are equally without authority from the general principles usually recognized in well regulated tribunals.

It is ordered and decreed that the appeal be dismissed.

JOHNSTON, DARGAN and WARDLAW, CC., concurred.

Appeal dismissed.

5 Rich. Eq. 76

A. SHANDS, et al. v. W. TRIPLET, et al.

(Columbia, Nov. and Dec. Term, 1852.)

[Judicial Sales \S 52; Navigable Waters \S 46.]

At a Commissioner's sale of the plat exhibited represented a river as running through the tract and covering a portion of the land; the land was sold by the acre; the river, at a place where it ran through the tract, contained obstructions to the navigation, but was navigable for boats above and below that place: *Held*, that the purchaser was not entitled to a credit on his bond for the purchase money, for that portion of the land forming the bed of the river.

[Ed. Note. Cited in *State v. Pacific Guano Co.*, 22 S. C. 75; *State v. Pinckney*, Id. 508; *State ex rel. Columbia Bridge Co. v. City of Columbia*, 27 S. C. 146, 3 S. E. 55; *Southern Power Co. v. Cassels*, 95 S. C. 470, 79 S. E. 453.

For other cases, see *Judicial Sales*, Cent. Dig. \S 100; *Dec. Dig.* \S 52; *Navigable Waters*, Cent. Dig. \S 287, 288; *Dec. Dig.* \S 46.]

Before Wardlaw, Ch., at Union, June, 1852.

The circuit decree is as follows:

Wardlaw, Ch. In this case objection is made to the confirmation of the Commissioner's report on sales, in behalf of James Rogers, a purchaser of land, on the ground that he had been required to give bond for forty-three acres covered by Tiger river. It appears that the Commissioner sold this tract of land by the acre, according to a plat made by John Gibbs, deputy surveyor, which represented the tract to lie on both sides of Tiger river, at a place called Glenn's Shoals, and to contain 743 acres, and that James Rogers was the last bidder, at the price of \$14,495.93, and paid one-third of the purchase money in cash, and executed his bond with approved sureties for the balance, but declined to re-

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ceive a conveyance, and insisted that *his bond should be credited for that portion of the land forming the bed of the river; that since the sale, the surveyor had again surveyed the tract, and ascertained that 43 of the 743 acres were covered by the stream of Tiger river. That this tract is composed of five or six grants, the corners of which are represented on the banks of the river; that Tiger river has been navigable for boats for twenty-five years, from Glenn's Shoals to its mouth in Broad river, and above the shoals for eight or ten miles to Cook's bridge; but that obstructions to the navigation have immemorially existed at Glenn's Shoals, and the practice has been to haul the cotton and other freight of the boats around the shoals. That the water power at the shoals is excellent for mills and other factories, and adds much to the value of the estate.

I am of opinion that the purchaser is not entitled to the deduction he seeks. He purchased according to the plat representing the 43 acres to be covered by water. Besides, this portion covered by the stream of a river not there navigable, may be well conveyed to

him. *Witter v. Harvey*, 1 McC. 67 [10 Am. Dec. 650]; *Cates v. Wadlington*, 1 McC. 580 [10 Am. Dec. 639]; *Noble v. Cunningham*, McMul. Eq. 289; *McCullough v. Wall*, (4 Rich. 68 [53 Am. Dec. 715].) It is ordered and decreed, that the Commissioner's report on sales be confirmed. It is also ordered, that the Commissioner proceed in the collection of the funds, and after paying the costs and the amount reported for the maintenance of the two old slaves, that he make distribution of the same according to the rights of the parties.

James Rogers appealed, on the ground:

Because Tiger river being a navigable stream, he should have been allowed a credit, or deduction on his bond, for the quantity of land covered by the bed of said river.

Dawkins, Thomson, for appellants.

Bobo, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. It is assumed in the ground of appeal, that the soil covered by the waters of a navigable river belongs to the State, and not to the riparian proprietors. The

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term *navigable* is equivocal. By the common law, rivers are regarded as navigable only to such extent as the tide flows and ebbs; and the property in the beds of rivers navigable in this sense, is undoubtedly in the State. But in our statutes, and in popular speech, navigable rivers mean those which may be navigated by ships or boats; and as to rivers of this class above tide water, it is not to be conceded that the State remains owner of the soil of the beds after granting the lands on both sides. Sir John Leach says, in *Wright v. Howard*, 1 Con. Eng. Ch. R. 102, "prima facie, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream;" and Sir Matthew Hale remarks, in his treatise *de jure maris*, &c., c. 1, "if a man be owner of the land of both sides of a fresh river, in common presumption he is owner of the whole river." In chapter 3 of this celebrated treatise, it is said: "there be some streams or rivers that are private not only in propriety or ownership, but also in use as little streams or rivers that are not a common passage for the King's people. Again, there be other rivers, as well fresh as salt, that are of common or public use for carriage of boats and lighters; and these, whether they are fresh or salt, whether they flow or reflow, or not, are, prima facie, publici juris, common highways for man or goods, or both, as well where they are become to be of private property, as in what parts they are of the King's propriety."

Tiger river, concerning the bed of which is the present controversy, is a small stream never floatable at Glenn's Shoals; and it is a tributary of Broad river, which disembogues into the Congaree; and we are now

sitting within hearing of the roar of waters over the falls of the Congaree. The case does not require us to determine whether the doctrine of the common law concerning navigable rivers in reference to riparian rights, should not receive some modification as to some of the great rivers of the United States; and we reserve this question, following the example of the Court of Law in the recent and well considered case of *McCullough v. Wall*, 4 Rich. 68 [53 Am. Dec. 715]. It is

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truly suggest*ed in that case, "that no authoritative decision has yet been made in this State which has changed the common law on the subject." And further, to borrow the language of that decision: "The rivers of our own State are not of remarkable magnitude, and whether we adhere to the common law definition, or consider as navigable all rivers that may be navigated by sea vessels, or all that are by nature floatable, we hesitate not to declare, that this Court, if it should feel itself at liberty, from considerations of public convenience, to assume legislative discretion in the matter, is not likely by any decision to extend the rules which by the common law are applicable to navigable rivers, to any stream above those falls, which by nature obstructed the serviceable use of its water for transportation. Above those falls as below, the right of the public to improve a river, and to use it as a highway, subsists: to that the proprietary right in the soil is subject: but so subject, the proprietary right exists in the owners to whom it has been granted—above the falls, at any rate, as we may now safely say." We entirely concur in this doctrine as to rivers altogether within the State, reserving our opinions as to rivers which may be coterminous between this and other States. Without discussing the authority of the Court to alter the common law as to navigable rivers, I venture the remark that it would be inexpedient even for the Legislature to divest the proprietors of lands, bounding on rivers above tide-water, of their rights to the soil covered by the waters of the rivers. If the rivers be needed as highways, the proprietary rights are properly subject to a servitude for the public use, as in the case of highways upon land; but beyond this, there should be no restrictions upon the ownership of the rivers. It would not be safe to adjudge that the mill at Glenn's Shoals belongs to the State.

The Act of 1784, 2 Brev. Dig. 4, provides, that deputy surveyors, on creeks (arms of the sea) and rivers, navigable for ships or boats, shall lay off their surveys by measuring four chains back from such creek or river for one chain fronting and bounding on the same, and that surveys contravening

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this regulation shall be void. It seems

that the Surveyor General, in pursuance of this regulation, has instructed his deputies, for a long time past, not to cross navigable creeks or rivers in their surveys. It is argued, that this enactment makes void any grant for land covered by a stream navigable for ships or boats. But it is obvious, that the Legislature merely intended to prevent particular grantees from engrossing river lands, and has determined nothing as to the extent of the rights of grantees of lands bounded by rivers. The instructions of the Surveyor General to his deputies could not alter the law, if they were so intended; but I do not understand them as aiming at more than to secure to the separate proprietors of opposite banks the ownership of the rivers, usque ad flum aquæ.

If the foregoing views should be utterly unsound, still the appellant is not entitled to his motion. He bought the land in question according to a plat which represented the forty-three acres, for which he declines to pay, as covered by the stream of Tiger river; and he gave his bond for the purchase money. The general presumption is, that every person knows the law; and in this instance it is no false presumption, for the purchaser is an expert lawyer. He knew what interest he was acquiring in the bed of the river. One may readily conceive circumstances under which land covered by water would be made more valuable than any equal portion of dry land. Such I suppose to be the fact in the present case. At least, there is no evidence that the purchaser is required to pay for more acres than he expected to pay for at the time of his purchase.

The proceeding in the present case seems to be supported by the case of *Noble v. Cunningham* [McMul. Eq. 289], cited in the circuit decree; but it is not clear, that a Chancellor can afford relief to a complaining purchaser, except by opening the biddings. In general the Court must either confirm the sale, or order a resale. It is doubtful whether, in any case, deduction from the amount of the bid should be allowed.

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*It is ordered and decreed, that the appeal be dismissed, and the Circuit decree be affirmed.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

Decree affirmed.

5 Rich. Eq. 81

WILLIAM WRIGHT v. N. R. EAVES.
(Columbia. Nov. and Dec. Term, 1852.)

[*Limitation of Actions* §10.]

To a bill for foreclosure of a mortgage of land, against one who holds, through intermediate conveyances, under the mortgageor, the stat-

ute of limitations is inapplicable—although the defendant and those under whom he claims have been in possession more than ten years.

[Ed. Note.—Cited in *Harper v. Barsh*, 10 Rich. Eq. 152; *Norton v. Lewis*, 3 S. C. 32; *Clark v. Smith*, 13 S. C. 600; *Lynch v. Hancock*, 14 S. C. 88; *Pegues v. Warley*, Id. 188.

For other cases, see *Limitation of Actions*, Cent. Dig. § 34; Dec. Dig. § 10.]

The doctrine of *Thayer v. Cramer*, 1 McC. Eq. 395, re-affirmed in *Smith & Cuttino v. Osborne*, 1 Hill, Eq. 342, may be regarded as the settled law.

[This case is also cited in *Norton v. Lewis*, 3 S. C. 25, and the doctrine thereof re-affirmed.]

Before Johnston, Ch., at Chester, July, 1852.

On November 26, 1826, Robert Kennedy mortgaged to Pamela Gunning, a lot of land in the village of Chester, to secure the payment of a money bond; which mortgage was duly recorded on the second day after its execution.

Robert Kennedy remained in possession of the mortgaged premises until July 13, 1831, when he conveyed the same to John Kennedy. John Kennedy conveyed to G. W. Coleman and wife, with warranty, on November 30, 1836; and they conveyed to the defendant, N. R. Eaves, on January 26, 1846.

At Fall Term, 1841, Pamela Gunning recovered judgment, in the Court of Common Pleas for Chester, against William Woods, administrator of Robert Kennedy, for \$1920, balance due on the bond. Payments were made by the administrator which left \$785 due on the judgment May 7, 1847, on which day Pamela Gunning assigned the securities for the debt to the plaintiff, William Wright.

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*The administrator, William Woods, was dead; and this bill was filed against N. R. Eaves, who was in possession of the mortgaged premises, for sale and foreclosure.

The defendant pleaded the statute of limitations; and his Honor sustained the plea. The plaintiff appealed.

G. W. Williams, for appellant, cited and relied upon *Thayer v. Cramer*, 1 McC. Ch. 395; *Nixon v. Bynum*, 1 Bail. 148; Act 1791, 5 Stat. 170; *Thayer v. Davidson*, Bail. Eq. 412; *Smith & Cuttino v. Osborne*, 1 Hill, Ch. 342; *Drayton v. Marshall*, Rice Eq. 374.

Dawkins, contra cited *McRae v. Smith*, 2 Bay, 339; *Cholett v. Hart*, 2 Bay, 156.

The opinion of the Court was delivered by

DUNKIN, Ch. The bill in this case was for foreclosure of a mortgage of a lot of land in the village of Chester. The defendant is a purchaser from one who held, through intermediate conveyances, from the mortgagor, and the defendant and those under whom he claims have been in possession of the land for more than ten years prior to the institution of these proceedings. He relied on the

plea of the statute of limitations. At the circuit the cause was not argued, nor the authorities cited. The plea was sustained.

The mortgage of the complainant was duly recorded prior to the conveyance in fee on the part of the mortgagor. Under these circumstances it was first held, in *Thayer v. Cramer*, 1 McC. Eq. 395, that the plea of the statute was inapplicable. Afterwards in *Smith & Cuttino v. Osborne*, 1 Hill, Eq. 342, that decision was reviewed and the doctrine re-affirmed. Since that time the authority of *Thayer v. Cramer* has been repeatedly recognized, as in *Drayton v. Marshall*, Rice Eq. 374 [33 Am. Dec. 84] and may be regarded as the settled law.

As the cause was heard only on the plea, it is proper that the defendant should have the opportunity of availing himself of any other defence to which he may consider himself entitled.

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*It is ordered and decreed, that the decree of the Circuit Court, sustaining the plea of the statute of limitations and dismissing the complainant's bill, be reformed—that the defendant's plea be overruled, and that he have leave to answer within thirty days after notice hereof.

JOHNSTON, DARGAN and WARDLAW, CC. concurred.

Motion granted.

5 Rich. Eq. 83

THOMAS KETCHIN and Wife v. ARCHIBALD BEATY and Others.

(Columbia. Nov. and Dec. Term, 1852.)

[Wills § 547.]

Testator bequeathed certain slaves to his daughters M. and P: the residue of his estate he gave to his wife for life—the personality to be divided, after her death, among his three daughters M., P., and J., and the lands among all his children (not naming them): he then declared, "should any of my daughters above mentioned, hereafter marry and die, leaving no issue living at the time of their death, their respective shares shall go to the survivor or survivors, free from any claim or control of their husbands;" and, lastly, he proceeded to say, "as my daughter N. and son A. are already provided for, I leave them \$100 to be equally divided between them;"—*Held*, (1) that M., P., and J. took, in their legacies, transmissible interests, defeasible upon the conditions mentioned in the will; and (2) that the words "survivor or survivors," referred to the three daughters M., P., and J. only, and not to all the children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1180; Dec. Dig. § 547.]

[Wills § 594.]

Bequest of slaves to one absolutely, and "should she hereafter marry and die, leaving no issue living at the time of her death," then over, is defeasible only upon the double contingency of her marrying, and dying leaving no issue.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1314; Dec. Dig. § 594.]

Before Johnston, Ch., at Fairfield, July, 1852.

The questions decided in this case, in the Court of Appeals, will be sufficiently understood from the opinion delivered in that Court.

Buchanan, for appellants.

Boylston, contra.

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*The opinion of the Court was delivered by

DARGAN, Ch. The testator James Beaty, by his last will and testament, in the second clause, gave to his daughter Mary, two negroes, Charles and Maria, and to his daughter Peggy, (who is one of the complainants,) he gave a negro named Louisa: the difference between the negroes given to Mary and Peggy, to be paid to Peggy in money; so as to equalize their legacies; and the difference was to be ascertained by appraisers chosen by the executors.

The residue of his estate, after the payment of debts, he gave to his wife for life; and after her death, he gave the personal estate to be equally divided between his daughters Mary, Peggy, and Jenny; and his lands after his wife's death, he gave to be equally divided among all his children.

Then after authorizing his executors to sell the house and lot before disposed of, he declares as follows: "Should any of my daughters above mentioned, hereafter marry and die, leaving no issue living at the time of their death, their respective shares shall go to the survivor or survivors, free from any claim or control of their husbands."

In the concluding clause the testator proceeds to say: "As my daughter Nancy and son Archibald are already provided for, I leave them one hundred dollars to be equally divided between them." It is important to remark, that Nancy and Archibald are then first mentioned by name. They were then married, and were living apart from the testator. His daughters Mary, Peggy and Jenny were single, and were living with him at the date of his will, and of his death.

The first question that arises is, what estate did the testator's daughters, Mary, Peggy and Jenny, take in the legacies given to them? The Chancellor who tried the cause was of the opinion, that each of them took an absolute estate; which was defeasible only upon the condition that she should die without leaving issue living at the time of her death. Nothing is given to the issue. No mention is made of the issue, except as forming a part of the condition upon which the

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previous, direct and absolute gift was to be defeated. The estate given to them in the second clause was not cut down to a life estate by any subsequent provisions; and was to go over to the survivors only upon the contingency which was provided for in the will.

The next question is, who are the parties, that, under the description and character of "survivors," are entitled to take, in the event that any of the testator's before-mentioned daughters should marry and die leaving no issue alive at the time of their death? Were the benefits of the survivorship, (which were to accrue upon the contingency expressed), intended to embrace all the testator's children, or to be restricted to his three daughters Mary, Peggy and Jenny? It is perfectly clear, that it was not intended to embrace his son Archibald Beaty; because the shares which were to go over in the event expressed, "were to be free from any claim or control of their husbands;" a form of expression which would be inapplicable in the case of a bequest to a son.

Was Nancy Cathcart, the testator's married daughter, intended to be provided for by this limitation in favor of survivors? The words of the will upon which this question mainly turns are as follows: "Should any of my daughters above mentioned, hereafter marry and die leaving no issue alive at the time of their death, their respective shares shall go to the survivor or survivors, free from any claim or control of their husbands." The testator was not limiting the share which he had given to Nancy in the division of the real estate. For the expression "should any of my daughters above mentioned hereafter marry and die," &c., excludes Nancy, who was at that time married. It was only the shares of his single daughters, upon which he was imposing this conditional limitation. This construction derives much additional strength from the fact, that it was the shares of his "daughters above mentioned," that he was affecting to restrict by a condition, which might at some day defeat the estates that he had given them. Up to that clause in the will, he had only mentioned by name, his three daughters Mary, Peggy and Jenny. Though he had in a previous clause,

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directed that his real estate after the death of his wife, should be equally divided among all his children; which would include Archibald and Nancy; yet it is only in a subsequent part of the will, that he alludes to them by name. As it was only the shares of his daughters Mary, Peggy and Jenny that he subjected to the condition, the most natural, and, it seems to me, the only proper construction is, that when he spoke of survivors, he meant the survivor or survivors of those three whom he had previously named in the same sentence.

It is apparent that he put Archibald and Nancy on the same footing. "As my daughter Nancy, and my son Archibald, are already provided for," says he, "I leave them one hundred dollars to be equally divided between them." He had also given to each of them an equal share of the land with the others, on the death of his wife. There is no

construction, short of that which would amount to a most perfect distortion of the testator's meaning, which would let in Archibald to the benefits intended to be conferred on survivors, in the clause that I am considering. And as he and Nancy throughout, seem to have been put in the same category, it is a strong argument against her claim.

This construction is in harmony with what appears to be the scheme of the testator's will. Archibald and Nancy were married, and were living apart from the testator. He had, before the date of his will, provided for them by advancements. He so declares. His object was to provide for his wife and his three single daughters, who were then living with him; and who were not likely to marry. Accordingly, the principal provisions of the will are in their favor. And again, at the death of his wife, he gave them all the personal estate, which he had given to her for life. Except the legacy of \$50 to each of them, and a share of the land, which was of no great value, and in which the widow had a life estate, Nancy and Archibald take nothing under the will. They had been provided for before. The property which they had received from their father, and to which they had a perfect title in his life, could not

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be subjected to the *conditions of his will in favor of survivors; which he had imposed on that which he had given to his three unmarried daughters. This want of reciprocity was the reason probably, why the testator left them out in the provisions, in favor of survivors. This construction makes the whole will consistent and harmonious.

The conclusion is, that the defendant Archibald Beaty, and the defendants John S. Cathcart and Nancy J. Cathcart the children of testator's daughter Nancy, (Mrs. Cathcart,) have no estate or interest, vested or contingent, in the slave Louisa and her children; which said slave Louisa was given to the complainant, Mrs. Margaret Ketchin, under the name of Peggy, by her father's will. And as Jenny died in 1842, and Mary Beaty died in 1851, Mrs. Ketchin still surviving, her estate which she derived under her father's will has become indefeasible. For, as the Chancellor has well observed in the Circuit decree, "an estate to a survivor is upon the condition of survivorship." This disposes of the first and second grounds of appeal.

The third ground of appeal has been abandoned.

The fourth ground of appeal is "that Mary Beaty took an absolute estate in the negroes Maria and Charles, defeasible only on her both marrying and dying without issue, and that having failed to marry and leave issue, she had a perfect right to dispose of her property by will or otherwise."

Mary Beaty died in August 1851, without issue and unmarried, having disposed by her will of the slaves Maria and Charles, which

she derived under the will of her father James Beaty, in the manner which has already been stated. The complainants, Thomas Ketchin and his wife Margaret Ketchin, set up in this bill a claim in behalf of the latter, to the negroes Maria and Charles under the limitations of James Beaty's will. The claim is, that Mary Beaty having died leaving no issue alive at the time of her death, (though she never married,) the complainant, Mrs. Ketchin, is entitled to the negroes, as the last survivor of the three sisters. The Chancellor in his Circuit decree, gave a construction to the will, which sustains this

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*claim, ordered that the slaves Maria and Charles be delivered up to Mrs. Ketchin or her trustee, by Archibald Beaty the executor of Mary Beaty, and that the latter do account for their hire, &c.

In the consideration of this question, it will be necessary once more to advert to the clause of James Beaty's will, under which it arises. The words are, "should any of my daughters above mentioned, hereafter marry and die leaving no issue alive at the time of their death, their respective shares shall go to the survivor or survivors," &c. This clause has been held by the Circuit Court, and by this Court, to have such an operation upon the previous absolute gift of the slaves in question, as to make the estate in said slaves a fee simple interest, defeasible upon a condition which was contingent. And the only question here is, whether the estate was to go over to the survivor upon the simple contingency of the first taker's dying and leaving no issue at her death; or upon the double contingency of the first taker's marrying and dying without leaving such issue alive at her death. The Chancellor did not think, that marriage was in the testator's mind, as a part of the condition upon which the estate was to go over. He understood the testator "to refer to marriage as preliminary and mere inducement to speaking of their issue." "I cannot," he says, "construe the will as imposing marriage as a condition to defeat the survivorship, which appears to be his main object. The words relating to the marriage of his daughters, are to have an effect only so far as they promote some intention on the part of the testator. Now, what purpose of the testator would have been accomplished, by the marriage of any one of the three daughters named? None, it appears to me, except so far as the marriage might lead to their having issue. If they had no issue; or died without issue, (whether they married, or did not marry,) then, and then only, was his intention effectuated, of limiting the property over."

Thus the Chancellor reasoned; and he accordingly decreed, that on the death of Mary

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Beaty, without issue, although she *never married, the estate in the negroes Maria and

Charles, went over to Mrs. Ketchin under the limitation of the will in favor of the survivor.

This construction is precisely the same, as would have been given to the will, if the testator had simply said: "Should any of my before-mentioned daughters die without issue alive at the time of their death," the property should go over. In other words, it is the same as would have been given, if the testator had omitted to impose marriage as a part of the condition. This is rejecting, as without meaning, a portion of the will; not for being unintelligible, or repugnant, but because we are at a loss to understand his purpose. It is expunging from the will the words "hereafter marry," and reading it, as if no such words were in it. I do not think we are authorized to do this. We are to take the will as we find it; to give every part some meaning,—and such a meaning as it is fairly capable of receiving, construed by itself, or in connexion with the other parts. If any part be unintelligible or repugnant, it may be rejected. But it cannot be said of the words stricken out by the Chancellor's construction, that they are obnoxious to either of those objections. On the contrary, they have a plain signification, and no repugnancy; and consequently are entitled to their proper influence in the interpretation. The testator may have been capricious, or unreasonable; but that is not an objection to the effectuation of his intentions clearly expressed.

Where, therefore, the testator has, as in this case, plainly said, in relation to an estate which he had previously given to three of his daughters, if any of them should hereafter marry and die leaving no issue alive at their death, their shares respectively should go over to the survivors: where he has annexed the double contingency of their marrying and dying without issue, as the condition on which their otherwise absolute estates were to be defeated, we are not authorized by any rule of construction, to throw out of view one of the contingencies, and to make the estate go over to the survivor on the happening of only a part of the condition.

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*I cannot undertake to say with any certainty, what was the object of the testator in ordaining that the estate should not go over, if his daughters died unmarried, and without issue; and in causing it to go over, in case they married and died without issue. As his meaning is plain, it would perhaps be useless to speculate. But I think I can perceive a motive that may have governed him, which does not appear unreasonable. If his daughters died unmarried, and without issue, he was willing for them to have the absolute estate. For without husband, or issue, by the force of the natural

affections, they would bestow it at their death, upon their brothers, and sisters, who were his own children. They would have no nearer objects of affection. If they married, and had issue, he was willing for them to take the absolute estate on account of their children; who ought to be provided for, and who, in the natural course of things, would take it from them in succession. But if they married, and died without issue, he was not willing for the husband, (who was a stranger to his blood, and not, in that case, united to his house by any but a severed tie,) to have the estate; but desired it to go back to his own children. Some such views as these, the testator may have had.

The Court is of the opinion, that the estate given by James Beaty to his three daughters Mary, Peggy and Jenny was not to be defeated, and to go over to the survivors, except upon the double contingency of their marriage and death without leaving issue alive.

So much of the Circuit decree as orders and directs the defendant, Archibald Beaty, to deliver up the slaves Maria and Charles to the complainants; and to account for their hire is reversed. In all other respects the said Circuit decree is affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN and WARDLAW, CC., concurred.

Decree modified.

5 Rich. Eq. *91

*WILLIAM WILIE and AMANDA, His Wife
v. HENRY R. PRICE.

(Columbia. Nov. and Dec. Term, 1852.)

[Contracts \S 18.]

Defendant wrote to the agent of plaintiff, Miss J., as follows: "We have had a meeting of all the citizens of the place that are interested in a female school, and all are satisfied with Miss J. and are anxious to employ her, and are resolved to make her this proposition. We will guarantee to her the sum of \$400 for one year," &c., "and if the school should become too great, an assistant will be employed at the expense of the trustees;" plaintiff accepted the invitation and taught the school three months and ten days, when the parties separated by consent: the petition was filed for discovery of the names of the trustees and of the persons represented in the phrase "we will guarantee," &c., and for payment for the time plaintiff had taught the school:—*Held*, that defendant was not liable, because (1) there was no contract shewn; and (2) if there was, plaintiff's remedy was at law.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 49; Dec. Dig. \S 18.]

Before Johnston, Ch., at Lancaster, June, 1852.

This case will be sufficiently understood from the opinion delivered in the Court of Appeals.

Clinton, for appellants.
Dawkins, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. The plaintiff Amanda, then Miss Johnson, was residing in Camden with her brother-in-law Alden, when through a letter written by the defendant to Alden, and bearing date May 15, 1845, she was invited to take charge of a female school in the village of Lancaster, in the following terms: "We have had a meeting of all the citizens of the place that are interested in a female school, and all are perfectly satisfied with Miss Johnson, as recommended, and are very anxious to employ her as our teacher, and are resolved to make her this proposition. We will guarantee to her the sum of \$400 for one year, and we will pay her board. She to take charge of the school, and if the school should become too great in number, an assistant will be employed at the expense of the trustees." Accepting this invitation, she went to Lancaster in June, 1845, and taught a female school there for one quarter and ten days. Becoming sick,

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she return*ed to Camden, with the intention of resuming her school on the restoration of her health; but while at Camden she received a letter from defendant, suggesting that for various reasons the school could not be revived; and she did not resume, nor offer to resume, her employment as a teacher in Lancaster. The parties separated by consent, and neither now insists upon the entirety of any contract between them for a year. At the rate of \$400 a year, Miss Johnson would be entitled to \$110 for the time she taught the school; and she has received only \$33.

By this petition, the plaintiff seek discovery from the defendant of the names of the trustees of the school, and of the persons represented in the phrase of the defendant's letter, "we will guarantee &c.;" alleging that defendant had declined to disclose these names on their previous application to him; and they pray that he alone, if he wrote the letter without authority from others, or that he, and others, who may be jointly liable with him, when made parties, may be decreed to make payment for the time the plaintiff Amanda taught school, at the rate of \$400 a year, with interest.

The defendant, in his answer, insists that this Court has no jurisdiction of the cause; and he makes no discovery beyond the fact that George W. Gill was one of the patrons of the school.

It appears by the proof, that trustees for the school were never appointed.

The petition was referred to the Commissioner of the Court, with reservation of the equities of the parties; and his report ascertains the foregoing facts, and other facts, which are not regarded as material.

At the last sitting of the Court for Lancaster, on hearing the report of the Commissioner, and argument of counsel upon the equities reserved, Chancellor Johnston ordered, that the petition be dismissed, and that each party pay his own costs.

From this order of dismissal, an appeal is taken by the plaintiffs to this Court, on

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various grounds, which are included in *the questions, whether there was any contract between the parties; and if there were a contract, whether this Court has jurisdiction of the cause.

Does the letter of the defendant to a friend and agent of the plaintiff propose a definite contract, which her acceptance consummated into an agreement, by exhibiting the concurrence of minds of the parties of opposite interests in the subject. If an individual person were to write a letter to one wishing employment as a teacher, nearly in the words of the letter in question, saying, I will guaranty to you \$400 a year and board you, if you will teach my daughters; it would not be questioned, that if the person addressed accepted the offer and entered upon the employment, a valid contract was made. So if one were to make a similar offer in behalf of himself and A. and B., which was accepted, when he had no authority from A. and B. to make the offer, he would be singly bound. *Fant v. Gadberrry*, 5 Rich. 10. But in ascertaining the intentions of parties from the language they have employed, Courts should interpret and apply their words in the light of surrounding circumstances, and not insist upon any nice philological construction of their phrases. Qui hæret in litera, hæret in cortice. The letter of the defendant to Alden, agent of the plaintiff Amanda, when fairly interpreted, simply narrates the proceedings of a public meeting, and proposes a basis upon which the plaintiff may treat for a contract with the citizens of Lancaster interested in a female school. It is not the offer of a contract in behalf of particular persons, to be completed by acceptance on the other side; it is the suggestion of what an irresponsible community had resolved to do, as the beginning of a correspondence for a contract. "We will guarantee," &c., by necessary inference, and by grammatical construction, refers to the writer of the letter and to others in common with him, "interested in a female school" at Lancaster; and implies that a definite contract was to be there-after made. We may regret that Miss Johnson, from youth and inexperience, as suggested in the earnest argument of her counsel, or from any other cause, was incautious in se-

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curing fit *compensation for her services, by some contract binding her employers, before she entered upon her duties; and we may even regard the defence as ungracious; but we cannot venture to decide cases upon no-

tions of gallantry and taste. We are of opinion, that the letter of defendant suggested terms upon which a future contract might be made, but did not offer a definite contract, to be completed by acceptance.

If we are mistaken in this view, the question recurs as to the jurisdiction of this Court. If the letter of the defendant amounts to a guaranty on the part of himself, or of himself with others as to whom he had no authority to contract, to pay the plaintiff Amanda a specific sum of money for certain services to be performed by her, this is a plain legal demand, to be enforced by the action of assumpsit. The plaintiffs do not seek discovery in aid of a suit at law; and they have obtained no discovery from the defendant. If the petition be regarded as a suit for discovery merely, the plaintiffs cannot contravene the answer; and as a suit for discovery and relief, the plaintiffs must fail, as they have not shewn by the disclosures of the defendant, nor by other proof, any claim to relief peculiar to this jurisdiction. The plaintiffs pray, not for account of complicated, mutual demands, but for payment of a specific sum due to them; and all matters approaching account are raised by the answer and proof by defendant of partial payments on the plaintiffs' claim. Their remedy, if they have any, is as plain and adequate in the Court of law as in this Court.

It is ordered and decreed, that the appeal be dismissed, and the decree be affirmed.

JOHNSTON and DUNKIN, CC., concurred.

DARGAN, Ch. I dissent. The petition is in the nature of a bill for discovery and account. The plea to the jurisdiction is unfounded. And the plaintiffs have made out a case which entitles them to recover.

Decree affirmed.

5 Rich. Eq. *95.

*WILLIAM A. ROSBOROUGH and Wife v.
JAMES and ROBERT N. HEMPHILL,
Ex'rs, et al.

(Columbia. Nov. and Dec. Term, 1852.)

[Wills ⚡865.]

Testator having a wife and six children, three of whom, to wit: J. M., E. B., and J. H. were minors, and intending to 'so order and dispose of his estate, in such manner, as appeared to him just and equitable,' devised and bequeathed, by the second clause of his will, to his wife \$20,000, seven slaves by name, and other personalty, absolutely, and a tract of land for life, with remainder to his two sons, T. H. and J. H.: by the third clause he gave the 'sixth part' of his 'estate not heretofore devised or willed' to his daughter M. R., with limitations: he made no further disposition of his estate, except that he bequeathed \$1000 to a nephew; and he directed, that his 'unwilled slaves' should be divided among his 'minor heirs,' the value

'to be deducted out of their respective dividends' of his estate; that three of his 'legatees,' naming his three children B. G., M. R., and T. H., who had received specified amounts out of his estate, should 'discount,' those sums 'out of their respective shares;' and that his just debts be paid 'previous to a division' of his estate:—*Held*, that after the widow had received her legacy of \$20,000, and the slaves and other property devised and bequeathed to her, M. R. was entitled to one-sixth of the residue, and the remaining five-sixths, after payment of the legacy of \$1000 to the nephew, and the debts of testator, were distributable, as intestate property, among the widow and six children, including M. R.:—the minor children taking the 'unwilled slaves' as part of their shares, and the three children, named as having been advanced, accounting for their advancements.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2194; Dec. Dig. ⚡865.]

[Wills ⚡487.]

In a Court of construction, evidence aliunde is inadmissible to show, that the testator intended to have a certain provision inserted in the will, and so instructed the draftsman; that through haste and inadvertence it was omitted, and the testator executed the will supposing the provision to be in it.

[Ed. Note.—Cited in *Whitlock v. Wardlaw*, 7 Rich. 458; *Laurens v. Read*, 14 Rich. Eq. 269; *Roundtree v. Roundtree*, 26 S. C. 465, 2 S. E. 474; *Clarke v. Clarke*, 46 S. C. 240, 24 S. E. 202, 57 Am. St. Rep. 675.

For other cases, see Wills, Cent. Dig. § 1028; Dec. Dig. ⚡487.]

Before Johnston, Ch., at Chester, July, 1852.

Johnston, Ch. The bill is filed by Mrs. Rosborough and her husband, for the construction of the will of her father, the late William Moffatt, and for an account of her interests in his estate.

The testator, a man of large property, consisting mostly of stocks, money at interest and other choses, died the 15th day of April, 1851, leaving a wife, Margaret, and six children—Thomas H., Josiah, Elizabeth B., (sometimes called Bethia Elizabeth), Isabella H., Barbara B., wife of Robert C. Grier, and Martha M., wife of Wm. A. Rosborough, all of whom still survive. Of these, Josiah, Elizabeth and Isabella, were, at the date of his will, hereafter to be noticed, and still are, minors.

On the 14th of March, 1851, the testator

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duly executed his *last will and testament, by the introductory words of which he announced his intention to "so order and dispose of my estate, in such manner as, at present, appears to myself just and equitable."

By the first clause, he appoints James and Robert N. Hemphill, his executors.

By the second clause he gives his wife \$20,000, seven slaves by name, with their future increase, his live stock, farming utensils, wagons, carriages, &c.; his household and kitchen furniture, crop on hand and library. And he also devises to her for life, the plantation of over 700 acres where he

resided, with remainder in fee, to his two sons, Thomas H. and Josiah.

He then proceeds:

"Thirdly, the sixth part of my estate not heretofore devised or willed, I leave in trust with my executors, for the benefit of my daughter, Martha Mary Rosborough, to be kept out on loan, or judiciously laid out in bank stock, either in this State or North Carolina. The interest thereof after defraying expenses, to be paid over, annually, to her, for her benefit and support. And at her death, should she leave any issue, children born of her body, that should arrive at the age of twenty-one years, then the aforesaid estate, so willed and devised for her benefit, shall be legally claimed by them, and paid over to them, by my executors, or their successors, accordingly. But should it be otherwise, and that she die childless, leaving no natural issue, then, the aforesaid estate, so willed and devised for her benefit, shall revert back to my other legal heirs, to be equally divided among them."

The material provisions of the fourth clause are as follows:

"Fourth. The unwilled slaves belonging to my estate, shall be, as equally as possible divided among my minor heirs," (meaning Josiah, Elizabeth, and Isabella.) "when they become of age." * * * "A fair value to be put on what each receives of said property, and to be deducted out of their respective dividends of my estate." * * * "The unwilled negroes to be kept by my widow,

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during the minority of my *children, without any accountability, on her part, for their services."

In the fifth clause, he enjoins it upon his executors to be "careful and judicious about the loaning of the money of my minor children, to guard as much as possible against doubtful loans."

The material parts of the sixth clause read thus:

"Sixth. I have further to observe, that three of my legatees have received certain amounts of my estate, viz: Barbara B. Grier, property and cash to the amount of \$5000; Martha M. Rosborough, in property, \$1200; and Thomas Henry Moffatt, in cash, \$5000; which sums * * * are to be discounted without interest, out of their respective shares of my estate."

The seventh clause gives a pecuniary legacy of \$1000, to a nephew in Indiana.

The eighth clause directs, that testator's just debts be paid "previous to the division of my estate;" and after declaring, that however defective, "in form and legality," the instrument might be, "it is my will," proceeds to declare that, "should any of my legatees, attempt to defeat its plain meaning and design, by throwing legal difficulties in the way of its execution, then,

I leave it in the power of my executors to entirely disinherit them.

The will closes with the following clause, which it will be important to remember in relation to a prior will executed the 13th of February, 1850, which is set forth in the answer of some of the defendants.

"Ninth. I do hereby revoke all former wills, and acknowledge in the presence of the subscribing witnesses, this to be my last will and testament, written on one sheet of paper."

This will (of the 14th of March, 1851,) was produced by the executors, in the Ordinary's Court for Chester District, admitted to probate, and letters testamentary granted them for its execution.

The debts, which were inconsiderable, and

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the pecuniary *legacy of \$1000, have been paid as provided for; and the estate is now subject to the interests of testator's family.

A claim, on behalf of Mrs. Rosborough, is advanced under the third clause, and stated in the bill, to the effect, that of the property covered by that clause, and therein denominated "my estate not heretofore devised and willed," "one-sixth part is bequeathed to the executors in trust for the benefit of your oratrix; and, after said one-sixth part is set apart, Margaret Moffatt, the widow, is entitled to one-third part of the remaining five-sixths, and your oratrix, and each of the other children of the testator, to an equal share of the remainder."

It is very clear, that the property intended in the third clause, by the phrase, "my estate not heretofore devised, or willed," was so much of his estate of every description, as had not been bequeathed and devised in the preceding, or second clause. By the word heretofore, was meant heretofore in that will—equivalent to hereinbefore. The testator could not have referred to devises or bequests made in any prior will or wills, nor have intended to make the residue spoken of in this third clause, a residue dependent upon what he had disposed of in such former wills, and only to result after those dispositions were effectuated; because in this will he expressly revokes all former wills. It would be absurd to attribute to him an intention to allow devises and bequests which he intentionally abrogates, to so operate still on part of his property, as to determine and define the residue upon which the provisions of this clause of this will are to attach.

Then, taking up the third clause for construction, the question is, what is the extent of its dispositions?

I presume, that the first impression of any one who had read that clause alone, without looking into the subsequent clauses—and who had never heard of any prior will—would be, that the testator had given one-sixth of the property referred to in the

clause to his daughter, Mrs. Rosborough, in trust, with limitations; and that the other five-sixths were left undisposed of.

I conceive that, apart from any idea of mistake on the part of the testator, and assuming that the language of this clause

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*gives a true expression to his meaning, it would be impossible to give any other interpretation to the clause, standing by itself, than that he had given a sixth of this property to Mrs. Rosborough, and had not given the remainder of it to any body.

Then, let us resort to the succeeding clauses, as a context, and see if they furnish anything from which a judicial judgment to the contrary of this can be drawn, conformably to sound principles of interpretation.

In resorting to the subsequent clauses as a context, it should not be forgotten that they are the context of this will. The same clauses situated in another will, and connected with another text, which does not contain all the words of the text now under construction, may have a very different meaning and application, as was said in the late case of *McCall v. McCall*, from *Darlington*, 4 Rich. Eq. 447 [57 Am. Dec. 733]—for as the context acts upon the text, so necessarily must text upon the context.

The 4th clause of this will is not repugnant to the idea that there is a partial intestacy under the 3rd. The “unwilled negroes” are to be allotted to the “minor heirs,” by way of satisfying their “dividends” of the estate, and their value deducted out of said “dividends.” Some observations were made respecting the time at which this was to be done. It was said it was to be done at the majority of the minors. But, I do not perceive how that difficulty, if it really exists in the will, properly administered, affects the question now under discussion—which is, whether the shares or “dividends” of the estate to be taken by the minors under the 3rd clause, accrues to them by testacy or intestacy. The difficulty referred to, would be equal, and indeed, precisely the same, whether they take their shares or “dividends” by testamentary disposition, or by operation of law—by the will or by intestacy. The objection therefore, determines nothing on the question of testacy or intestacy. I suppose, however, that in the administration of the will—which is not a matter strictly involving doctrine—the aggregate value of the

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negroes, at the testator's death, should *be deducted from the aggregate to which all the minors would be entitled under the 3rd clause, (whether testate or intestate) and set apart for the minors, for subdivision among them, with fair compensations, at their majority. This, however, by the way. What I intended to observe is, that the terms “unwilled negroes,” “minor heirs,” and

“dividends” are, at least, not repugnant to the notion of an intestacy under the 3rd clause of the will, and unless they are sufficiently repugnant, to raise by necessary implication a construction of that clause different from that which its own terms import, they leave it as it was before. It might be contended, indeed, (though I imagine that would be allowing too much influence to mere terms,) that the words, to which I have referred, rather serve to fortify than to rebut the idea of intestacy under the 3rd clause: that they import that, notwithstanding all that is contained in the 2nd and 3rd, (which are the only disposing clauses which precede the 4th, where the words occur), there still remained “unwilled” property, to “dividends” of which the minors were entitled as “heirs.”

It was said, however, that the will intended that the minors should receive an equal share of the whole property covered by the third clause; that this was evidenced by the direction for equal partition of the negroes, and for the deduction of their value out of the dividends. If this is so, it necessarily excludes Mrs. Rosborough's claim for more than the one-sixth of that property given to her. But is it so? It is a mistaken assumption that the testator (who has merely declared that he wished to dispose according to his notions of justice and equity, not equally,) intended that each child should receive equal benefits under his will. That idea is rebutted by the remainder devised to his two sons, in the second clause, beyond what the other children were to get. And, if their devise is not to be derogated from, in order to bring up the minors to a position of equality; if the two sons (one of whom is among the minors, on whose behalf this argument of equality is used,) are entitled to hold their devises, and still come in for their shares or “dividends” (whatever this may be,) under the third clause—upon

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what *principle is it, that Mrs. Rosborough's bequest of one-sixth, expressly given to her in that clause, is to exclude her from participation in the five-sixths which are not disposed of? The truth is, there is nothing in the 4th clause, whose provisions we are now examining, which intimates that the minor children are to receive an equal dividend of the whole property covered by the 3rd clause, (the residuary property as it has been denominated,) but only an equal dividend of so much of it as that clause does not dispose of.

There is nothing, that I can perceive, in the fifth clause, to affect the construction of the third. We proceed to the sixth.

What is there in this to change the natural interpretation of the third?

In cases of partial testacy, children who have been advanced are not bound, in the division of the intestate portions of the es-

tate, to account for their advancements, unless expressly required to do so by the will.^(a) The testator in this will directs that three of his children, (loosely calling them legatees, which only two of them are,) shall account; and that their advancements shall be discounted out of their "shares" of his estate. Does this prove that the shares are testate or intestate? It is a trifling evidence that they were regarded as intestate, that the account is to be "without interest," which exactly squares with the law of distributions.

It remains to consider the introductory words of the will, by which the testator announces an intention to dispose of his estate. Such phrases are a make-weight in doubtful cases. They may remove the impression of intestacy, when that is slight, and give an extent to dispositions that are equivocal, so as to carry the whole estate. But I conceive, that there is no word or sentence in the third clause, professing to dispose of the five-sixths.

In opposition to all that has been urged from the subsequent clauses, which I have examined, and from the preamble, as a context, there is a clause, (the 7th) affording

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very strong grounds *for holding a partial intestacy. That clause contains a pecuniary legacy. If the third clause disposed of the residue of property left from the second, it absorbed the whole estate, and gave interests in it superior in degree to this legacy. How, then, did the testator contemplate that this legacy should be paid? It must, on the defendants' construction, have been intended as an empty compliment. It was not so, however, if there was a partial intestacy, furnishing a fund for its payment.

I have thus come to the conclusion, upon the construction of this will, apart from all extrinsic circumstances, that the third clause disposes of only one-sixth of the property left untouched by the second clause, by giving that sixth to Mrs. Rosborough, upon the terms expressed by the testator. The other five-sixths are not disposed of, and she is entitled to participate in them. Nothing but an operative disposition of that part can exclude her from her right, as a distributee, to take a share of it. Even if the testator had given her the sixth, "and no more," unless he disposed of the residuary five-sixths, the law gave her an interest in them.^(b)

I have preferred to consider the will, in the first place, apart from extrinsic circumstances, because I conceived that in that way, the meaning inherent in its terms and language would be more clearly perceived.

My construction of it I have stated; and under that construction the five-sixths are to be considered as intestate. Of course, as in-

testate, these five-sixths are the primary fund for the payment of debts and expenses, and the pecuniary legacy of \$1,000. The pecuniary legacy of \$20,000, given to the widow by the second clause, stands upon a different footing. It is first to be allowed, according to the terms of the will, in order to ascertain what is the residuary property, upon which the third clause operates. The intestate portion, therefore, of that property is not the fund for its payment, as in the case of the legacy of \$1,000, given by the 7th clause. In the distribution of the residue thus left, the widow's third would be set

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apart. *It is stated that she has released it. The release has not been furnished me, and I cannot know whether it is a general release, or a release operating as an assignment to particular children. If the latter, then these particular assignees are to stand in her shoes and take her third. If the release is merely general, then all the children will take that third; but as widows have no concern in advancements, this third must be distributed by itself. As to the other two-thirds, the advancements charged in the will against Mrs. Grier, Mrs. Rosborough, and Thomas H. Moffatt, must first be brought into the computation, without interest, and then a division made among all the children.

Such is the decree of the Court, unless upon an examination of the extrinsic circumstances, to which I now proceed, it shall be found that there is any thing calculated to change the import of the will, as I have construed it.

It appears, that the testator was dissatisfied with the marriage of Mrs. Rosborough. On the 13th of February, 1850, he had drawn up and executed another will, which was in full force when the present will was executed. It was sealed up and deposited by him in his desk.

In its general features it resembled this will by which it was revoked. It differed, however, from the latter in the disposition of the remainder, engrafted on the devise to the wife. That remainder was given by the former will to Josiah alone, instead of Josiah and Thomas H., as it is in the latter; and it contained a conditional power to the widow to alienate the land in her life-time, which is omitted in the latter.

It devised lands in Indiana and York to Thomas H. These were sold by him after its execution. The omission of these lands in the new will necessarily followed from the sale. But the sale did not render a new will necessary, because the old will contained a provision to meet the case; in which it was declared that, in case of such after alienation, the devisee should take the proceeds in place of the land sold.

There are some other minor differences between the old and the new will, which I deem it unnecessary to notice.

(a) Snelgrove v. Snelgrove, 4 Des. 274.

(b) Snelgrove v. Snelgrove, 4 Des. 274.

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*There was, however, one capital provision contained in the third clause of the old will, which is omitted in the third (and corresponding) clause of the new.

The third clause of the former begins thus:

"Third. All the residue of my estate, I leave to be equally divided among my six children, viz: Barbara B. Grier, (&c., naming them) subject to such regulations as I shall hereafter distinctly lay down and define, viz: that the distributive share of my estate that would fall to Martha Mary Rosborough, I leave in trust to my executors, to be kept out on loan," &c., and then proceeds throughout the clause, as in the present will.

It appears from the testimony of the Reverend Laughlin McDonald, a very intelligent witness, that the testator was suddenly taken ill on the night of the 13th of March, 1851, (the night preceding the execution of the last will,) and was obliged to call in his physician. Either that night or the next morning, Mr. McDonald was sent for. When he arrived, the testator informed him, that in consequence of some alterations in his property, he wished him to draw up a new will for him, corresponding to the existing will, with some alterations. Mr. McDonald distrusting his skill in such matters, wished for time, and desired that some legal gentleman should be sent for. But the doctor, taking him aside, told him there was no time to be lost; and he yielded. Upon his signifying his assent, the testator caused the existing will to be brought from his desk, and unsealed. The room was then cleared, and he proceeded to his task, taking directions from the testator.

After he had completed the draft, he read it clause by clause to the testator, and then the whole consecutively, and he assented to it, and executed it before the requisite number of witnesses, of whom Mr. McDonald was one. It was then enveloped and sealed up with the prior will, and put back in the desk.

Some time the same day, and after the will had been put away, the testator expressed dissatisfaction at part of its contents, and caused it to be brought out again. Mr. McDonald and the other attesting wit-

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nesses were still present. The will *was again either read to the testator, or was read by him; and he with his own hand, made certain erasures in its first page, leaving its language as it now reads. It was then, as thus altered, subjected anew to the formalities of execution and attestation, and was put back with the prior will, as before.

Testator lingered until the 15th of April, when he died, as before stated. After his death the two wills were found, sealed up together in his desk.

I allowed testimony as to any thing relating to the posture and condition of the

estate of the testator, and to the state of his family. I am, and always have been satisfied, that such testimony is admissible. The Court which is to interpret a will, is aided in the application of its provisions, and sometimes in the interpretation of its language, if it is enabled, by testimony, to place itself in the same circle of circumstances, and to surround itself by the same field of subjects, which were known to the testator, and by which he was surrounded when he uttered his will. All wills have a tacit reference to the circumstances in which their authors stand when they make them. "In considering questions of this nature," says Mr. Wigram,^(c) "it must always be remembered, that the words of a testator, like those of any other person, tacitly refer to the circumstances by which, at the time of expressing himself, he is surrounded. If, therefore, (when the circumstances under which the testator made his will are known) the words of the will do sufficiently express the intention ascribed to him, the strict limits of exposition cannot be transgressed, because the Court, in aid of the construction of the will, refers to those extrinsic collateral circumstances, to which it is certain the language of the will refers. It may be true, that, without such evidence, the precise meaning of the words could not be determined; but it is still the will which expresses and ascertains the intention ascribed to the testator. A page of history, (to use a familiar illustration) may not be intelligible till some collateral extrinsic circumstances are known to the reader. No one,

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however, would imagine that he was *acquiring a knowledge of the writer's meaning from any other source than the page he was reading, because, in order to make that page intelligible, he required to be informed to what country the writer belonged, or to be furnished with a map of the country about which he was reading." As a further illustration of the clearness which the simple presentation of facts imparts to terms previously obscure, I would refer to the Sacred Prophecies. Here Divine Wisdom, actually looking at the future facts and events, has frequently, for the wisest purposes, foretold and described them in language, unintelligible until they arise, but which, after they have arisen, become at once clear and unmistakeable; so that the exact applicability of the terms, themselves, is rendered apparent.

I therefore, allowed evidence of the description I have stated.

But, then, it was proposed to prove, that the intention of the testator was, to put a provision, for the equal division of the residuary property among all the children,

(c) Wigram on Wills, Prop. V. Pl. 76. 3d Lond. Ed.

into the third clause of this will, as it was in the prior will; that he so instructed the draftsman; that it was omitted through haste and inadvertence; and that the will was executed under a mistaken supposition that the provision was inserted. This proof being objected to, I excluded it. It is possible the witness might have proved these facts, if allowed to proceed; but being clearly of opinion that the evidence was incompetent, and the press of business requiring the Court to save every moment of its time, I did not take the testimony subject to exception, as is my general practice, but sustained the objection to it at the hearing.

I am still satisfied with my decision on this point. If the proof exists, it is incompetent.

We have a circuit decision, (in the case of *Geer v. Winds*, 4 Des. 85, I believe,) that parol evidence may be heard in this Court, for the purpose of enabling the Court to insert the name of a legatee intended to have been inserted in the will, but omitted by mistake. This is to the very point; and if I had confidence in the decision, or if it were authority, I must yield to it. The

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*point, however, was but slightly considered in that case; the Court manifestly acted under a strong inclination to obviate the peculiar hardships presented; and the decision was, probably, not repugnant to the wishes of all parties, and was, therefore, not appealed from. I do not believe it has ever been relied on, or followed in subsequent cases. It appears to be contrary to safe principle, and to authority.

When parol testimony is offered in the case of a will, its competency must depend upon the purpose to which it is directed. "Any evidence is admissible," says the elementary writer before referred to by me,^(d) "which, in its nature and effect, simply explains what the testator has written; but no evidence can be admissible, which, in its nature and effect, is applicable to the purpose of showing merely what he intended to have written." "The distinction between evidence which is ancillary only to a right understanding of the words to which it is applied, and which is, therefore, simply explanatory of the words themselves, and evidence which is applied to prove intention itself, as an independent fact, is broad and palpable." "Where the inquiry is, what the words of a will express, as distinguished from what the testator meant by the words, evidence of declarations of intention, of instructions given by the testator for preparing his will, or any evidence of a similar nature, is obviously inapplicable to the point of inquiry."^(e) "The judgment of a Court

in expounding a will must be simply declaratory of what is in the will."^(f)

It is conceived, that if the effect or purpose of parol evidence is to introduce into a will, matter which it does not contain, so as to constitute it part of the will; to give to the will, in itself considered, operative elements, language or provisions, which were not in it before, then such evidence is incompetent in a Court whose sole function is to expound wills, whether it be competent or not, in Courts entrusted with the probate and establishment of testamentary pa-

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pers. Such evidence is very *different from that which is offered for the purpose of affording a light, by which what is in the will may be read, understood, and applied; which is always proper.

Mr. Wigram, in enumerating thirty-six cases, in which it is not competent to introduce extrinsic evidence,^(g) includes among them, those, "of filling up a total blank in a will;" "of inserting a devise omitted by mistake;" "of reconciling conflicting clauses in a will;" "of construing the will with reference to the instructions given for preparing it;" "of controlling a technical rule of verbal construction;" "of increasing a legacy;" "of adding a legacy to a will;" "of adding to, detracting from, or altering the will," "or (generally) of proving intention."

It appears to me, that the tendency of ordinary minds is to overlook or undervalue the danger of allowing parol to add to, to contradict, or to vary written instruments. Even when there is no statute requiring writing, it leads to endless litigation, to uncertainty, to danger of mistake, and to falsehood; and, therefore, is so subversive of justice in general, that experience has compelled Courts to disallow it. But when we consider that we have statutes relating not only to wills of realty, but to those of personality also; statutes, (which conceptions of sound policy, founded on profound observation and experience, have induced the legislature to enact,) requiring them to be, not only reduced to writing, but executed with solemn formalities, attested by witnesses; how can we fail to see that the introduction of parol evidence, to add to, or detract from wills thus executed, prostrates the policy of the country, and repeals its enactments? How easy to destroy the true will of a party, in his grave, and no longer able to speak for himself,—a will, which he has deliberately and publicly executed and acknowledged as required by statute— if it be left to witnesses to say, (perhaps laboring under mistake or misconception, themselves,) that his intention was different from his words; that a clause which is in his will is improperly there, or that a

^(d) Wigram on Wills, Pl. 9, 10. See also Prop. V. Pl. 76.

^(e) Wigram, Pl. 104.

^(f) Wigram, Pl. 120.

^(g) Wigram, Pl. 121.

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clause or part of a clause, which *is not there, was omitted by mistake, and should be inserted. The witness, in many cases, may speak the truth; and I am sure, the witness, in this instance, would have done so. But the danger is, that other witnesses may not speak the truth. To cut up fraud and perjury by the roots, the legislature has said, no witness shall speak on such a point. The testator alone shall speak, and speak in his will.

"It is said, (and correctly)" says the judicial writer, whose work I have so often quoted, "that the statute, by requiring a will to be in writing, precludes a Court of Law from ascribing to a testator, any intention which his written will does not express; and, in effect, makes the writing the only legitimate evidence of the testator's intention. No will is within the statute but that which is in writing; which is as much as to say, that all that is effectual and to the purpose, must be in writing, without the aid of words not written."(h) "How," he asks in another place,(i) "can it be said, that the will is in writing, when it is admitted that the will must be inoperative unless the intention of the testator be proved aliunde?"

I might rest the argument here. But there is still another objection to the evidence proposed. Its object is two-fold;—first, to show that provisions were omitted which were intended to have been inserted in the will—and so have these provisions allowed and established as part of the will,—and, (second), to show that the testator executed his will, laboring under a mistake as to its contents.

The objection to all this, is, that this is not a Court for the establishment of wills or clauses of wills.

If the clause which it is proposed to add, can be added, since the statute of 1824, the evidence should have been produced in the probate Court, and the will should have been established with that addition. If, since the statute, written instructions can be established as testamentary, in the ecclesiastical Court, the instructions should have been introduced and proved there.

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*If, on the other hand, the testator labored under the mistake imputed to him, the will of 1851, was no will. The evidence of mistake would have tended to defeat its probate; and should have been offered to defeat it. If defeated, the prior will was not revoked by it, and should have been established in its place.

But the will of 1851, has been admitted to probate by the competent Court; and its judgment, until rescinded, or reversed, is a judgment that the will, in the form in which

it has been allowed, is the true and only will of the testator.(j) My province is only to expound and execute the provisions of that will.

I have now closed my judgment in this case. It has been to me a painful duty; because in upholding what I conceive to be sound and necessary principles, I have constantly felt that the justice of this particular case has not been attained. While a sense of official duty, and of the obligations I was under to sustain those principles upon which the general interests of the community depend, compelled me to the results announced in this judgment—since to have sacrificed those principles, would have been to sacrifice the law,—and, in it, the great body of justice which it, and it only, can afford—I could never for a moment, divest myself of the impression, that in performing this duty, I was sustaining a claim, which, however legal, was ungracious. It is not, however, as a man that I sit in this Court. I have no right to act upon my impressions, or affections, as a man. What I am to do, I am to do as a Judge—governed not by "individual belief, but by judicial persuasion."

On the whole, I adhere to the decree, which I announced conditionally, in the course of this opinion; and it is hereby decreed accordingly.

Other questions not included in the judgment are reserved; and among them the costs of this suit; and the question, whether the funds and property to be taken by Mrs. Rosborough should not be also settled, and the terms of the settlement.

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*Perhaps the parties may agree. If not, let it be considered on reference.

As one of the executors is the Commissioner of the Court, the parties may propose an order of reference of the accounts, if desired, with other matters proper for inquiry, to some other person as referee.

The defendants appealed, and now moved this Court to reverse the decree, on the grounds:

1. Because the Chancellor erred, in refusing to receive in evidence a former will of testator, by which the will in controversy was drawn, and the evidence of the scrivener who drew the will, to show an omission or mistake in said will.

2. Because, according to the true construction of said will, the testator died intestate as to no part of his estate, and the complainant, Martha M. Rosborough, is entitled to no part of said estate, excepting the one-sixth part directed by said will to remain in the hands of the executors as her trustees.

McAliley, Herndon, for appellants.

Dawkins, Williams, contra.

The opinion of the Court was announced by

(j) See also the Statute of 1823 (6 Stat. 209,) as to the effect of probate as it respects real estate.

(h) Wigram, Pl. 9, citing Brett v. Rigden, Plow. 340; 2 Vern. 625; Hobart, 32; Hiscocks v. Hiscocks, infra, Pl. 183.

(i) Wigram, Pl. 153.

JOHNSTON, Ch. We have attentively considered this appeal: and it appears to us impossible, upon any safe principle, to come to any other conclusion than that attained by the Chancellor.

It is therefore, ordered, that the decree be affirmed for the reasons given therein: and that the appeal be dismissed.

DUNKIN AND WARDLAW, CC., concurred.

Appeal dismissed.

5 Rich. Eq. *112

*W. FORTUNE, et al., Adm'rs R. McCrary v. JOHN A. HAYES and Others.

(Columbia. Nov. and Dec. Term, 1852.)

[Limitation of Actions ⇨ 155.]

Promissory note drawn by H. & C., dated May, 1820, and payable January 1, 1821; J. H. & G. C. composed the firm: In 1820, G. C., being insolvent, assigned his interest in the firm for the benefit of his creditors—the assets remaining in the hands of J. H.: in December, 1823, and January, 1824, payments made by J. H. were endorsed on the note as made by H. & Co.: in October, 1825, J. H. died, and in February, 1829, and March 1830, his administratrix made payments on the note: On reference before the Commissioner, February, 1834, on bill for settlement of the partnership accounts, the administratrix of J. H. produced a copy of the note with the credits endorsed: the Commissioner disallowed the balance due on the note as a charge against the firm, and the administratrix excepted to the report, claiming that it should be allowed: a dry balance of over \$1,000 was found to be due, on the partnership accounts, to the assignees of G. C., which was paid by the administratrix of J. H.: G. C. died in August, 1836, and this bill, filed October, 1836, was for payment of the balance of the note out of the partnership effects, or out of the individual estate of either of the partners:—*Held*, that the note was barred by the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 626; Dec. Dig. ⇨ 155.]

Before Dargan, Ch. at Barnwell February, 1852.

The circuit decree is as follows:

Dargan, Ch. James Harley and George W. Collins were partners in trade in Barnwell District, under the name and style of James Harley and Company. The business was conducted by Harley, at his own residence, and Collins also carried on business as a merchant on his separate account, in Savannah, Georgia. It does not appear when the partnership commenced, but it was in existence during the year 1820, when Harley, in behalf of the firm, executed a promissory note, of which the following is a copy, to the complainant, Ann McCrary, administratrix of Robert McCrary:

"On or before the first day of January next, I promise to pay Ann McCrary, representative of the estate of Robert McCrary, deceased, or order, the sum of four hundred

and sixteen dollars and 33-100, for value received. This 28th day of May, 1820.

Signed, James Harley & Co."

Since the date of this note the complainants have intermarried. James Harley died

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23d of October, 1825. Administration *of his estate was granted to Jane A. Harley and John A. Hayes, who took possession and administered jointly for a time. Subsequently, Jane A. Harley died, leaving the defendant, John A. Hayes, sole surviving administrator of James Harley.

George W. Collins died August, 1836, and the defendant, John F. Peyton, is his administrator. On the 7th May, 1836, the complainants brought an action of assumpsit at law upon the said note, against George W. Collins, as surviving partner of James Harley & Co., which abated by the death of Collins. This occurred at the time already stated. Soon after the complainants commenced their suit in this Court. Their original bill was filed 24th October, 1836, against the representative of Harley and against the representative of Collins. The amended bill was filed 28th of September, 1838. The complainants alleging that the note was a debt of the firm of James Harley & Co., and that a balance is still unpaid, claim to have it satisfied and paid out of the partnership effects, if there be any, or out of the individual estate of either of the said partners. There are no assets of the partnership, and the estate of Collins is insolvent. It is not denied that the note was given by Harley, and that it was binding upon the firm, and if not upon the firm, it is of course upon Harley individually. The only question in the case is, whether the claim upon the note is barred by the statute of limitations, which has been pleaded by the defendants. A statement of some other facts will here be necessary. In the year 1820, Collins became insolvent, being indebted to the Planters' Bank of the State of Georgia, the Bank of the State of Georgia, and to Alexander Smets. He assigned all his interest in the partnership effects of James Harley & Co., to his aforesaid creditors, Harley himself concurring and joining in the execution of the deed of assignment. The assignees afterwards filed a bill against Jane A. Harley and John A. Hayes, the representatives of James Harley, for an account of the partnership effects of James Harley & Co. The cause came to a hearing. The partnership assets, on the accounts being taken, were found to consist entirely of Harley's indebtedness to it. A balance was found against

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him *of \$2,691.68. The firm owed Collins as a creditor \$590.88, and as partner \$1,050.40: in the aggregate, \$1,641.28, for which a decree went against Harley's estate, and which has since been paid by the administrators of Harley to the assignees of Collins. While

this case was in progress, and the accounts were before the Commissioner on a reference, with a view to a final settlement between the representatives of the two parties, on the 14th of January, 1834, the administrators of Harley presented before the Commissioner a copy of the note to Ann McCrary, alleging that this was an outstanding debt of the firm, and claiming to have provision made for its payment, out of the assets of the firm, before a partition thereof. There was some evidence that the debt was contracted for Harley's individual benefit. The Commissioner disallowed the claim thus set up by the administrators of Harley, and reported against it. This report is dated the 16th of January, 1837. The administrators of Harley took exceptions to the report, which were argued 19th of January, 1837.

Among other exceptions, they excepted that the Commissioner had not allowed the note to the estate of McCrary as a charge upon the firm in the settlement. These facts were proved by the testimony of Mr. Angus Patterson, who spoke for the most part from the records of the Court then before him, which were also in evidence. This evidence has an important bearing upon the issue of the statute of limitations, in this way: They establish a most unequivocal acknowledgment on the part of the administrators of Harley, as late as the 19th of January, 1837, that the note in question was on an outstanding debt, and that the balance was still due. It does more than this. It establishes the authenticity of the credits endorsed upon the original note; for the copy presented by the administrators of Harley to the Commissioner, in the manner before stated, was a transcript of the note with all the credits endorsed. This was an admission that those credits were rightfully upon the note, and removed all grounds for suspicion, if any existed, that those credits were inscribed on the note

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(as has sometimes been done) *for the purpose of manufacturing testimony to take the case out of the statute. The evidence relieves the Court of all difficulties on that head. There can be no more emphatic admission of the obligations of a debt than a payment upon it, and causing a credit for the payment to be endorsed as evidence upon the instrument, by which the debt is secured. The payment, if proved, without the endorsement of the receipt, would be sufficient. The endorsement of the credit only makes the evidence more explicit, and the facts more unmistakable. A partial payment of a debt has always been considered as equivalent to a new promise to pay the balance. The evidence in this case to relieve the debt from the bar of the statute, is as follows: The note was due on the 1st of January, 1821. On the 18th of December, 1823, payment by Harley & Co., and endorsed upon the note, \$27.50; on the 1st of January, 1824, payment by James Har-

ley & Co., \$50; the 16th of February, 1829, payment by Jane Ann Harley, \$100; the 17th of March, 1830, payment by Jane Ann Harley of \$15; the 14th of January, 1834, the administrators of Harley, presented the claim as a subsisting debt against the firm of James Harley & Co., as has already been stated. On the 16th of January, 1837, the administrators took exceptions to the Commissioner's report in the case of the assignees of Collins v. the administrators of Harley, because this debt was not allowed as a subsisting debt of James Harley & Co.

On the 24th of October, 1836, the original bill in this case was filed. On the 12th of September, 1838, the amended bill was filed, which has been pending ever since. It will thus be perceived, that there has been a series of acknowledgments of the existence of this debt from an early period after it was due, until, and even after, the suit was instituted. Each admission following the one which had preceded it, before the statutory period had run out, with the exception of a single instance. From the second payment by Harley, on the 1st of January, 1824, to the first by his administratrix, on the 16th of February, 1829, more than four years had

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expired, even adding the nine months *during which there was a disability to sue on the part of the complainants. The debt was barred, if the administrators of Harley had chosen to avail themselves of that ground for refusing to pay the debt. The law is well settled, that if a debt be barred in the life time of the intestate, the administrator cannot revive it by a promise to pay. Such a promise will be binding neither upon himself nor the estate; and if he pays a debt that is barred, it will be a devastavit to that extent; and he will be personally liable, or in other words, he would not be allowed credit, for the payment. But it was decided in the case of *Reigne v. Desportes*, Dud. 118, that where a debt was not barred in the life time of the testator, but the statutory period had run out after his death, a promise by the executor constituted a good cause of action, upon which the plaintiff might recover. Though it was necessary, where the promise was made by one who was not a party to the original contract, that the plaintiff should declare upon the promise as a new contract. An administrator may keep a debt of his intestate's, not barred in his life time, beyond the reach of the statute, by promises from time to time; and a debt may thus continue in active force, unaffected by the statute, for an indefinite time. If the statutory period expires after the commencement of his administration, he may avail himself of the plea of the statute, or he may waive it at his own discretion.

He may pay the debt, and he will be allowed credit for it in his accounts, or he may bind the estate by a promise to pay, or what

is equivalent, an implied promise. It certainly requires a more explicit promise to pay, or clear recognition of a debt, to revive it after it has been barred, than before; but it would be a mistake to suppose, that when a debt is barred, that it would require an express promise to pay. There may be implications as strong and emphatic as verbal declarations to that effect. In *Young v. Monpoe*, 2 Bail. 280, it is said, that when the statute has not run out, and there is a still subsisting debt, very slight acknowledgments will be sufficient to arrest the operation of the statute. But to revive a debt already

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barred, there must be a *promise to pay express or implied. "I do not mean," said the Judge who delivered the opinion of the Court, "to be understood as laying down the rule broadly, that nothing short of a direct, express promise will revive a debt already barred; if there be an unequivocal admission that it is still due and unpaid, unaccompanied by any expression, declaration, or qualification, indicative of an intention not to pay, the state of facts on which the law implies a promise is then present, and the party is bound by it." It would be utter nonsense to say, that a payment, on a note or other demand, was not an admission that so much was due, and did not create the presumption of a promise to pay the balance, when unaccompanied by any declaration to the contrary.

When Jane Ann Harley, administratrix of James Harley, on the 16th of February, 1829, paid on the note \$100, the note being then barred, but having become so during her administration, and she having the power to revive it by a new promise, I construe the act as an unequivocal admission that the debt was still due and unpaid, and the strongest implication of a promise to pay the balance, the payment being accompanied by no protest or qualification.

It is ordered that the plea of the statute of limitations be overruled, and that the complainants do recover the amount of the balance due upon their debt. It is further ordered, that it be referred to the Commissioner to inquire and report as to the amount due upon the said note.

The defendant, John A. Hayes, appealed and moved this Court, to reverse the decree, on the grounds:

1. Because the said note, set forth and mentioned in the bill, was barred by the statute of limitations, at the time of the filing of the said bill.

2. Because on the case made by the pleading and evidence, the defendant, John A. Hayes, is not liable at all.

3. Because the said complainant had a plain and adequate remedy at law.

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*4. Because the said decree is, in other respects, contrary to evidence, law and equity.

Bellinger, for appellant.

Bauskett, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. That a common note of hand, given in 1820, should be a subsisting and valid demand in 1852, thirty-two years after it became due, would be quite surprising, even if there were no statute to bar it. But that a statute, which expressly bars such a demand in four years, has failed to accomplish its purpose, in all the time which has elapsed in this case, cannot be credited, without very plenary proof of the fact. Such a thing is a bare legal possibility; but we have never known an instance of its actual existence.

The note, in this instance, was given and accepted as the partnership note of Harley & Co., and no circumstance is suggested, which renders it probable, that the consideration of it was other than the debt of the firm. The rule is, that partnership debts are payable out of the partnership assets; and the parties are liable, individually, only after these are exhausted.

The payments made on the note in the life time of Harley, were made and credited as partnership payments, and if these are deducted, it appears, that there were joint assets left, as late as 1836, more than sufficient to discharge the balance, without resorting to Harley's particular estate. When I say this, I refer to the fact stated by the Chancellor, that a balance was found due to Collins, as partner, of \$1,050.40. This means, a balance due him after deducting the partnership debt. This dry balance could not be allowed him, until all the joint debts were paid: and, if this debt had been taken with the account, as it should have been, if then subsisting, the \$1,050.40 would have been more than sufficient to satisfy it. The only effect would have been to diminish the dry balance due to Collins.

What I wish to observe, here, in relation to the statute of limitations, is this:—Upon

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the death of Harley, in 1825, the legal *obligation to pay the note in question devolved on Collins, the surviving partner; and it was certainly barred before August, 1836, when Collins died. The remedy against the estate of Harley, in consequence of the insolvency of Collins, (which, however, was no ground in this case—because this demand could have been satisfied, as I have stated, out of the supposed dry balance of Collins,) was not a legal, but an equitable, remedy. But, I think, equity will never enforce an equitable demand, arising from and purely dependent upon, and in aid of, a legal demand, when that legal demand is barred and extinguished.

This single consideration is sufficient to dispose of the case.

But the payments made by Harley and his

administratrix, Jane Harley, are relied on as acknowledgments of the debt as the debt of Harley and his estate.

Every payment made by Harley, in his life time, was credited expressly as a payment by the firm. In no way can these payments be regarded as admissions of the debt as Harley's private debt; and the utmost effect they could legitimately have produced, was to revive the debt, as against the firm, (and, consequentially only, as against the partners,) from their dates respectively. The last of these payments made by Harley, was in January, 1824. The bar, counting from that date, was complete in January, 1828.

The payment of \$100 made by Jane Harley, administratrix, the 16th of February, 1829, is we think no clear admission of the balance then remaining due on the note, as a balance legally due by her intestate. In the first place, she was in possession of the partnership assets, which it appears were, on the assignment of Collins, left in her intestate's hands. The note presented to her, and on which she made the payment, was not the individual note of her intestate, but the note of the firm, whose assets she held, and on which she acted. The payment made by her, upon such a note, if it admitted a balance due, is most naturally construed as an admission that that balance was due by the firm—and not by her intestate. She might very safely admit such a balance due by the

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firm, knowing the sufficiency of its assets, without admitting, in the slightest degree, that there either was, or ever would arise, any obligation, on the part of her intestate's estate, to **pay it**. The bar, dating from this payment, accrued to the firm (and, if necessary, to the estate of Harley,) in 1834.

But we very much question, upon the authority of a current of decisions made by the law Courts, and binding upon us, (a) whether the payment was, under the circumstances, a clear admission of a balance due; or whether it was competent for the administratrix, after the demand was barred before the estate came to her hands, to bind the estate by any admissions upon the subject. If she became bound by the supposed admission—it must be by its being construed into a promise,—which under the circumstances stated, would be binding only on herself, personally, and not on the estate, or her successor, now before the Court. The presentation of the demand in 1836, on the reference of the accounts of the firm, is no clear admission that the debt was still due, much less that it was due by Harley's estate. It was not presented by the holder of the note. We may infer that the note was not in the

(a) See *Reigne v. Desportes*, Dud. 118; *Young v. Monpoey*, 2 Bail. 278; *Lomax v. Spierin*, Dud. 365; *Horlbeck v. Hunt*, 1 McM. 197; *Lawton v. Bowman*, 2 Strob. 190; *Gowdy v. Smith & Gillam*, 6 Rich. 28.

hands of Mrs. Harley, but was in the hands of Fortune: a copy of it, only, being presented.

It is most natural to suppose, that the copy, with the credits endorsed, was submitted with the view of getting credit, for the payments made on it, in the copartnership accounts: and so far as credit was claimed for the balance due on the note, such a claim might well be made, either with the pure intention of aiding Fortune, or from a cautious respect to any danger the estate of Harley might be in from his demand—without admitting that his estate was at all liable. The circumstances are too equivocal to infer from them an explicit admission of indebtedness, or a promise to pay.

The rejection of the note, on that occasion, was a clear decision that no demand then

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existed against the firm: and consequently discharged Harley's estate from all equitable liability for such demand.

On the whole, we are of opinion, that the statute of limitations should have been sustained, and the bill dismissed; and it is so ordered.

DUNKIN and WARDLAW, CC., concurred.

Bill dismissed.

5 Rich. Eq. 121

THOMAS G. DUKE v. JOHN A. FULMER and Others, Adm'rs.

(Columbia. Nov. and Dec. Term, 1852.)

[*Limitation of Actions* ⚡28.]

One with whom plaintiff's wife lived in concubinage, received considerable sums of money belonging to the wife, and purchased property in his own name:—*Held*, that plaintiff's claim to the money or the property was barred by the statute of limitations—his bill having been filed more than eight years after the payment of the money.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 134; Dec. Dig. ⚡28.]

[*Divorce* ⚡327; *Marriage* ⚡57.]

A marriage contracted in South-Carolina is indissoluble, either by the consent of the parties, or by the judgment or statute of any foreign tribunal or legislature. Per Wardlaw, Ch.

[Ed. Note.—Cited in *Davis v. Whitlock*, 90 S. C. 244, 73 S. E. 171, Ann. Cas. 1913D, 538.

For other cases, see *Divorce*, Cent. Dig. § 831; Dec. Dig. ⚡327; *Marriage*, Cent. Dig. § 111; Dec. Dig. ⚡57.]

[This case is also cited in *Sollee v. Croft*, 7 Rich. Eq. 40, without specific application.]

Before Wardlaw, Ch., at Lexington, June, 1852.

The Circuit decree is as follows:

Wardlaw, Ch. In this suit the plaintiff, as husband of the late Louisa Duke, calls upon the defendants to account for certain moneys received by their intestate in behalf of said Louisa, with whom the intestate long lived in concubinage.

About June 23, 1820, the plaintiff married, in Fairfield District, in this State, Louisa Webb, illegitimate daughter of Morning Dickson. After a short residence in Lancaster, the pair removed, in February, 1821, to Jones county, in the State of Georgia. In March, 1822, the wife eloped with one Samuel Godby, and the husband never saw her after-

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wards; nor, so far *as appears in testimony, made any inquiries about her. On August 12, 1822, he instituted proceedings for divorce, in the Superior Court of Jones county, on account of the adultery of his wife. And, after a delay consequent, partly, on the necessity of making her a party by publication, at October term, 1824, obtained a verdict from a special jury, sustaining his allegations. Afterwards, at his instance, the Legislature of Georgia, by an Act, assented to by Governor Troup, November 29, 1825, enacted: "That the matrimonial contract, or civil contract of marriage, made between Thomas G. Duke and Louisa, his wife, late Louisa Webb, shall be completely annulled, set aside, and dissolved, as fully and effectually as if no such contract had ever heretofore been made and entered into between them; and that the said Thomas G. Duke and Louisa Duke, late Louisa Webb, shall in future be held as separate and distinct persons, altogether unconnected by any mystical union or civil contract whatever, at any time heretofore made or entered into between them." Soon after this divorce the plaintiff removed to Alabama; and he is now living in Chambers county, of that State, where he is the reputed husband of another woman, and the father of three children; the eldest a daughter of about fourteen years of age. He made a visit to South-Carolina, in 1849, and filed this bill, June 9, 1849, within eight months after the death of his wife Louisa.

Louisa Duke within a few years after her elopement is found to be again residing with her mother. Before 1830 she and the intestate William Fulmer, lived together in a state of concubinage; and in 1835, the form of marriage passed between them. She died in October, 1848, and he died in December, 1848, both intestate, and without children, legitimate or natural. Under an Act of 1826 (6 Stat., 284,) her husband was her sole distributee. At the time of the filing of this bill, A. G. Summer had applied for letters of administration on her estate, and having subsequently obtained a grant of them, he has filed an answer denying the possession of assets, and taking part, not improperly, with the plaintiff. William Fulmer left as his dis-

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*tributees two brothers and a sister, viz: Abram, John A., and Elizabeth, wife of Joseph Counts; and John A. Fulmer and Joseph Counts have administered upon his estate.

The circumstances from which this claim of the plaintiff arises must be further stated.

James Webb, of Fairfield, who died in January, 1820, made his will December 10, 1819, containing the following bequest: "I give and bequeath to my daughter, Morning Dickson, and the heirs of her body, the profits and earnings of the following property, viz: 'seven negroes.' I also will that the whole of the property mentioned, to my said daughter Morning, be, or remain, in the hands of my executors, for the separate and sole use of my said daughter Morning and her children, during her natural life; and her present husband, John Dickson, is forever excluded from any claim or interest in the same; and, after the decease of my said daughter Morning, I will the said negroes and their increase to be equally divided between her four children, viz: 'Louisa Webb, Bazzil McKnight and William W. McKnight, and Henry Dickson.'" Abner Fant and Jonathan Davis were the executors of this will, the former managing the estate.

In 1820, under proceedings instituted in this Court by Duke and wife, a decree was made, that one-fifth of the hire of said slaves be paid to said Louisa. In 1829, William W. McKnight died an infant and intestate.

On February 22, 1836, an agreement, under seal, was made by Morning Dickson, Louisa Duke, Bazzil McKnight and Henry Dickson, that the first should surrender to the other three her life estate, under said bequest, and that they should secure to her by bonds, with sureties, the payment of \$350, annually, during her life. On March 1, 1836, the said Morning Dickson, by deed reciting that she held the bonds of William Fulmer, David Aiken, and Bazzil McKnight, to secure the payment of said annuity, surrendered her life estate in said slaves to said Louisa, Bazzil and Henry.

On April 8, 1835, Bazzil McKnight and Henry Dickson filed their bill in the Court of

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Equity for Fairfield, against the executors of James Webb, for shares of the income from said slaves; and afterwards, on June 23, 1836, said plaintiffs filed an amended bill, suggesting the surrender by Morning Dickson of her life estate in said slaves, and praying partition of the slaves between themselves and Louisa Duke, and process to answer, in addition to the executors, against Duke and wife and Morning Dickson. That Duke was made a party, according to the procedure of the Court, does not appear, unless it may be inferred from the deposition of Commissioner McCants, that he was made a party; which, I suppose, means only that he was named as a party on the record. At July sitting, 1836, the Court decreed the partition prayed for, and for that purpose ordered a sale of the negroes by the Commissioner. The negroes were accordingly sold on January 2, 1837, for the aggregate sum of \$11,415. At July sitting, 1837, the Court further ordered, by consent, on motion of plaintiffs' Solicitor,

"that David Aiken be appointed trustee for Louisa Duke, a party interested in the funds arising from the sale of personal estate in this case, and that the Commissioner of this Court pay over to him her distributee share of the funds as they come into his hands."

Under this last order, David Aiken received at various times considerable sums of money from the Commissioner; and paid over to Louisa Duke, sometimes on her own receipts, generally on the receipts of William Fulmer and herself, and sometimes on the receipts of Fulmer alone, the aggregate sum of \$3,588.17; if some of these receipts be not re-duplicated, which is not meant to be determined, the dates of these receipts range from July 12, 1837, to April 30, 1841. Aiken, who is not pursued by the plaintiff as a party, and is made a witness by him, deposed that all the payments were made to Louisa, personally, or to her written order, and that she approved of the payments to Fulmer, and of every payment.

I conclude from the evidence that William Fulmer did employ some of the money paid by Aiken in the purchase of property—afterwards sold as Fulmer's estate by his heirs

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and representatives—the Counts tract of land, the slaves Jerry, Isaac, Anny, Amy, (of whom Isaac and Amy are dead, Amy being offspring,) a barouche and a horse. Fulmer was a tailor, and industrious and frugal; and by his trade and by farming made profits—partly expended in the maintenance of Louisa, especially for the last three years of her life, during which she suffered much from disease, and was expensively attended by physicians. Louisa herself was generally industrious and frugal, but, in certain moods, was extravagant and wasteful, even destructive of property. Morning Dickson died in February, 1848.

In this state of facts, the plaintiff insists that he is entitled to recover from the administrators of William Fulmer, all the moneys received from David Aiken, with interest from the times of the receipt; and to follow up the property in which the moneys were invested. The defendants deny his rights as husband, but mainly rely upon the statute of limitations.

The first point in the case is, whether plaintiff remained the husband of Louisa (women have no surnames) until her death in 1848, notwithstanding he and she were professedly divorced by the Act of the State of Georgia, and both afterwards in form assumed conjugal relations to new consorts. In my judgment, a marriage contracted in South-Carolina is indissoluble, either by the consent of the parties, or by the judgment or statute of any foreign tribunal or legislature. I am not aware that there has ever been in this State an authoritative decision, that a foreign divorce, regularly obtained, will not dissolve a marriage contract here; but the

negative dicta and indications are numerous. In *Boyce v. Owens*, 1 Hill, 10, it was said: "The marriage contract in this State is regarded as indissoluble by any human means. Nothing short of the actual or presumed death of one of the parties, can have the effect of discharging its obligations and legal effect." The intimation in this dictum, that the presumption of the death of one of the consorts, from absence for seven years, during which he is not heard from, will excuse the other consort from the obligations of the marriage contract, must be confined, as

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doubtless it was intended to be *confined, to exemption from charges of bigamy, or other crime, and unintentional violations of the marriage vows. If the absent consort return, or be proved otherwise to be living at the time of the second marriage, the second marriage is void, and the issue spurious. 1 Hag. Cons. R. 135 n.; 3 Man. & Ry., 329 n.; *McCarty v. McCarty*, 2 Strob. 6 [47 Am. Dec. 585]. In the last case it was held, that presumption of divorce could not arise from any lapse of time. See 1 Des. R., Intro. 54; 2 Des. 646, n.; Caro. L. J. 377. The common law, as declared by the Judges of England, is clear against the recognition of foreign divorces as dissolving marriages contracted in England. *Lolley's case*, 1 Russ. & Ry. Cases, 236; *Warrender v. Warrender*, 9 Bligh, 89; *Tovey v. Lindsay*, 1 Dow, 117; *Story Conf. L.* § 205. In my judgment, Thomas G. Duke was the lawful husband of Louisa during her whole life.

I am of opinion, even more strongly than on the latter point, that the plaintiff is barred from his claim by the statute of limitations. His claim, in all its substance and effect is, that the intestate, William Fulmer, received from the plaintiff's wife money for the plaintiff's use. It is a mere legal demand for money had and received—would be barred in the Court of Law if demanded in assumpsit, by the statute of limitations; and is barred in this Court, in obedience or analogy to the statute, by the lapse of more than eight years after the receipt of the money before bill filed. Suppose plaintiff had been living with his wife, and she had given away his money to her leman—and surely the case he makes is not so strong as the one supposed—he would still be liable to the operation of the statute, for no exception in favor of an injured husband in such case is made by the legislature. The notion that the leman is a trustee for the husband, in such circumstances, and not entitled in Equity to the protection of the statute, is more sublimated morality than has ever been recognized by human tribunals. It makes no difference in what estate the adulterer invests his unhallowed gains. He is at most an implied trustee, within the protection of the statute, and not an express and technical

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trustee, who is *inhibited by the principles and practice of this Court from availing himself of the bar of the statute.

The argument for the plaintiff, that the statute does not begin to run against him before the death of the life tenant, Morning Dickson, in 1848, does not impress me. The plaintiff seeks to recover money received in virtue of the surrender of the life estate; and his right and the consequent bar proceed from the date of the surrender.

It is ordered and decreed, that the bill be dismissed.

The plaintiff appealed, and moved this Court to reverse the decree, upon the grounds:

1. Because his Honor erred, in decreeing that the claim of the plaintiff was barred by the statute of limitations, more than seven years having elapsed from the time that William Fulmer received the proceeds of property sold for partition, though the plaintiff was not made a party, according to the practice of this Court, in the proceedings under which the life estate of Morning Dickson was sold.

2. Because, according to the decree of his Honor, the plaintiff was the legal husband of Louisa; and William Fulmer had no right, legal or equitable, to receive the property of the life estate—the same being the property of the plaintiff—and, by receiving it, he became a trustee for the plaintiff.

3. Because the property bequeathed to Morning Dickson did not vest, according to the terms of James Webb's will, in the children of Morning until her death, and was not subject to division until after the death of the tenant for life.

4. Because the plaintiff had a right to pursue the property, or the proceeds of the sale thereof, into the hands of those in whose possession he could trace the same.

5. Because the decree is contrary to the principles of Equity and the facts of the case.

H. Summer, for appellant.

Boozar, contra.

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*PER CURIAM. We concur in the decree of the Chancellor; and it is ordered that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, and DARGAN, CC., concurring.

Decree affirmed.

5 Rich. Eq. 128

MARGARET HEAD and Others v. WM. R. HALFORD and Others.

(Columbia. Nov. and Dec. Term, 1852.)

[*Husband and Wife* ⇨30.]

Where a plaintiff in a judgment, confessed without consideration, takes a colorable bill of

sale of the defendant's property, on a secret trust to hold it for the benefit of defendant's wife and children, and afterwards carries the trust into effect by making a deed of the property to trustees for the use of the wife and children—such deed is a post-nuptial settlement, and void, as against subsequent creditors, if not duly registered.

[Ed. Note.—Cited in *Wade v. Fisher*, 9 Rich. Eq. 363.]

For other cases, see *Husband and Wife*, Cent. Dig. § 176; Dec. Dig. ⇨30.]

[*Evidence* ⇨230.]

Where one makes a conveyance of property to trustees for the use of others, his declarations made before the conveyance was executed, and while he held the title, are admissible, as against the cestui que trusts, to show that the transaction was fraudulent.

[Ed. Note.—Cited in *Means v. Feaster*, 4 S. C. 256.]

For other cases, see *Evidence*, Cent. Dig. § 836; Dec. Dig. ⇨230.]

Before Dargan, Ch., at Barnwell, February, 1852.

Dargan, Ch. The complainants (who are the wife and children of one Newport Head) charge in their bill, that on the 28th of January, 1833, Henry Hartzog (who was the brother-in-law of Newport Head's wife,) executed and delivered to Samuel Reed, Jr., and David Hair, a certain deed, by which the said Hartzog conveyed to the said Reed and Hair, two negro slaves, Albert and Fanny, in trust, for the exclusive use of Margaret Head, (wife of Newport Head,) during her life, and after her death, to the use of such child or children, grandchild or grandchildren, as she might leave alive at the time of her death. This deed was proved 28th January, 1833,

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and recorded in the office *of the Register of Mesne Conveyances for Barnwell District, on the 4th February, 1833. The complainants further allege, that some time after the execution of the deed, the slave, Albert, was abducted from their possession by some person or persons to them unknown. That the increase of Fanny is as follows: Jesse, Rose, Lewis and Silvy. That the said Samuel Reed and David Hair, named as trustees, duly signed the deed, and accepted the trust. That immediately after the execution thereof, the negroes went into the possession of of the complainant, Margaret Head, (wife of Newport Head,) who had a life estate in the said negroes. That the said Samuel Reed and David Hair are both dead, and that no other person has been appointed as trustee in their stead.

The complainants further charge, that one John D. Baxley, having obtained a judgment, and issued an execution thereon, against the said Newport Head, has lately directed William R. Halford, the Sheriff of Barnwell District, to levy on the said slave, Jesse, and that the said William R. Halford has accordingly levied upon, and threatened to sell the said slave, under and by virtue of the

aforesaid execution. They pray an injunction, subpoena, &c. Newport Head is a defendant, charged as a confederate of Baxley and Halford. The defendants, Baxley and Halford, in their joint answer, admit the levy upon the slave, Jesse, under the execution. They rest their defence principally upon the alleged fact, that if the deed of trust set forth in the complainants' bill was ever executed, the negroes therein conveyed, were not the property of Henry Hartzog, but of the said Newport Head. That the said Newport Head being deeply indebted at the time, in fraud of his creditors settled the said negroes upon his wife and children, through the instrumentality of Henry Hartzog, who never had a title, and if he had, the title was given to him for this fraudulent purpose, and that the said deed was, therefore, null and void. They further contend, that if they should fail to show that the said deed was fraudulent and void—the negroes being the property of Newport Head—

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the deed of Hartzog—executed for the *same, with the concurrence of Newport Head, was nothing but a deed of post-nuptial settlement by Head, for his wife and children, and is void, for the want of registry in the proper office. The foregoing are the positions which the parties respectively occupy on the record. The negroes were, indisputably, at one time, the property of Newport Head. On the 1st October, 1832, Head executed and delivered to Hartzog, a bill of sale for the negroes, Albert, about four years of age, and Fanny, about fourteen years of age and some other property of inconsiderable value. The consideration expressed is \$700. The bill of sale also conveys, for the same consideration, a sorrel mare, and household and kitchen furniture. On the same day, there was a receipt from Head to Hartzog for \$187.43, being the balance in full for two negroes, Albert and Fanny, household and kitchen furniture, and the sorrel mare. Hartzog had a judgment and execution against Head in the Court of Common Pleas for Barnwell District. Judgment was confessed on 6th February, 1832, for \$524.63, with interest on \$500, from 7th February, 1832; *fi. fa.* for this sum, together with costs, was entered 8th February, 1832; the cause of action was a note from Head to Hartzog, dated 1st February, 1832, for \$500, with interest on \$300, from 1st January, 1831, to 1st January, 1832, and interest on \$500, until paid. On 1st October, 1832, (the date of the bill of sale for the negroes) Hartzog executed on Sheriff Harley's execution book, a receipt "for the debt and interest in full of this case." On the same day, he paid to Harley \$6.50, as sheriff's fees, and on the 18th May, 1833, he paid the clerk's fees, \$5.50. Whether it was done *bona fide* or *mala fide*, the amount due on the execution, was, doubtless, applied in part payment of the purchase money of

the negroes, and after deducting the amount of the execution from the \$700, is left to be paid otherwise, about the sum covered by the receipt of the same date, (\$187.43.) There is some difference, though not much. There was a judgment of John T. Willis against Newport Head, for \$280.43, with interest and costs, entered 12th November, 1839—cause of

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action, a note for \$98.45, due 21st January, 1837, and another note for \$87, due 1st January, 1836. Both notes were from Head, to J. T. Willis, and contracted several years after the deed of trust was executed. The judgment of the defendant, Baxley, against Head, is for \$59.79, besides, subsequently accruing interest and costs. The execution was entered 8th of August, 1838. The cause of action was two notes of Head, one to P. P. Noling for \$30.50, dated 1st January, 1838—the other to Jackson and Baxley, for \$27.10, dated 2d January, 1838. The style of the case is Jackson and Baxley v. Newport Head. There was another execution spoken of by the witness, Mathews, as due to himself by Head. The cause of action was after the date of the trust deed. The date and other particulars were not furnished me. There does not appear to have been any other execution ever entered in the Sheriff's office against Head, besides those above described. There was no existing debt proved against Head, but a note for \$56.50, which was sold by the witness, Richmond Watson, to the defendant, Baxley, for \$6.50. It is shown that James T. Willis, (who married Head's sister,) had notice of the trust deed before Head's debt to him was contracted. Head was considerably indebted to him. It came out in the evidence, that Head sold Albert to Willis, who ran off the negro. I suppose, that the proceeds of Albert were applied in part payment of Head's indebtedness to him, and, that the judgment of Willis, against Head, was for the balance.

On the foregoing state of facts, the necessary inference would be, that Hartzog did *bona fide* purchase the negroes from Head, for a valuable consideration, and that he afterwards made a voluntary conveyance of the said negroes to Head's wife and children. This is the import of the transaction between Hartzog and Head, which I have above stated, and if this be the conclusion, the case is divested of all difficulty, and the rights of the complainants are unquestionable. There are, however, other facts to be considered, which are stated in the Commissioner's report of the evidence. This evidence was tak-

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en sub*ject to all legal objections. The defence which the defendants have attempted to establish is, that the negroes were not purchased by Hartzog. That the bill of sale and receipt acknowledging the payment of money, were pretensive—that the whole arrangement was intended to enable Head to settle his

property on his wife and children, in fraud of his creditors. If this position has been sustained by the evidence, then the deed of trust was void in its inception.

If a conveyance, whether voluntary, or for a valuable consideration, be executed with the actual intent to commit a fraud, it is void from the beginning and so continues. It is so vitiated by the fraud, that it is void not only against existing, but subsequent creditors. The payment of the debts which were intended to be defeated by other means, than the property conveyed, cannot wash away the original taint. A title thus derived, can only become valid by becoming, as it were, a new title, under the operation of the statute of limitations. I am speaking of course, of the rights of third persons, and not of those of the parties to the fraud; between whom a fraudulent arrangement is binding. If a person, who is indebted, bona fide makes a voluntary conveyance of his property, and with no intent to commit a fraud, it is still a fraud by presumption of law, as against his existing creditors. *Reade v. Livingston*, 3 John. Ch. 481. It is a fraud in law, because the rights of creditors are paramount to those claiming by gift, and no man has a right to bestow his estate gratuitously, to the disappointment of his existing creditors, even though such disappointment was not intended at the time.

The doctrine reduced to its simple essence is, that the estate of a debtor quoad his debts, is the property of his creditors in Equity, and is not his to give. If a voluntary conveyance be fraudulent, merely by presumption of law, on account of existing debts which remain unsatisfied, the payment of such existing debts purges the fraud, and makes the title valid. There is no actual fraud to fasten upon it an ineradicable defect. Where the defect had been removed, subsequent credi-

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tors cannot come *in and claim to have the property made subject as assets to their claims.

There is but one combination of circumstances under which they would be let in. If the prior debts remain unpaid, and the Court vacates the voluntary conveyance on their application, and for their benefit, subsequent creditors will also be allowed to present their demands, and to participate in the distribution. They would even be allowed to take the initiative, though, upon this last point, there is much contradiction in the authorities.

Having premised thus much as to the principles of law that may be applicable to the case, I proceed to consider facts that have not yet been brought forward. Several witnesses were called by the defendants to prove declarations of Head.

They testified to conversations with him, in which he unequivocally pronounced the trust deed fraudulent. According to him, it

was a scheme to defeat his creditors. If Head's declarations were to be received as evidence, and full credit given to him, there could remain no doubt but that the deed of trust was contaminated by an actual fraud. But I rule out the whole of the testimony as to Head's declarations as incompetent, (*Footman v. Pendergrass* [3 Rich. Eq. 33].) A husband cannot, even when he has no interest, be a witness for or against his wife. If he cannot be a witness, a fortiori his declarations are inadmissible. The other most material evidence taken in the case, which tends to invalidate the deed of trust as a fraudulent arrangement against Head's creditors, is that of Dr. James W. Tarrant. His testimony, so far as it bears on this issue, consists of a statement of certain declarations made by Hartzog just before the execution of the trust deed, and while it was in contemplation. He said that Hartzog came to his house and asked him to draw a deed, making Samuel Reed and David Hair trustees for Mrs. Head and her children. He told the witness that he had been a trustee (by a deed from Head,) for Head's family. That he did not wish to hold the property any longer, and wished to convey it over to Reed and Hair.

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The witness de*clined, and excused himself, by alleging his incompetency to draw such a deed, and advised him to go to a lawyer. Hartzog said, that what he was doing, was for the benefit of Head's family. That he had had the property in his hands long enough; that he wished to turn it over to Reed and Hair; and that this would "make a stronger link in the chain." He said that Head did not owe him anything when he made the deed to him, and that it was merely done to secure the property to Head's family. The witness repeats, that he understood Hartzog to say, that Head had transferred the negroes to him, for the benefit of Head's wife and children, and that Head owed him nothing at the time of the transfer. Hartzog said, that he was at liberty to do as he pleased with the negroes, for the benefit of Head's family. So far, the evidence of the witness relates to the declarations of Hartzog.

The witness says further, that a short time after the date of this conversation, the deed of trust was proved before him as a Magistrate—that Head got the negroes from his father's estate—that they were never in possession of Hartzog, but have always been in the possession of Head and his family—that the deed embraced all the property that Head had in possession—that Hartzog was the brother-in-law of Mrs. Head—that he was a "tight-fisted man"—was not likely to have bought the negroes and made them over to his sister-in-law, without consideration. The witness further said, that Hartzog, Reed and Hair were all of them honest men—that Head became considerably indebted to James T. Willis, who had married his sister, and

who was aware of the deed of trust at the time that the debt to him was contracted. That Head sold Albert to Willis, who ran him off on account of the deed, and that Hair and Reed never sued for Albert. He also proved that Hartzog is dead. That Head, seven or eight years since, brought suit for the negroes, which he afterwards dropped, and that he was "very angry at the time with the whole concern," alleging that they would not let him have any control over the property, and that he did not like it. The other statements of this witness re-

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late *to the declarations of Head, impeaching the fairness of the deed of trust, which have been already ruled out as inadmissible.

It will not fail to be observed, that the most material part of this witness's testimony, bearing upon the issue of fraud, is a statement of the declarations of Hartzog, made at the time when he was about to divest himself of his title to the negroes, and when neither Hair nor Reed, the trustees, nor Head's wife or children, were present. It seems strange that he should have made such declarations, which if they were true, would be so much opposed to his previous caution, and all that machinery of forms which he had employed to carry out his views. But the question occurs, are these declarations admissible to impeach the deed of trust that he executed?

The admissions of a party to the record, against himself, are generally considered competent evidence. Such admissions are received partly from necessity, because in many cases no other evidence exists, and partly on the principle that the cautious selfishness of man's nature would generally be a sufficient safe-guard against the admission of facts that have no existence. They emanate also from a person, who, from his interest in the subject matter, may be presumed to possess the most accurate information. Though the admissions of parties to the record are accepted by Courts as evidence, on what seems to be sound legal philosophy, yet they are very far from being, as is sometimes said, the highest and most satisfactory species of evidence. I am speaking here of parol admissions by parties, affecting their rights or titles, in conversations ante litem motam, and when no controversy is anticipated.

It is seldom that such a conversation embraces a full statement of the case, and when it does, portions are liable to be forgotten by the witness, and thus the party making the admission loses oftentimes the benefit of important qualifications. To guard against this mischief, Courts of Equity, without repudiating in any degree the principles upon which the admissions of a party are received in evidence, have adopted rules for his security and protection, by which it is required

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that the confessions or admissions of a party, when intended to be brought forward in evidence, must be mentioned in the pleadings. Daniel, (2 vol. p. 996,) says: "It is a rule, if a letter or writing amounts to an admission or confession, it must be put in issue, in order that the party against whom it is to be read, may have an opportunity to meet it by explanations or evidence."

"The rule," he says, "is not confined to writings, but applies to every case where the admission or confession of a party is to be made use of against him. Thus it has been held, that evidence of a confession by a party, that he was guilty of a fraud, could not be read, because it was not distinctly put in issue. So, also, evidence of alleged conversations between a witness and a party to a suit, in which such party admitted that he had defrauded the other, was rejected, because such alleged conversations had not been noticed in the pleadings. 'No man,' says Sir Anthony Hart, 'would be safe, if he could be affected by such evidence. Lord Talbot said, long ago, that if you were to oust a defendant for fraud alleged against him, and the fraud is proved by the acknowledgment of the defendant, that he had no right to the matter in litigation, the plaintiff must charge that on the record, to give him an opportunity to deny or explain and avoid it.'" (See Story's Eq. Pl. § 265.)

The admissions here sought to be read, are not the admissions of any party to the record, but they are the admissions of Hartzog, through whom the plaintiffs derived their title, and through whose admissions alone, their title stands affected with a suspicion of fraud.

Hartzog has paid the debt of nature and no explanation can be given by him. It is true that the authorities quoted speak of the admissions of parties to a suit. It seems to me that the principle is the same and that it is even more dangerous to admit the parol declarations of a deceased grantor against the validity of a title he was about to execute without making the truth of such declarations an issue in the pleadings. And this the defendants in their answer have not done. There are difficulties which present themselves from another point of view.

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*The admissions of an owner against his own title are sometimes, and under proper restrictions, competent testimony against his grantee, provided they were made when the grantor was the owner, and when he alone was interested. It is equally clear, that the admissions of the grantor, made after he had conveyed his estate, are not competent against the party to whom it was conveyed. The distinction lies upon the ground, that in the latter case, it is the admission of a party who has no interest in the subject matter. Can the title of the grantee be affected by

an imputation of fraud or other defects cast upon it by the grantor, when in pursuance of a precedent agreement he is just about to execute his deed of conveyance, when these declarations are made, not to, or in the presence of the grantee, but to a stranger? In an issue between the grantee and another party, would those admissions be competent evidence? For the purpose of illustration, suppose the case of a party who has sold his property, and pending the preparation of conveyances, he whispers to a third person, (not in the presence of the vendee,) that the title he is about to execute is contaminated with fraud, or defective in some other particular. In an action between the vendee and another party, could the admissions of the vendor, made under these circumstances, be received as competent evidence? It seems to me they must be rejected, as the admissions of the person who has virtually ceased to be interested. Again: according to Dr. Tarrant's statement, Hartzog said that he was the trustee; that he had held the property long enough, and that he wished to convey it to other trustees, (Hair and Reed;) then it is the admission of a trustee against the rights of the beneficiaries of the trust:—is the proof of such admissions competent against the *cestui que trust*? I think not. The whole of this doctrine of the competency of admissions by parties, is founded upon the principle, that such admissions are made by the parties in interest, and against their own interest. The law presumes that admissions against one's own interest are true, and no admissions are ever received as evidence except under these circumstances, and on this principle. But a

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trustee is not *in reality a party in interest—his legal title is a barren estate—his admissions against the rights of the *cestui que trust* do not affect his interest. They take no money out of his pocket. He may admit away the rights of those for whom he holds, and it costs him nothing. Such admissions do not come within the principle upon which the competency of such evidence rests. The safeguard for their truth and reliableness is wanting. These views would apply if Hartzog was still the trustee and a party to the record.

But to make the case stronger, Hartzog is dead, and long before his death ceased to be the trustee, if he ever was. If he were alive, he might be examined as a witness. By his death before this trial, the defendants have the misfortune, not uncommon, of losing a witness, whose declarations cannot be received as evidence. But, suppose the whole statement of Hartzog to Dr. Tarrant to be admissible, and to be received as evidence, it would be difficult to say that the defendants had made out more than a suspicion of fraud. If these declarations of Hartzog be considered, the case made out by the evidence amounts to this: That Hart-

zog did not himself buy and give the property to Head's wife and children, but that the property was conveyed by Head to him, in trust for his family. If this be true, the confession of judgment, when nothing was due; the bill of sale, purporting to be for full and valuable consideration; the receipt for the purchase money, when no money was paid—all these circumstances were in a high degree suspicious. But Hartzog did not say to Tarrant, that a fraud against Head's creditors was contemplated, nor did he explain why he thought his deed to Reed and Hair, "would make a stronger link in the chain."

They may have supposed that a voluntary deed from Head would not prevail against his future creditors, and the finessing, if it existed, may have had reference to that state of things. It is an important fact that no debt of Head's cotemporary with the date of the deed of trust, and for several years afterwards, has been proved, nor is there any gen-

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eral *proof of his pecuniary embarrassment or insolvency at that time.

One witness, (Jacob C. Kitching,) says, that in 1833 or 1834, Hartzog came to his mill and put up an advertisement, calling upon "all persons indebted to Head to make payment to him, and that all persons whom Head owed should render their demands to him for payment." This does have the appearance of an arrangement to defeat creditors, and, as has been said, it has not been shown that there were any creditors at that time to be defeated. There is no proof of a solitary debt at the date of the deed, except the inference that may arise from the fact of this advertisement having been put up by Hartzog before the world. Therefore, admitting all of Tarrant's evidence to be competent, I do not think that the defendants have made out a case which could authorize me to say, that the deed of trust was void for fraud. If Hartzog did, in fact, pay no consideration for the negroes, and they were conveyed by Head to him, to be held in trust, for the benefit of the wife and children of the latter, or to be conveyed by Hartzog to some other person, for the same purpose, this, I think, would make it a post-nuptial marriage settlement. As such, it would come under the provisions of the statute law, requiring marriage contracts and settlements to be recorded. It would be easy to evade the registry laws, if a man were permitted to convey his property to another, with the understanding that it should by him be conveyed to a third party, in trust for his wife and children, and say this is not a marriage settlement; thus accomplishing by indirection, what could not be directly done. Equity will look at the transaction as it is, will regard it in its true character, stripped of all the disguises with which it may be invested. And if the arrangement be intended as a provision out of the husband's estate for his

wife and children, made after marriage, it is a post-nuptial marriage settlement, whatever may be the forms which the conveyance assumes. It would, therefore, be void against creditors, without notice express or implied. If the deed of trust in this case be a marriage settlement, it would be void against

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the debts of the defendant, *Baxley, for he had no express notice, and no implication of notice could be raised against him from the registry of the deed in the office of the Registrar of Mesne Conveyances. But having ruled out the declarations of Head and Hartzog as incompetent, there are not sufficient grounds for deciding, that the transaction was different from what it purported to be—a gift from Hartzog. The decree must be for the complainants.

It is ordered and decreed, that the levy upon the negro Jesse be discharged, and that the defendants be perpetually enjoined from levying upon and selling any of the property conveyed in the said deed of Henry Hartzog to the said Reed and Hair, in trust for the complainants.

It is further ordered and decreed, that the defendants pay the costs of suit.

The defendants appealed on the grounds:

1. Because the decree rejects as inadmissible, the declarations of Hartzog, made prior to his alleged conveyance to Hair and Reed—whereas said declarations are admissible as evidence against the assignees of Hartzog, claiming under him, immediately or remotely.

2. Because said declarations abundantly establish that the transaction in question was a post-nuptial marriage settlement by Head, and as such, it is void, for want of recording, against such of Head's creditors as had no actual notice of it.

3. Because the decree is contrary to equity and the evidence.

J T. Aldrich, for appellants.

Bellinger, Hutson, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. The Chancellor was of opinion, that if the bill of sale from Sheriff Harley, to Henry Hartzog, (the brother-in-law of the complainant,) dated 1st October, 1832, was merely colorable, and that he held the slaves on a secret trust, for Newport Head's wife and children, which was carried into effect by the deed of 28th January, 1833, to the trustees Reed and Hair,

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*this must be regarded as a post-nuptial settlement, and would be void for want of proper registry. In this view, this Court unanimously concur, and it is unnecessary to add materially to the reasoning of the Chancellor on this subject. If the deed of January, 1833, was, bona fide, a settlement by Hartzog on the family of Head, it would not be sustained by the consideration of mar-

riage, and would be, in no respect, a marriage settlement. But, if the property belonged to the husband, who confessed a voluntary judgment to a third person, and then had the property sold at Sheriff's sale, to the plaintiff under such judgment, who, thereupon, settled the property on the family of the apparent debtor, this flimsy contrivance cannot defeat the beneficial provisions of the statute. It is void as to creditors, if not recorded in the proper offices, within the time prescribed by law.

The character of the transaction, was proved by evidence of the declarations of Henry Hartzog, (who is since dead) made while he held the Sheriff's deed for the slaves, and before his transfer to Reed and Hair as trustees. The Chancellor received the evidence as reported to him by the Commissioner, subject to objection, and it is set forth in the decree. If admissible, it establishes, very clearly, the declarations of Hartzog, that Head owed him nothing at the time of the purchase from the Sheriff, and that Head had transferred the negroes to him for the benefit of his (Head's) wife and children. Upon consideration, the Chancellor rejected the testimony and decreed for the complainants; and the rejection of this evidence constitutes the defendants' first ground of appeal.

There are several classes of cases, in which the admissions of third persons, not parties to the suit, are admissible in evidence. It is done, for instance, says Mr. Greenleaf, (Vol. 1, § 181,) "when the issue is, substantially, upon the mutual rights of such persons at a particular time; in this case, it is the practice to let in such evidence in general as would be legally admissible in an action between the parties themselves." Can there be any doubt that, in an action between the complainants and Henry Hartzog, or between these defendants and Henry Hart-

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zog, *his admissions as to the character of his title at that time, would be receivable in evidence? If, prior to the deed of January, 1833, the complainants had sought to enforce the trust, or the creditors of Head had attempted to set aside the Sheriff's deed of October, 1832, would not the admissions of Henry Hartzog be evidence of the most direct and satisfactory character?

The admissions of a person not a party are also admissible, in respect of his privity with a party. Id. § 189. The trustees under the deed of January, 1833, are privies in estate with Henry Hartzog, and any admissions by him qualifying his right, and made while he held the legal title, are receivable in evidence against his successors, in the same manner as they would have been against himself. See also § 190. The Chancellor remarks, that "Hartzog, if alive, might be examined as a witness. By his death, the defendants have the misfortune, not uncom-

mon, of losing a witness whose declarations cannot be received in evidence." It does not appear to us that the defendants would have been obliged to make a witness of Hartzog, if alive; or that they have lost anything by his death. His admissions, made in 1832, would be equally receivable in evidence, although he were now to testify that those declarations, thus made by him, were not true, or that he never made them. "These admissions by third persons" says the elementary writer, already cited, § 191, "as they derive their value and legal force from the relation of the party making them to the property in question, and are taken as parts of the *res gestæ*, may be proved by any competent witness who heard them, without calling the party by whom they were made. The question is, whether he made the admission, and not merely, whether the fact is as he admitted it to be. Its truth, where the admission is not conclusive, (and it seldom is so,) may be controverted by other testimony; even by calling the party himself when competent; but it is not necessary to produce him; his declarations, when admissible at all, being admissible as original evidence, and not as hearsay."

A majority of this Court is of opinion, that

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the admissions of *Henry Hartzog, as proved, were properly receivable in evidence, and that, corroborated and confirmed as they are by his deed to the trustees, of January, 1833, it established this latter to be a post-nuptial settlement, within the provisions of the Acts of Assembly. Not having been duly recorded, it should have been declared void as to the rights of creditors. It is ordered and decreed, that the decree of the Circuit Court be reformed—that the injunction be dissolved, and that the bill be dismissed, but without costs.

JOHNSTON, DARGAN and WARDLAW, CC. concurred.

Decree reversed.

5 Rich. Eq. 143

ZACHARIAH RAWLS v. WILLIAM WALL and Another.

(Columbia. Nov. and Dec. Term, 1852.)

[Principal and Agent ⇨ 79.]

Bill to set aside a purchase made by an agent of his principal's property at sheriff's sale: the Circuit Chancellor refused to set aside the purchase, but ordered defendant to account for "the true value" of the property:—*Held*, that this meant "the true value" at the time of the sale; and plaintiff having acquiesced in the decree and acted under it, his appeal, after an adverse report from the Commissioner on the question of value, was refused.

[Ed. Note.—Cited in *Verdier v. Verdier*, 12 Rich. Eq. 143.

For other cases, see *Principal and Agent*, Cent. Dig. § 193; Dec. Dig. ⇨ 79.]

Before Wardlaw, Ch., at Fairfield, July, 1851.

Wardlaw, Ch. This is a bill by the principal against his agent, to enjoin the execution of a judgment of the agent against the principal, and to set aside certain purchases of the principal's estate by the agent, and for a general account of the agent's transactions in the affairs of his principal. On November 13, 1844, Z. Rawls confessed a judgment to Wm. Wall for \$1,300, with interest thereon from November 10, 1844, and on the same day Wall gave Rawls a written acknowledg-

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ment, that the judgment was intended as security to Wall for several bail bonds he had signed as surety for Rawls, and for various notes held by him on Rawls, and for several notes of Rawls to other persons, in which he was surety. On the same day, Rawls executed a deed, constituting Wall his attorney, to demand and receive all money due or to become due to him in this State—to pay all his just debts, and to take charge of his property, both real and personal, during his absence from the State, and to act for him generally in relation to his business here. The judgment and power of attorney were given by the plaintiff in contemplation of his absence for a time from the State; and the general arrangement between the parties was, that plaintiff was to furnish the defendant with \$300, for the satisfaction of plaintiff's creditors having older liens, and to deliver to him plaintiff's property and claims here; and that defendant was to protect plaintiff's property, until plaintiff's return from the West with means. The plaintiff soon afterwards left the State. Before his departure, he hired his land and three negroes, and some chattels, for 1845, to one Carter, for five-sixths of the crop which should be made,—he delivered to the defendant chattels and credits to a considerable amount in value, but, so far as appears, did not pay to him the \$300, according to stipulation. Carter, who is since dead, did not remain the whole year at Rawls's place, having been informed by the sheriff that the property must come to sale under the executions, in the course of the year; and defendant rented out the place to one Thomas Barber, for \$75, and hired out some of the negroes. The defendant also disposed of nine bags of cotton, two horses, a mule, a cow and calf, a wagon and harness, some hogs, two axes, some corn and fodder and small notes, belonging to the plaintiff, for sums sufficient, if so appropriated, to satisfy the elder liens upon plaintiff's property; but, as defendant alleges, these sums were applied to the discharge of other liabilities of the plaintiff. On November 5, 1845, the Sheriff, not acting, so far as appears, at the instance of defendant, sold the land and two negroes belonging to plaintiff, under executions, to the defendant, for the aggregate

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price of \$450, which, in the opinion of the witnesses, was not more than half the value. Most of the bid of defendant was applied to the satisfaction of older executions. Before and after the sale, the defendant declared that he would allow the plaintiff to redeem the property, upon the plaintiff's repaying his advances; and all that was owing to him by plaintiff. At the time of the sale, the impression prevailed that Wall was purchasing for the plaintiff, and one witness, Harrison, forebore to bid on that account; but there was no proof that Wall declared that he was so purchasing at the time of sale. After Rawls's return to this State in 1846, he and defendant attempted some settlement, but disagreeing, defendant gave notice that he should hold the property as his own, if his claims were not promptly settled, and afterwards sued out a ca. sa. against plaintiff. This bill was filed November 12, 1847, to enjoin the execution of the plaintiff, and for a general settlement.

The case of the plaintiff is not very strong. He failed in his promise, in the first instance, to furnish money to discharge the elder liens; and since his return to the State, he has not used proper diligence in his efforts to redeem. But time is not usually regarded in this Court as of the essence of contracts; and purchases by agents, from the principal, should be scrutinized with vigilant suspicion. Story Eq. § 315, 316. The defendant is liable to account generally for his agency in the affairs of the plaintiff, and he is not entitled to make profit of a bargain, to which he was helped by the fiduciary relation he sustained to an absent principal, and by his equivocal declarations as to the character in which he purchased, discouraging competition.

It is ordered and decreed, that it be referred to the Commissioner to inquire and report as to the accounts between the parties, in which accounting the defendant must be charged with the true value of the land and slaves bought at sheriff's sale, and of all the property and choses of the plaintiff received by him, and be discharged for all expenditures, debts and liabilities on account of the plaintiff. Costs to await the accounting.

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*In obedience to the above decree, the Commissioner submitted his report, dated July 1, 1852, as follows:

"To use the words of the Chancellor in his decree in this case, this is a bill filed by a principal, against his agent, to enjoin the execution of a judgment of the agent against the principal, and to set aside certain purchases of the principal's estate by the agent, and for a general account of the agent's transactions in the affairs of his principal."

"The Chancellor's decree settles all the questions of law made by the pleadings, sets up the purchases made by the defendant at a sale of the plaintiff's property, made by the

Sheriff of Chester District, on the 4th November, 1845, under sundry judgments in force against plaintiff at that time, and closes by a reference to the Commissioner in the following language:—"It is ordered and decreed, that it be referred to the Commissioner to inquire and report as to the accounts between the parties; in which accounting, the defendant must be charged with the true value of the land and slaves, bought at sheriff's sale, and of all the property and choses of the plaintiff, received by him, and be discharged for all expenditures, debts and liabilities, on account of the plaintiff."

"On the 13th November, 1844, the plaintiff confessed a judgment to the defendant in the sum of one thousand three hundred dollars. The defendant admits in writing at the time of the confession—"That the consideration of the said judgment is my liability for him, as security on several bail bonds, together with various notes, which I hold on said Zachariah Rawls, and several notes given by him to various persons on which I am his surety"—In other words, the confession was given in part as indemnity. Therefore, in order to state the accounts between the parties, as directed by the decree, it must be determined what amount, if any, was due to defendant on this judgment, at some convenient period for the accounting. Plaintiff and defendant, in the bill and answer, differ so widely in their statements as to this amount, and their accounts were so badly kept on both sides, as appears from the ex-

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hibits filed, that *the Commissioner would feel at very great loss to fix this amount, but for the testimony of the witness, Martin Reynolds, examined on reference, before the hearing. He testified, that he, soon after Rawls returned from the West, presented a statement or account to Rawls, in which Wall had charged him (Rawls,) with a statement of claims he held against him to the aggregate amount of \$773.41 and in which he had given Rawls credit, the items stated, to the amount of \$261.34; thus leaving a balance due to Wall, at that time, of \$512.07. The witness testified, that when he presented this account to Rawls, he said the debts were correct, but that he thought that he was entitled to more credits than were allowed him therein, but could not recollect but a very few small items.

"This statement of accounts was offered in evidence and proved by the witness. To this evidence Rawls made no reply. The Commissioner's judgment is, that at the time of the sale of Rawls's property, by the Sheriff, 4th November, 1845, there was justly due the defendant, on this confession of judgment, about \$500.

"At the hearing, some evidence was offered to shew that the property purchased at sheriff's sale was bid off for less than its true value. This property was a small

tract of land, and two negroes, one old woman, and a boy probably about two or three years old. This property was purchased by the defendant, and under the circumstances of the case, the Chancellor thought proper to refer it to the Commissioner to inquire whether it was sold for its true value or not. The whole property was bid off at \$445, of which amount, only about \$120 was applied to the confession, there being other older judgments in the office against this plaintiff at that time. Allegations of unfair conduct on the part of defendant, touching this sale and purchase, were made in the bill, but were denied in the answer, and stand wholly unsupported by evidence. The defendant, therefore, seems entitled to the presumption that the sale was a fair one, having been made by the proper officer, under executions unsatisfied against the defendant at law, and stands free to

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insist, that the best evidence *of the true value of the property, is the price at which it sold at a fair sale. Several witnesses were examined on reference before me, who testified that this property was bid off by defendant, at less than its true value, and about an equal number testified on the other side, that Wall gave the full value of the property at that time.

"The judgment of the Commissioner is, that the land and two negroes were sold for their full and true value at that time.

"On the reference, plaintiff offered to prove the present value of the property, to which defendant objected. The Commissioner held that the inquiry must be confined to the time of the sale. That such was his construction of the decree.

"Upon the conclusions arrived at in this report, I find the balance due to the defendant, William Wall, upon his said judgment against complainant, to be three hundred and eighty dollars, and interest thereon from the 4th day of November, 1845."

The complainant excepted to the report.

Because the Commissioner has erred in not charging the defendant with the present value of the land and slaves, the subject of suit.

The cause was heard on the report and exception, at June Sittings, 1852, before his Honor, Chancellor Johnston, who made the following order:

Johnston, Ch. On hearing the report of the Commissioner in this case, and argument on the exception, it is ordered, on motion of Boyce, complainant's solicitor, that the complainant's exception be sustained, and that the report be re-committed to the Commissioner with directions to re-state the account upon the principles of this order.

The defendant appealed, on the ground, that his Honor, the Chancellor, erred, in sustaining the exception to the report of the Commissioner.

The complainant also moved to modify the decree of his Honor, Chancellor Wardlaw, so as to declare the purchases of complainant's property, by defendant, void:

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"Because the defendant standing in a fiduciary relation to the complainant, his purchases, under the circumstances, were fraudulent and void.

Hammond, McCants, for defendant.

Boyce, for plaintiff.

The opinion of the Court was delivered by

DUNKIN, Ch. The object of this bill was to enjoin an execution which the defendant held against the complainant, and to set aside a purchase which the defendant had made of the complainant's property at sheriff's sales. The charge was, that the defendant was, at the time, the agent of the complainant, and that the property was sacrificed for half its value. The cause was first heard at July Term, 1851. The Chancellor, after reviewing all the facts, remarks, that "the case of the plaintiff was not very strong," but that purchases of this character should be scrutinized strictly; and concludes, by directing an account, in which the defendant should be charged, among other things, "with the true value of the land and slaves bought at sheriff's sale." Under this decree, the parties proceeded with their references, and, at July Term, 1852, the Commissioner submitted his report, stating, among other things, that the property purchased at sheriff's sale was a small tract of land and two negroes, one an old woman, and the other a boy, probably about two or three years of age, and that, after hearing the testimony, his judgment was, "that the land and two negroes were sold for their full and true value at the time." And that, on the accounting, the complainant was indebted to the defendant in the sum of three hundred and eighty dollars, with interest from 4th November, 1845. To this report the complainant excepted, because the Commissioner had erred in not charging the defendant with the present value of the land and slaves; and the exception was sustained.

It appears to this Court, that the Commissioner acted in strict conformity with the terms of the decree of July, 1851. If the complainant had been dissatisfied with the

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measure of justice *then awarded to him, he was at liberty to have had that decree revised. But he acted under the decree, and witnesses were examined before the Commissioner, to prove that the property was sold, at sheriff's sales, at less than its true value. On the preponderance of testimony, the Commissioner came to a different conclusion; and, on that issue, the complainant having failed, he seeks now to reform the decree of 1851, in which he had acquiesced, and under which he had acted, and thereby create

a new issue for another inquiry before the Commissioner. This Court is of opinion that the exception should have been overruled, and the report of the Commissioner confirmed; and it is now so ordered and decreed.

JOHNSTON, DARGAN and WARDLAW, CC., concurred.

Appeal sustained.

5 Rich. Eq. 150

D. REEVES and Others v. GEORGE H. TUCKER and Others.

(Columbia. Nov. and Dec. Term, 1852.)

[Equity ⚡340; *Executors and Administrators* ⚡506.]

When a testator or intestate has died in the possession of personal property, and that fact is alleged, after the usual form, in a bill for partition or account against the executor or administrator, the answer of the latter cannot be received as evidence in support of a title adverse to that of the testator or intestate:—the executor or administrator, asserting such claim, must proceed to support it by the same evidence as if he were the actor in the proceedings.

[Ed. Note.—Cited in *Barr v. Haseldon*, 10 Rich. Eq. 62; *Cloud v. Calhoun*, Id. 366.]

For other cases, see Equity, Cent. Dig. § 700; Dec. Dig. ⚡340; *Executors and Administrators*, Cent. Dig. § 2176; Dec. Dig. ⚡506.]

Before Dargan, Ch., at Barnwell, February, 1852.

Dargan, Ch. This is a bill for account and distribution of the estate of Joseph Tucker, deceased. The complainants are legatees. The defendant, George H. Tucker, is a legatee; he is also executor of the estate. The other defendants are legatees.

The present litigation relates entirely to

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three negroes, alleged *by the complainants to belong to the estate. The defendant, George H. Tucker, denies that they were the property of the testator, and sets up title in himself.

The negroes in dispute are Isaac, Sam, (sometimes called Dave,) and Bull, (sometimes called Lewis.) The defendant, George H. Tucker, omitted to include these negroes in his return as executor. The complainants in their bill mentioned this fact; alluded to the claim set up by the executor; and charged that the negroes were the property of the testator, and passed under the residuary clause of his will. The executor contends that his answer, denying the right of his testator to the negroes, and setting up a title, is evidence in his behalf to establish his claim. I think not. The negroes were on the plantation of the testator, in his employment, and under his control; and I do not think that there is any authority or reason for holding, that, under these circumstances, an executor should avail himself of his fiduci-

ary position and possession to seize upon a portion of the ostensible property of the testator, and retain the same in his own right; and, on a bill filed by the legatees, claiming such property as a portion of the estate, by his answer establish his own adverse claim. The answer, in the judgment of the Court, is inadmissible as evidence, and the case must rest upon other testimony.

The testimony conclusively shows that the negroes were in the possession of the testator at and before the time of his death, and were managed and employed as he managed and employed his other negro property. It is true that George H. Tucker lived with his father, and never lived separate from him. He lived, after he was grown, as an overseer or superintendent, and was his father's general agent in the management of his business. There is no proof that he had any special control or possession of these negroes that might be referred to the character of a proprietor. There is no proof, in fact, that he had any control or possession at all in reference to these negroes, more than he had of any ne-

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groes owned by Joseph Tucker. *The presumption of title is, therefore, with the latter, and the onus lies upon George H. Tucker to prove his claim.

In relation to the slaves Bull and Sam, I am strongly impressed that the evidence is entirely insufficient for any such purpose. As to Isaac, the case is different. George H. Tucker claimed him in his father's life time. The father admitted that Isaac belonged to George, and what is more, he said that George had bought him. And George H. Tucker, we may well suppose, as his father's overseer, had the means of purchasing one negro, but not, probably, in the short time he was thus employed, of purchasing three, in addition to the one (Larry) which, by some means, he had got before.

As to Bull and Sam, there is no proof that he ever set up a claim till after testator's death.

Only the Spring before, he paid taxes on but one negro, and, I suppose, made his return on oath, as by law required. Whether he meant to pay the tax for Isaac or Larry, I have no means of knowing. The fact is significant either way. It is certainly not calculated to produce the impression that he then owned four negroes.

The facts relied on to support the claim of defendant to Bull and Sam, are very inconclusive. They were purchased at the sale of the estate of old John Tucker. George H. Tucker bid them off, took the titles in his own name, executed the mortgage to secure the purchase money, and his name was first on the bond. But the testator was also an obligor on the bond. And it is in proof that he paid the cash instalment for the negroes, and for this purpose asked George H. Tucker

to lend him the money, which he did. It would have been a very idle ceremony, if George H. Tucker had purchased the negroes for himself, for his father to have borrowed of him the money to make the cash payment. There were very intimate business relations between the father and son. They very well understood each other; and as the negroes were transferable by delivery, it did not matter which of them took the titles.

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*And as an illustration of this, we have in evidence another business transaction of a similar character. Isaac, Will, and Peggy, were bid off by the testator, in person, at Moncrieff's estate sale, yet we find George H. Tucker, the first obligor on the bond, Joseph Tucker, the second, and A. Byrd, the third. Titles were also executed in this transaction for Isaac, Will, and Peggy, to George H. Tucker, who gave a mortgage of them to I. E. Robinson, the administrator of the estate, to secure the purchase money. Will and Peggy, though included in the bill of sale to George H. Tucker, were confessedly bought for Joseph Tucker, and were his property at his death. Will was given by Joseph Tucker's last will to George H. Tucker, and Peggy to Lewis Tucker, under which bequest they are now claimed. This transaction shows their mode of doing business, and shows what little force is to be given, to the fact that George H. Tucker received the bill of sale for Bull and Sam from the executor of John Tucker.

The conclusion is, that Isaac is the property of George H. Tucker, and Bull and Sam, of the estate of Joseph Tucker, deceased, and pass under the residuary clause of his last will and testament. And it is so ordered and decreed.

It is further ordered and decreed, that partition be made of the residuary estate of Joseph Tucker, including Bull and Sam, among the parties in interest, according to the provisions of said will.

It is further ordered and decreed, that the accounts of the executor, George H. Tucker, be referred to the Commissioner of this Court, and that he report thereon.

It is further ordered and decreed, that the parties have leave to apply, at the foot of this decree, for the necessary orders to carry the same into execution.

The defendant, George H. Tucker, appealed on the ground inter alia:

Because the answer of the said George H. Tucker, (which is in direct response to the allegations of the bill charging the said slaves to be the property of the said Joseph Tucker,)

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expressly *denies that the slaves, Bull and Sam, were at any time the property of the said Joseph Tucker; and claims that the

said slaves are the property of the said defendant; nor was said answer contradicted.

Hutson, Bellinger, for appellant.

Owens, contra.

The opinion of the Court was delivered by

DARGAN, Ch. The only comment which I deem necessary on the questions raised in this appeal, in addition to what has been said in the Circuit decree, will relate to the position assumed by the defendant, George H. Tucker, that his answer, denying the title of his testator to the negroes in controversy, should, under the circumstances of this case, be received as evidence of his own title to the said negroes. If the answer is admissible as evidence, I apprehend, that it must be received with the usual force of that kind of evidence, and must prevail, unless contradicted by the testimony of two witnesses, or of one and corroborating circumstances.

The facts are, that the testator died in possession of the negroes, the title to whom is involved in this litigation. He used and employed them as he did his other negroes, to the day of his death, without question, or claim on the part of the defendant, who now sets up an adverse right. On a bill filed by some of the legatees against the defendant, George H. Tucker, (who was both legatee and executor,) and against the other legatees, for a partition of the estate, the said executor, in his answer, denied that these two negroes were the property of his testator, and asserted a title in himself. The presiding Chancellor ruled, that the answer of the executor was not admissible as evidence, in support of his claim to the negroes. And this Court is of the opinion, that the Chancellor was right.

When a testator or intestate has died in the possession of personal property, and that fact is alleged after the usual form in a bill for partition or account, against the executor or administrator, the answer of the latter

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cannot be received as evidence, in *support of a title adverse to that of the testator, or intestate. But, the executor or administrator asserting such claim, must proceed to support it by the same evidence, as if he were the actor in the proceedings.

What was the particular form of the plaintiffs' allegations in this case, has not been satisfactorily shown. The brief sets forth only fragmentary portions of the pleadings. It is assumed, that the bill contained the usual statements of bills for partition and account, under the like circumstances.

The appeal is dismissed, and the Circuit decree affirmed.

JOHNSTON, DUNKIN, and WARDLAW, CC., concurred.

Appeal dismissed.

5 Rich. Eq. 155

ROBERT MOFFATT, Adm'r v. A. W. THOMSON.

(Columbia. Nov. and Dec. Term, 1852.)

[Partnership ⇨189.]

Where one partner dies insolvent, and is, at the time of his death, indebted, individually, to the surviving partner, individually, and the surviving partner afterwards collects funds of the partnership, he cannot apply the share of the deceased partner to the individual debt due to himself—such share must be paid to the representative of the deceased partner, to be applied to his debts, as directed by the Act of 1789.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 343; Dec. Dig. ⇨189.]

[Partnership ⇨245.]

A surviving partner is entitled to take and hold as survivor, for the purpose of administering the co-partnership estate, but after the effects have been reduced to money, and the debts of the co-partnership paid, the share of the deceased partner constitutes assets, and belongs to his representative.

[Ed. Note.—Cited in Wiesenfeld, Stern & Co. v. Byrd, 17 S. C. 114.

For other cases, see Partnership, Cent. Dig. §§ 514-518; Dec. Dig. ⇨245.]

[Partnership ⇨89.]

Though each partner has a lien upon the co-partnership effects for a debt due him by the co-partnership; yet, for a private debt, the survivor has no lien upon the share of the deceased partner.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 137; Dec. Dig. ⇨89.]

Before Wardlaw, Ch., at Union, June, 1851.

Wardlaw, Ch. This is a bill filed by the plaintiff, as administrator of Lewis Bowers, against the defendant, as surviving partner, for an account of the assets of the partner-

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ship of Thom*son & Bowers, as attorneys and solicitors. The partnership was formed in the beginning of the year 1841, and continued until October, 1844, when it was dissolved by the death of Bowers. There was no written agreement between the parties, as to the terms of the partnership; but, according to the proof, Thomson was to furnish the office and books, and defray the incidental expenses of the office; and the profits of the practice were to be divided between them in the proportion of one-third of the tax costs, and one-quarter of the counsel and other fees to Bowers, and the rest to Thomson. By contract between them, but not as an integral part of the partnership arrangement, Bowers was to board with Thomson, and be furnished with food, chamber, fuel, lights and washing, at the price then customary in the village of Union; and he did so board from January 13, 1841, until his death, being absent only two or three weeks; and he was charged, and the charge was proved to be moderate, at the rate of \$137 a year. No portion of this debt, except \$24 for washing, was paid by Bowers in his lifetime; nor was there ever an account stated between the

partners. Both, however, at various times, during the existence of the partnership, received sums of money on account of the partnership, and at Bowers's death, Thomson had thus received money, in excess of his share of the profits, sufficient, or nearly sufficient, to pay his demand for board, if he be entitled to make such application of what was then in his hands belonging to Bowers. In the answer of Thomson, it is stated that Bowers directed him to draw from the sheriff's office the fees due to him, Bowers, and therewith pay himself, Thomson. But this statement is not responsive to the allegations of the bill, and is not otherwise proved. The estate of Bowers is insufficient to pay the debts in full, and the administrator, in behalf of other creditors, insists that Thomson is entitled to retain, for his debt, ratably with other creditors, and no more. The Commissioner sustains the view of the administrator, and the matter comes before me on exceptions to the Commissioner's report.

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*As to the private debt of Bowers to Thomson, not connected with the partnership, Thomson seems to occupy the position of any other creditor of Bowers. For all sums received by him, as surviving partner, he must account to the administrator; and as to these, his equity, after the settlement of the partnership debts, if any, is not superior to that of any other creditor of Bowers individually. But Thomson, as any other creditor of Bowers, has the right to apply any sum received on account of Bowers, in Bowers' life time, to the extinguishment of the debt owed to him by Bowers. The balance of the indebtedness on one side or the other, at Bowers's death, is to be ascertained by collating the debts at that time, of each to the other, and subtracting the gross amount of the smaller from the larger debts of the parties, respectively. The state of indebtedness existing at the death of the intestate cannot be changed injuriously to the creditors of the intestate generally, by a subsequent contract, such as the purchase of a note of intestate, or receiving money from his debtor. These views result from the construction which has been given to our discount law, (*Mayhew v. Flake*, 2 N. & McC., 398; *Happoldt v. Jones*, Harp. 109,) and they might be deduced from the superior lien, and rights of a creditor in possession. I am of opinion that the defendant is entitled to set-off his debt, upon the intestate, against any liability he incurred, from receiving the money of the intestate in his life time, and the Commissioner is ordered to amend his report accordingly.

The frame of the bill in this case is imperfect; there is no allegation of the insolvency, or even the indebtedness of the estate of the intestate; and defendant might treat this suit as having all the incidents, and among

them the doctrine of discount, which would belong to a suit of Bowers against the present defendant. But I understand all objection, on this score, to be waived.

Other exceptions were filed; including slight mistakes, principally clerical, to the

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report, but these were not argued, and *seemed to be abandoned by counsel. These mistakes of fact should be corrected.

It is ordered and decreed that the Commissioner's report be re-committed for correction, according to the opinions herein expressed. Costs to be paid out of estate of intestate.

At June Sittings, 1852, the case again came up, on the report of the Commissioner, before his Honor, Chancellor Johnston, who made the following decree.

Johnston, Ch. On hearing the report of the Commissioner in this case, dated 5th June, 1852, and the exceptions filed by the defendant thereto: Ordered, that the exceptions be overruled, and that the Commissioner's report be confirmed, and become a decree of this Court.

The defendant appealed from both decrees, on the ground:

Because the defendant had a good and equitable right to retain for the debt due to him from his partner, as the case is not like that of an executor or administrator, whose rights are fixed by statute in this State, and our discount law applies to this case.

Jeter, for appellant.

Dawkins, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. The ground of appeal involves the inquiry, whether the surviving co-partner can set-off a private debt due to him by his deceased partner, against his share of assets collected since the dissolution of the co-partnership. The Chancellor has directed, that for any balance due the deceased at the dissolution, the survivor is entitled to discount; but that the rights of the parties were fixed at the death of the intestate, and cannot be varied by subsequent transactions. This general principle has been repeatedly recognized, and can scarcely be regarded as open for discussion. In the recent case of *Morton & Courtney v. Caldwell*,

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(3 Strob. Eq. 161.) the Court, in *commenting upon the statute of 1789, remark, that "while this statute abolishes preferences among creditors of equal rank, and virtually entitles each creditor, in case of deficient assets, to a claim on the estate of the deceased debtor, proportioned to his demand, it does not, in terms, settle any point of time, in reference to which the respective demands must be examined, in order to determine the relative proportion of assets liable to their payment." "But that still it is a fundamental idea in the statute—a disregard of which must ren-

der its due administration intolerably perplexing, if not impracticable—that the juncture, for the purpose of such a calculation, is the death of the debtor. It is then the remedy of the creditor ceases as to the person, and is restricted to the effects of the party indebted." So far is the principle carried, that, if a creditor afterwards receives 50 per cent of his debt from a third party, he is entitled to recover the balance from the assets of the intestate, according to the proportion assigned to his original debt. On the other hand, the amount of assets for distribution cannot be diminished by any subsequent arrangement, or management, of an unsatisfied creditor. Thus, in *Happoldt v. Jones*, Harp. 109, a debtor of the intestate attempted to set-off a note of the intestate to a third person, which had been transferred to the defendant since the intestate's decease. The Court say, "the Act expressly provides that no preference shall be given to creditors in equal degree. The debt due by the defendant, was assets. The effect of allowing the whole amount of the discount, is the payment of that entire demand, in exclusion of others, and is in direct opposition to the provisions of the Act."

At the death of the intestate, Bowers, he was indebted, individually, to the defendant, Thomson, individually, in a certain amount. For the balance, as it thus stood, the defendant was entitled to this proportion of the assets of the intestate. But in the course of the administration, it appeared that, subsequent to the death of the intestate, funds of the co-partnership of Thomson and Bowers had been collected, after the dissolution, by the surviving copartner. The position

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assumed, is, that *Thomson is entitled to appropriate the share of the intestate in these funds to the extinguishment, in full, of the debt due by the intestate, individually, to the defendant, individually. If the intestate's proportion of this fund constituted assets, the position is untenable, unless the defendant's condition, as surviving partner, gave him a preference over the other individual creditors of the intestate. Both will be considered. The principle is as old, at least, as the time of Lord Coke, that copartners constitute an exception to the rule as to the *jus accressendi* amongst joint tenants. Co. Litt. 182. a. Though they are joint tenants of all the partnership stock during their lives, there is no survivorship either at law or in equity. Story on Part. § 90. It follows that, upon the decease of one of several partners, his share of the stock and effects of the partnership, subject to the partnership debts, devolves to his personal representatives, who thereupon become, both at law and in equity, tenants in common with the surviving partner. Such is the doctrine of Kent, of Story, and indeed of

every elementary writer on the subject. But, as on the decease of one of the partners, the surviving partner stands chargeable with the whole of the partnership debts, he is authorized to take and hold as survivor, for the purpose of administering the co-partnership estate, until the effects are reduced to money, and the debts are paid. When this is done, the surviving partner shall be held to account with the representatives of the deceased, for his just share of the partnership funds. Collyer on Part. § 129. It is very difficult to make these principles more clear. On the death of one of the partners, his share in the concern constitutes assets, subject only to the charge of co-partnership debts. No other debt, except a debt due by the co-partnership, has any preference in relation to the share of the intestate in these funds. The lien which a partner has, is equally well settled and distinctly limited. Each has a specific lien on the partnership stock and effects for moneys advanced by him for the use of the co-partnership, beyond his proportion, and for moneys abstracted by his co-partner, from the co-partnership funds,

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beyond the amount of his share. In*deed, as declared by Lord Hardwicke, nothing can be considered as the share of a partner, but his proportion of the residue, after an account has been taken of what has been paid or advanced, by each partner, in the partnership transactions. The result is, that, according to acknowledged principles, upon the dissolution of a co-partnership by the death of one of the partners, the survivor has, as such, no rights, either in law or equity, except for the collection of co-partnership assets, and the payment of copartnership debts. That done, he is bound to pay to the representative of the deceased partner his share of the fund, which is liable for distribution among his creditors upon the principles prescribed by law. The partners are declared to have no specific lien except for the purpose of securing, or re-imbursing themselves, for advances made on account of the co-partnership. The survivor has no other lien over the share of his deceased partner. It is not pretended that the debt of the intestate was due to the firm or co-partnership. It was an individual transaction with the defendant. Assuming that the other co-partnership affairs were closed prior to the intestate's death, the case may be thus simplified. Suppose that, on the decease of the intestate, insolvent, he owed the defendant a private debt of one hundred and fifty dollars, and that in his possession the administrator found a note due to the co-partnership by a third person, of five hundred dollars. As he was bound by law to do, the administrator delivers this note to the defendant, the surviving partner, who collects the money, and

then insists on retaining one hundred and fifty dollars from the share of the intestate, in payment of the private debt due to him. If there be any reliance on the principles stated, the administrator had an equal right with the defendant, both in law and equity, to this fund. For convenience, as well as for other reasons before stated, the surviving partner is authorized to collect the note. That done, and the debts due by the co-partnership paid, he is bound, in the language of the authorities, to pay over to the legal representative of the deceased, his just share of the partnership funds. He has no lien upon it for his private debt. His lien,

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*by the authorities, is limited to advances for co-partnership purposes. Upon what principle then, or upon what authority, can he claim to appropriate the share of the intestate to the extinguishment of his private debt, and thus obtain a preference over other private creditors, and disturb the due course of administration? The authorities, from Lord Coke down, declare that the surviving co-partner and the representative of the deceased partner, are to be regarded as tenants in common of the co-partnership effects. If there were three negroes belonging to the firm, and the debts paid, could the defendant resist the claim of the administrator for partition on account of a private demand which he had against the intestate? Or, if there were a sale for partition, would his open account exclude the specialty creditors of the intestate? It is believed that no tenant in common, although in exclusive possession of the common property, has ever been sustained in such a pretension. Upon the whole, the Court is of opinion that the judgment of the Chancellor is sustained by established principles, and the appeal is dismissed.

DARGAN and WARDLAW, CC., concurred.

Appeal dismissed.

5 Rich. Eq. 162

JOHN McLURE v. ELIZABETH ASKEW,
Executrix, and Others.

(Columbia. Nov. and Dec. Term, 1852.)

[Witnesses ⇨ 107.]

Bill to subject legacies assented to, and land, sold under a power conferred by the will to raise a fund to satisfy pecuniary legacies, to plaintiff's debt against the testator: the executrix had retained sufficient assets to pay the debt, but had wasted them, and was insolvent; and some eight years before the bill was filed, the plaintiff had taken the note of the executrix in payment of the debt:—*Held*, that the executrix, who was a party defendant to the bill, was a competent witness for her co-defendants; and that plaintiff had no equity to subject the legacies and the land to his debt.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 265; Dec. Dig. ⇨ 107.]

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[Payment ⇨18.]

*A creditor of testator taking the note of the executrix for the debt, *held*, upon the evidence, to have taken it as payment and discharged the estate of the testator.

[Ed. Note.—Cited in *Adger & Co. v. Pringle*, 11 S. C. 548; *Ex parte Williams*, 17 S. C. 405.

For other cases, see *Payment*, Cent. Dig. § 78; Dec. Dig. ⇨18.]

[Executors and Administrators ⇨318.]

An executrix who has retained sufficient assets to pay debts and legacies, and has wasted them, cannot sustain a bill against the paid legatees to compel them to refund.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1319-1326, 1328-1331; Dec. Dig. ⇨318.]

[Executors and Administrators ⇨318.]

The principles upon which executors, and unsatisfied legatees, may sustain bills to compel satisfied legatees to refund, examined.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1322; Dec. Dig. ⇨318.]

[Wills ⇨832.]

The right of a creditor of the testator to follow legacies assented to, is a mere equity, and should not be enforced inequitably.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 2141; Dec. Dig. ⇨832.]

This cause was heard at Union, June, 1852, before Johnston, Ch., who made the following decree:

Johnston, Ch. From the pleadings, and the proof taken before the Commissioner, and the evidence taken at the hearing, and appearing on my notes, which fully disclose the case, I shall extract only so much as will serve to explain the judgment I am about to render.

This is a case in which a creditor seeks payment from the estate of his debtor, out of assets delivered over by the executors, and in the hands of the legatees.

The debtor in this case was the late Dr. Askew. At the time of his death, which happened the 18th of January, 1841, he was indebted to the plaintiff, McLure, as the bill states, by sealed note, dated about the 4th of March, 1840, in the sum of \$410.56¼, with interest from the 1st January, 1840, (subject to a credit of \$60, paid on it the 21st December, 1841,) and also in the further sum of \$26.26¼, upon open account.

Dr. Askew left a will, of which the defendants, Elizabeth Askew and W. T. Crenshaw, were executors.

Mrs. Askew, the executrix, who was the widow of Dr. Askew, on the 31st of December, 1842, took up the open account by her own note; and then, on the 22d of January, 1844, took up that note and the note of her testator, by giving the plaintiff her sealed note of that date, in her unofficial character, for \$474.54, payable at one day.

A number of judgments, dating from the 20th February, 1849, to some time in April,

1849, and amounting in all to near \$1300, was obtained against Mrs. Askew for her

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private debts; *under which her property was sold out by the sheriff for \$1120.36; leaving her insolvent for the balance of those judgments.

On the 24th of February, which was but a few days after the first of these judgments was obtained, McLure brought suit upon his note; but in 1851, his counsel dropped the proceeding, and returned the note to him; and on the 2d March, 1852, he filed this bill.

The bill alleges, and it is proved, that both the executrix and executor are insolvent; and, having no relief against them, the plaintiff contends that he has an equitable right to recover his demand against the estate of his original debtor, and to have satisfaction out of assets delivered to legatees under the will.

For the understanding of this matter, it is necessary to state some of the provisions of Dr. Askew's will.

He left, besides his widow, three sons, Henry S. D. Askew, James M. Askew, Wm. N. Askew, and four daughters, Charlotte, (wife of Henry Anderson,) Eunice, (wife of Newton Anderson,) Jemima, (wife of W. P. Anderson,) and Sarah, (wife of the defendant, W. T. Crenshaw.)

By his will, duly executed 20th of December, 1837, he directs, that, for payment of his debts, his executors should sell so much of his plantation stock as his wife might think she could conveniently spare—and if that should not suffice for the purpose, then that they should sell so much of his land as should be required.

He then devised "all his lands, remaining after the payment of his debts," to his wife—on her death to be sold, and the proceeds equally divided among his seven children.

He bequeathed her, for life, six negroes, Nathan, Abby, Scilla, Mary, Becky, and Maria, with the power to appoint any three of them, by will, at her pleasure, among his children; and such as she should not appoint, to be divided, with the increase, equally, between his two daughters, Charlotte and Jemima, and his son, Henry S. D. Askew.

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*He bequeathed, also, to his wife, absolutely, all his farming utensils, all his house and kitchen furniture and utensils, and so much of his plantation stock as she might not wish sold for the payment of his debts.

He bequeathed to his daughter, Jemima, absolutely, three negroes, Huldah, Evelin, and Manda; and \$200, to be paid on her marriage, or attaining majority; to be raised by a sale of land; with power to the executors to make the sale.

To his son, Henry S. D. Askew, he gave

two negroes, Matilda and David, absolutely; and \$200, to be paid at his majority; to be raised by sale of land, &c.

There are various other legacies to his children, not necessary to be noticed.

By a codicil executed the 14th of January, 1841, the testator, reciting the power he had given his executors, to sell lands for the payment of debts, declares, "as I have since sold the land thereby intended to be sold, I hereby revoke that clause in my said will." He makes some other alterations, not necessary to be stated.

All the legacies have been long ago assented to, and delivered—the last of them (except as I shall hereinafter state,) more than eight years ago—and the legatees, with the exception of Henry S. D. and James M. Askew, are without the State, and have no personal property in this jurisdiction.

It might have been stated, that, on the 8th of May, 1849, the executors, for the purpose of raising the \$200, payable to Jemima on her marriage, (which had taken place,) and the \$200 payable to Henry S. D. at his majority, (which occurred the 10th of January, 1847,) sold and conveyed to the said Henry S. D., and to Wm. P. Anderson, at the price of \$901.50, a small body of land, described in the pleadings.

The effort is to subject this land, and the negroes in the hands of these legatees, to the payment of the debt formerly held by the plaintiff against the testator.

The conveyance of the land might be suspected of being colorable; but there is no

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such charge in the bill. The ground *taken is, that the debt of the testator still equitably subsists against the land, irrespective of the fraudulency or fairness of the conveyance.

But the first question is, whether the plaintiff is a creditor of the testator, as he assumes in his bill. That he held demands against him at his death, is admitted. But these demands were surrendered to the executrix, upon the consideration that she should substitute her personal note for the amount. Whether this substituted note was a payment of the demands against the testator, depends, in my opinion, upon the intention of the parties. That is payment, which is intended as payment.

The evidence is, that "the estate was to be freed from debt, and the liability of the executrix substituted in place of that of the estate." "The plaintiff proposed to the executrix to take up the estate note, &c., and give her own individual note." "The executrix asked him, after she took them up, what she should do with them, and he said she might take them home, tear them up, burn them, or do what she pleased with them, and she tore the name off in his presence."

The estate, in my opinion, was, (according to this evidence,) intentionally discharg-

ed.(a) If the plaintiff has any equities upon the estate, they are not equities belonging to him as a creditor of the estate—he is simply a creditor of Mrs. Askew; and if she being executrix, has any equitable right to subject the assets in the hands of the legatees, the plaintiff may, perhaps, as her creditor, insist on that equitable right in her name.

Then, taking the executrix's right to be the measure of the plaintiff's, the inquiry is, could the executrix maintain this bill for the purposes indicated in it?

"It is the rule in Equity," says Mr. Roper, (1 Rop. Leg. 408, 2d Lon. edit., chap. 9. Abatement and refunding of legacies,) "to presume that where an executor pays over a legacy, he has possessed assets sufficient to

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pay all the legacies; and although *the fact may not be so, yet not to admit proof to the contrary. Therefore, in such cases, executors will be obliged to make up the deficiency out of their own money, as the Court will not permit them to institute suits against the legatees, whom they have voluntarily paid, to oblige them to refund."

It has been sometimes supposed, that a distinction obtains between legacies voluntarily paid or assented to by executors, and payments of legacies to which the executor is enforced in invitum by the judgment of a Court; and it has been suggested, that, in the latter case, the executor is better entitled than in the former to recoup, in case of insufficiency of assets to meet creditors or other legatees. To this point Mr. Roper quotes *Newman v. Barton*, *Grove v. Banson*, and *Hodges v. Waddington*, (Ib. 409.) I think, however, that this distinction must be doubtful. It would seem, upon principle, that the recovery against the executor, must be regarded as *res judicata* against him, and conclusive of every defence which it was in his power to set up in that suit; as certainly an insufficiency of assets,—if that were then known to him,—would have been. The more reasonable doctrine would seem to be that of *Nelthorpe v. Biscoe*, (1 Chan. Ca., 135,) where, without reference to any distinction between payments made voluntarily, or, in invitum, it was said, and admitted by the Court, that if executors pay away assets in legacies, and afterwards debts appear, and they be obliged to pay them, of which debts they had no notice before the legacies were paid, the executors, by a bill, might compel the legatees to refund.

When one legatee has been paid in full, while other legatees of equal grade remain unsatisfied, these latter legatees have, in general, no right to compel the former to abate or refund, but must go against the executor,

(a) Vide *Fraser v. Hext*, (2 Strob. Eq. 257;) *Dogan v. Ashbey*, (1 Rich. 36;) *Chastain v. Johnson*, (2 Bail. 574;) *Thornton v. Payne*, (5 Johns. R. 74;) *Douglas v. Fraser*, (2 McC. Eq. 106;) and *Wardlaw v. Gray*, (2 Hill. Eq. 644.)

unless it can be shown, that there was an original deficiency of assets to meet the legacies remaining unsatisfied. In that case, a refunding will be decreed, so as to put all the legatees upon their proper footing, in regard to the actual assets. But, if, at the time that one legatee was paid, the executor retained enough to pay the other, though the ex-

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ecutor wasted those latter funds, the unsatisfied legatees are not entitled to any thing from the paid legatee, who has obtained no more than his due. He is no surety for the executor's administration. And if, after he had received his own legacy, he had filed a bill to prevent the executor from wasting the residue in his hands, his bill would have been dismissed as impertinent; so that he has no power to regulate the after conduct of the executor in such a case, and should not be responsible for it.

Even upon this principle, between legatee and legatee, (if the executrix in the present case can claim its benefit,) she can have no claim against the legacies to which she has assented. It is in evidence that she retained enough to pay all demands against the estate; and if she has wasted what she thus retained, her own misconduct, in this respect, is the worst reason she could possibly urge for a decree against the legatees.

Then, again, in relation to the land conveyed, in order to raise the pecuniary legacies paid to the two younger children,—there was no deficiency of power under the will. If there was, it is for those entitled to the land, to make the complaint. The executrix could not disaffirm her own act, if she desired to do so.

It remains only to state that the plaintiff is, himself, perhaps, responsible for, at least, a large part of the debt, the payment of which he claims out of others.

The property given to the widow under the will, is charged with payment of debts. She was chargeable with the debts in respect to this property. Could she have claimed credit for the notes she took up against the other legatees?

At the sale of her property by the sheriff, including that given to her under the will, the plaintiff purchased several valuable parcels of it, at apparently under-value. He holds that property in the right of the widow; and if his debt were now chargeable to the estate, must not that property be first exhausted?

There still remains one other consideration. If the plaintiff were still entitled in Equity to be regarded as a creditor of the estate, after taking another security, the estate's assets became, *as to him, the secondary security, and he discharged it by his laches in regard to the primary security. After the executrix gave him her note, it is in evidence that she went to him three years

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in succession, and offered to sell property to him—and he replied, "oh, no; hold on, this is not a good time to sell property. Hold on, I will never distress you." His right to go against the legatees is a mere equity, and should not be enforced inequitably. (McMullin v. Brown) 2 Hill Eq. 162.)

It is ordered that the bill be dismissed.

The complainant appealed, upon the grounds:

1. Because the acceptance of the sealed note of the executrix, by the plaintiff, was no discharge of the estate of her testator, and was not intended to be so, the executrix never having charged the estate with the payment of the same.

2. Because the land conveyed to H. S. D. Askew and W. P. Anderson, should have been decreed liable to plaintiff's demand.

3. Because the negroes devised to the executrix should have been decreed liable to plaintiff's demand.

4. Because the Court should have decreed against the executor and executrix, so as to make any assets which might hereafter come into their hands, liable to the payment of plaintiff's demand.^(b)

5. Because the plaintiff was entitled to a reference to ascertain the fact whether, when the specific legacies were delivered over, the executrix retained sufficient assets to satisfy plaintiff's demand.

6. Because Elizabeth Askew was an incompetent witness.

Dawkins, for appellant.

Herndon, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. This Court has considered all the grounds of appeal, and is entire-

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ly satisfied with the decree: and it is *deemed unnecessary to add anything to the observations of the Chancellor, except upon the sixth ground, in respect to which he has said nothing in his decree.

If the plaintiff, upon the case made in the bill, and with the parties who were before the Court, had been entitled to a decree against the estate,—binding against Mrs. Askew, as executrix,—her interests, as between that liability and her liability on the note she had given to the plaintiff, would have been equally balanced. A satisfaction of either demand, would be a discharge of the other: and it was immaterial to her which of them she was made liable for.

The evidence she gave, to protect the legacies in the hands of the legatees from liability to pay her note to the plaintiff, or whatever demand he might have against her as executrix, was certainly evidence against her

(b) No such claim set up in the bill, nor made at the hearing. The bill alleged that all the assets were exhausted, except that delivered to the legatees.

interest; which was to discharge her own liabilities out of those legacies.

It is ordered, that the decree be affirmed, and the appeal dismissed.

DUNKIN, DARGAN and WARDLAW, CC., concurred.

Appeal dismissed.

5 Rich. Eq. 170

MATILDA POAG and Others v. C. P. SANDIFER, and Others.

(Columbia. Nov. and Dec. Term, 1852.)

[*Frauds, Statute of* ¶152.]

To a bill to enforce an agreement in relation to land, if the defendant deny the agreement in his answer, he need not plead the statute of frauds.

[Ed. Note.—Cited in *Hubbell v. Courtney*, 5 S. C. 90; *Groce v. Jenkins*, 28 S. C. 175, 5 S. E. 352; *Suber v. Richards*, 61 S. C. 398, 403, 39 S. E. 540.

For other cases, see *Frauds, Statute of*, Cent. Dig. § 371; Dec. Dig. ¶152.]

[*Frauds, Statute of* ¶129.]

The mere retention of a pre-existing possession, will not take a case out of the statute of frauds.

[Ed. Note.—Cited in *Boozar v. Teague*, 27 S. C. 357, 363, 3 S. E. 551; *Charles v. Byrd*, 29 S. C. 559, 8 S. E. 1; *McMillan v. McMillan*, 77 S. C. 515, 58 S. E. 431.

For other cases, see *Frauds, Statute of*, Cent. Dig. § 308; Dec. Dig. ¶129.]

This cause was first heard before Wardlaw, Ch., at York, June Sittings, 1851, who made the following decree:

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*Wardlaw, Ch. As I have formed the opinion that all proper parties are not before the Court, I shall state so much only of the case as involves that point.

In 1819, John Carroll obtained from the Catawba Indians, a lease for ninety-nine years, of a tract of land, including sixty acres the subject of this suit, within the Indian boundary of York District. He died in May, 1837, having devised this land to Minor Carroll. In 1841, Minor Carroll took a grant of the land from the State. He died intestate in May, 1844, and in 1845, this land was sold under proceedings in this Court for partition, and purchased by C. P. Sandifer, who has not yet paid the whole of the purchase money.

The claim of the plaintiffs is, that an undivided portion of the sixty acres of this land were held by John Carroll, from 1819 anterior to his lease under a parol trust for his sister Jane Gallagher. She died in May, 1832, leaving of force, a will, which contained no express mention of this land, whereof Joseph Carroll, since dead, was executor; and leaving as her next of kin, her children Matilda Poag, Martha Abshier and Esther Poag. The husband of Martha Abshier left this State about fourteen years ago, and has not been

heard of since. Esther Poag died in 1839, leaving a husband Jackson Poag, and two children, Dorcas and Mary J. The bill is filed by Matilda Poag, Jackson Poag, Dorcas Poag, and Mary J. Poag, as heirs at law of Jane Gallagher against C. P. Sandifer, the present owner of the land, and against the administrators and distributees of Minor Carroll, and prays that Sandifer be compelled to deliver up the sixty acres, and account for rents and profits, or that Sandifer, or the administrators of Minor Carroll, if they have sufficient assets in their hands, otherwise the distributees of Minor Carroll, account for the value of the land with rent or interest. Martha Abshier is not made a party, and it is alleged that she has released her interest to Matilda Poag.

The defendants deny the trust, and plead the statute of limitations; but, in limine, in-

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sist that Martha Abshier and the *personal representatives of Jane Gallagher and Esther Poag, are necessary parties to the suit. The determination of the question, whether any of these is a necessary party, may depend on the character of John Carroll's legal estate in the land, whether leasehold or freehold, at the death of Jane Gallagher, in 1832; and, perhaps, on that of his devisee afterwards. I mean their estate in the Indian lands under our legislation, for it is unnecessary to investigate whether the reversionary right was originally in the State or the Indians.

By the Act of 1739, 3 Stat. 525, all persons were inhibited from treating with the Indians for their lands, without a license from the Governor and Council, and all contracts with the Indians for their lands were declared void. In 1808, the Catawba Indians were empowered, under certain restrictions, to lease their lands for a term not exceeding three lives in being or ninety-nine years. (5 Stat. 576.) In 1812, some of the restrictions upon leasing were repealed, and it was further provided, "that a lease for three lives or ninety-nine years of the said Catawba lands shall be, and the same is hereby declared to be, a qualification equivalent to a freehold, in all cases where a freehold is not required by the Constitution of this State, or of the United States." (5 Stat. 678.) The Act of 1838, (6 Stat. 602,) invested on prescribed conditions, all the reversionary right and interest of the State in these lands in the lessees; and the Act of 1840, (11 Stat. 102,) authorized the lessees on certain terms to take out grants for these lands, and to hold them as other lands.

The title of John Carroll to the tract in question, from his lease in 1819 until his death in 1837, governed by the Acts of 1808 and 1812, was clearly enough a chattel interest, unless the latter Act converted it into a freehold; and it is argued that such is the effect of the Act. But the Act does not pro-

fess to change the nature of the estate of the lessees; it only makes a chattel interest equivalent to freehold for certain political purposes; it qualifies the lessees to sit as jurors on the trial of slaves, and to exercise

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other privileges limited by law to freeholders—perhaps to become members of our House of Representatives, under the constitutional requirement of “a real estate of the value of £150 sterling, clear of debt.” I am informed that these leaseholds, where grants have not been taken out under the Act of 1840, have always been regarded without dispute as passing to the personal representatives of deceased owners, for sale or other disposition. In *Payne v. Harris*, 3 Strob. Eq. 39, 42, where the nature of the estate in these Indian lands of an intestate, who died in 1841, was in question, the Court say: “Leasehold estates go to the executor, and are personal estate within the meaning of the Act of 1791, which intended to include under the term, whatever was to be administered by the personal representative of the deceased.” If the legal estate was a chattel real, any trust imposed upon it would follow its nature; and the beneficial interest of Jane Gallagher at her death in 1832, passed to her executor. This question is not formal merely, for on the term of the statute of limitations, and the effect of the acts and declarations of Jane Gallagher’s executor, both of which may seriously affect the rights of the parties, the decision may turn. It is urged, that as beneficiaries have the option to accept the subject in which trust funds have been invested by trustees, and as the land here has become freehold by the grant of 1841, the effect must be to change the character of the beneficiaries retroactively into heirs at law. But I cannot venture, without hearing the personal representative, thus to nullify intermediate Acts and establish new rights and liabilities by relation. I think that the personal representative of Jane Gallagher should be made a party.

Then as to the necessity of bringing the personal representative of Esther Poag before the Court. Many of the preceding observations apply to this question, but before her death the Act of 1838 came into operation. The reversionary right and interest of the State granted by that Act to the lessees, probably means the possibility of revert to the State upon the extinction of all the Indian possessors, and the right of the State to extinguish by treaty their usufructuary interest.

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*The grant cannot be construed to change the estate of the lessees into freehold, especially after the case of *Payne v. Harris*. Supposing, however, the beneficial interest of Esther Poag was of the nature of a chattel real, then, if Jackson Poag, her husband, reduced it into possession during the coverture,

he became entitled to it as a marital right, and is properly before the Court, although his children Dorcas and Mary J. are misjoined as plaintiffs. But it is not clear that he could reduce to possession such an equitable interest: nor does it appear that he either aliened this chattel or attempted to reduce it to possession during the coverture. It seems by the cross-examination of Martha Abshier, that he never lived upon the land. The personal representative of Esther Poag should be made a party. (1 Wins. Exors. 479.)

Then as to Martha Abshier. Any interest that she could release to Matilda Poag is probably an equitable interest, not transferable at law; and it is settled that the assignor must be a party to any suit by the assignee respecting the chose.—*Cathcart v. Lewis*, 1 Ves. jun., 463; *Walburn v. Ingilby*, 1 Myl. & K., 61. (6, Con. Eng. Ch. R., 498.) If her’s were a legal interest in a chattel real, it would seem that it was reduced to possession by her husband during coverture; and his representative would be a necessary party. But I am not prepared to decide that the interest was susceptible of reduction into possession. I have already waived prejudging the effect of the grant of 1841 on the estate of these claimants. My conclusion is, that Martha Abshier is a proper party—that the plaintiffs might use her as a witness, is suggested in the answer as the motive of omitting her as a party originally; and I may say, to avoid misconception, that the exclusion of her testimony does not necessarily follow from this decision.

It is ordered, that the plaintiffs, within a reasonable time, make Martha Abshier, and personal representatives of Jane Gallagher and Esther Poag, parties to this suit.

Afterwards, at June Sittings, 1852, the cause was heard before his Honor, Chancellor Johnston, who made the following decree:

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*Johnston, Ch. This cause relates to certain lands lying within the Indian boundary, in York district; and it may be proper, by way of introduction, to state the statutory law of the State relating to lands of this description. I am indebted to my brother Wardlaw, who has made a decision upon certain points in this cause, for the following summary of it:

By the Act of 1739, (3 Stat. 525,) all persons were inhibited from treating with the Indians for their lands without license from the Governor or Council, without which all contracts with the Indians for their lands were declared void.

In 1808, the Catawba Indians were empowered, under certain restrictions, to lease their lands for a term not exceeding three lives in being, or 99 years, (5 Stat. 576.)

In 1812, some of the restrictions upon leasing were repealed; and it was further pro-

vided that, "a lease for three lives, or 99 years, of the said Catawba lands, shall be, and the same is hereby declared to be, a qualification, equivalent to a freehold, in all cases where a freehold is not required by the constitution of this State, or of the United States." (5 Stat. 678.)

The Act of 1838, (6 Stat. 602,) vested, on prescribed conditions, all the reversionary right and interest of the State in these lands in the lessees.

And the Act of 1840, (11 Stat. 102,) authorized the lessees, on certain terms, to take out grants for these lands, and to hold them as other lands.

Thomas Carroll held a large body of lands of this description, on which he resided in 1819, and had resided from the beginning of the present century, and for some years previous. In June, of that year, (1819,) he authorized a survey to be made by one Kuykendal, for the division of his lands between his three sons, then living, to wit: John Carroll, Matthew Carroll and Joseph Carroll. At the time, John Gallagher, the husband of his daughter Jane, was residing, with his family, on this land.

The survey had been nearly completed when Gallagher interfered and set up a claim

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to some portion of the land intended to be divided. This led to a dispute, which was compromised, however, by including the residence of Gallagher, and the spot of ground cultivated by his family around his house, in the portion to be laid off to John Carroll.

The portion laid off to John Carroll, containing 524 acres, was platted by Kuykendal, the 1st of June, 1819; but the plat takes no notice of the possession of Gallagher, nor of any portion of the land or its boundaries, now alleged to have been intended for his wife within the limits of that plat.

Shortly after this division, the lease of Thomas, the father, was surrendered, and among others, John Carroll, on the 6th of June, 1819, took out a new lease to himself for the 524 acres allotted to him, and if not already in possession, he took possession of it.

Thomas, the father, died at some uncertain period afterwards.

Gallagher and his family remained on the land as before the division.

Gallagher died 6th March, 1825, but his wife and children continued on the land.

On the 8th of March, 1832, Jane Gallagher made her will, of which she appointed her brother, Joseph Carroll, one of the executors, who alone qualified and acted. This will was admitted to probate the 21st of the same month; so that she must have died between the 8th and 21st of March, 1832.

The will makes no express mention of lands; but, after disposing of a negro, Andy, her cooking utensils, a loom, a reel, two pairs of cards, two wheels and two beds, with their furniture, the testatrix proceeds thus:—"All

the balance of my property, consisting of my negro man, Jim, my cows, and many other pieces of property, I direct my executors, hereinafter named, to expose to public sale," &c.

Jane Gallagher left three daughters, Matilda, then the wife of Leander Poag, Martha and Esther. The three sisters, with Leander Poag, Matilda's husband, remained at the old spot on the land; Martha married one Alfred Abshier, and he came in with them, as did also Jackson Poag, who married Esther.

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*In 1834, Abshier gave his note to John Carroll for that year's rent of the premises in their occupancy. The next year he refused to give another note for rent, and John Carroll sued him for the possession. He defended himself, and in the plat of survey made for the trial of the case, (dated Oct. 6, 1834,) we have, for the first time, the spot located where the family of Jane Gallagher resided. It is laid down by dotted lines as "Abshier's farm—about twenty acres cleared and in crop." On the 15th of October, 1836, the action was tried, and John Carroll recovered; and under further proceedings in that case, Abshier and his co-occupants were dispossessed, and Carroll put in possession in their place. Abshier absconded 2d July, 1837, and has not been since heard from.

John Carroll died 6th May, 1837, having devised his lands to Minor Carroll, who came into possession. In 1841, Minor took a grant covering the whole 524 acres from the State. He died intestate, in possession, in May, 1844; and, in 1845, the whole body of land was sold for partition among his heirs, under proceedings in this Court, and bought by the defendant, Calvin P. Sandifer, who has not yet paid the whole purchase money.

Dudley Jones and one Thomas Carroll, jointly administered on Minor's estate, and are made defendants to this suit—as are also the heirs of Minor.

Matilda's husband, Leander Poag, having died, Abshier, the husband of Martha, having removed from the State, and being presumed to be dead—and Esther having died, leaving her husband, Jackson Poag, and two children, who are still infants:—an action was brought by the two sisters, Matilda and Martha, and by the distributees of Esther against Sandifer, the purchaser of the land, to recover possession. Their action was brought in February, Extra Term, 1851, of the Common Pleas for York; and resulted in a verdict for the defendant, Sandifer. Thereupon, the same parties, with the exception of Martha Abshier, who is made a defendant, filed this bill, the 17th of March, 1851. Ma-

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tilda Poag sues in her own right, and as administratrix de bonis non, cum testamento annexo, of her mother, Jane Gallagher, whose

executor, Joseph Carroll, is dead, and also, as administratrix of her deceased sister, Esther Poag. The defendants are Martha Abshier, Sandifer, and the administrators and heirs of Minor Carroll.

The bill, which is very vague, states that John Gallagher, shortly after his marriage with Jane Carroll, the daughter of Thomas Carroll, removed and settled upon a part of a certain tract of land then held by the said Thomas Carroll, under a lease from the Catawba Indians, lying, &c., "and having such shapes and boundaries as will appear by reference to plats of the same herewith filed, as exhibits A & B," (which, by the way, were never filed.) "That the said John Gallagher continued in the peaceable and undisturbed possession of said land, for a period of about twenty years, until his death, without the said Thomas having executed a lease therefor." "That Jane Gallagher, the widow of the said John, continued in possession of the said land until her death, in the year of our Lord, 1832; leaving your oratrix, Matilda Poag, Martha Abshier, and Esther Poag, her only surviving children. That the said Jane left a last will and testament," (referred to as an exhibit, but not exhibited.) "That one Joseph Carroll took upon himself the execution of the said will. That as executor of Jane Gallagher, he in no wise claimed or administered upon said land as a part of the estate of Jane Gallagher." "That on the day of June, in the year of our Lord, 1819, Thomas Carroll made a partition of his lands—and a tract leased by him to his son, Moses Carroll, who had died, leaving neither wife nor children. That upon that occasion, it was agreed by and between the said Thomas Carroll and his children, John Carroll, Matthew Carroll, Joseph Carroll, John and Jane Gallagher, that sixty acres of land, embracing the house where the said John Gallagher then lived," (no other description of its location or boundaries,) "should be run into the said John Carroll's share of land, for the use and benefit of the said Jane Gallagher and her children." "That no lease

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was executed for the share of *said Jane Gallagher and her children, in the partition of said land, but that the same was so run into the plat of the said John Carroll, in special trust and confidence that the said John should stand seized of the same for the sole use and benefit of the said Jane Gallagher and her children—in order that the share of the said Jane in the lands so partitioned, should not be subject to the control or debts of the said John Gallagher, who was thriftless in his habits and in insolvent circumstances." "That said John Carroll, from the time of the said partition until his death, acknowledged that sixty acres of land covered by his lease," (viz: one which he took from the Indians after the partition,) "and lying around the Gallagher house, of

right belonged to his sister Jane Gallagher, and her children—and that he was holding the same for their use and benefit."

The bill then proceeds to state the death of John Carroll, after having ousted Abshier and his companions; his devise to Minor Carroll; the grant taken out by Minor in 1841; his death; the purchase of his land by Sandifer, &c., as I have narrated them; and avers, that the administrators of Minor, have assets to compensate them for the value and rents of the sixty acres, which the plaintiffs claim; if not, that the residue, due by Sandifer on his purchase, should be subjected; and if insufficient, the heirs of Minor should answer out of so much of the proceeds of the sale, and assets of the estate of Minor, as they have received. The bill also states, that Martha Abshier has assigned her interest to Matilda Poag, her sister.

If the plaintiffs are entitled to the value of the land, I suppose an inquiry might be made into the assets and the balance due by Sandifer, &c., and a decree made accordingly.

But the statements of the bill which I have quoted, are denied by the answer generally. It is denied that Moses, the son of Thomas Carroll, who died before the division of 1819, ever had any lease from his father, or any other interest in any portion of his lands, than a permissive possession as tenant at will. It is denied that John Carroll ever agreed to hold the sixty acres in trust for Jane Gallagher and her children, although

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he agreed *to permit her to reside on his lands during her life; and the answer denies, that he, at any time, acknowledged the land to belong to her or her children, or that he held it in trust for her or them.

Now, if there is evidence to establish the agreement, it must be in writing, or the contract must be taken out of the statute of frauds by some circumstance, so as to let in parol proof of it.

The defendants have not pleaded the statute, but having denied the contract as stated, they objected, at the hearing, to the proof of it by parol.

In *Cozine v. Graham*, 2 Paige, 177, where the contract related to land, the Chancellor, upon an examination of cases in the Court of Chancery, observes: "The rule of pleading on this subject is well settled in the Court of Law; and I do not see why the principle of that rule is not equally applicable to this Court. It is there held, that the statute did not alter the form of pleading. That if an agreement or contract is stated in the declaration to have been made, it is not necessary to allege that it was in writing, as that will be presumed until the contrary appears. If the agreement is denied, the plaintiff must produce legal evidence of its existence, which can only be done by producing a written agreement, duly executed according to the provisions of the statute. If the agreement

is admitted by the pleadings, no evidence to prove its existence is necessary, and the Court never inquires whether it was in writing or not."

In the *Ontario Bank v. Root*, 3 Paige, 478, the principle affirmed in *Cozine v. Graham*, is referred to and approved. In this latter case, (*Bank v. Root*), the agreement fell under another head of the statute of frauds. It was an agreement to pay the debt of another; and was denied in the answer. The Chancellor says, "As the agreement was denied in the defendant's answer, it was not necessary for him to insist upon the statute as a bar. The complainant in such case must produce legal evidence of the existence of the agreement, which cannot be established by parol proof merely."

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*This appears to be a reasonable view of the subject. In this case, the bill states that no lease was executed for what the plaintiffs denominate "the share of Jane," in the division of 1819, which approaches very near to stating, that the agreement, stated to have been made in relation to her "share," was merely verbal. If that had been explicitly stated in the bill, the bill itself would have put the agreement within the statute, and the defendants need not have pleaded it. It is the function of a plea to bring to the view of the Court, independent facts not stated in the pleading of the other party; which facts are sufficient in law to bar the claim set up in that pleading. But if the other party himself states matter which is good ground of defence, he pleads against himself, and must submit to the bar which he himself establishes. There is no need to plead the bar in such a case. But it is possible, that though no lease was executed, a written agreement was made of the description stated. The defendants deny that any agreement of the kind was made, and call for the proof. No written agreement, as required by the statute, is produced, but in its place parol evidence is adduced. The defendants object to it, and the statute decides it generally insufficient. The statute must avail the defendants, unless a case is stated and proved, which in some way escapes its operation.

It has been urged, that the long possession of Jane and her family, under the "alleged" agreement, takes it out of the statute, being in the nature of a part execution of the contract: and so it would (possibly) if that possession had been taken under the agreement. A statute made for the suppression of fraud, shall not be perverted by construction so as to make it the instrument of fraud. If a party, by means of a verbal contract, induces another to take possession of lands, by which he would be liable as trespasser, unless the agreement was allowed and enforced, this would be a fraud; and the party guilty of it shall not shield himself under a statute in-

tended simply as a defence against injustice. But Jane's possession was not taken under the agreement alleged, but existed before, and

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it has been *often held, that the mere retention of a pre-existing possession does not take a case out of the statute.

But it is attempted to take the case out of the statute in another way. It is alleged that Moses, the deceased son of Thomas Carroll, held a lease from his father for part of the premises partitioned among the surviving sons in 1819, and that Moses having left neither wife nor issue, Jane was entitled to a "share" of his leasehold estate part of the lands to be divided. The intimation is, that the surviving brothers were allowed to throw her share into the lot of John, upon condition that he would hold it in trust for her benefit. This would, certainly, be sufficient, in two ways, if the facts existed. It would give a right of partition in Moses' portion of the lands; or it would operate as a consideration of the trust contract alleged in the bill; and John Carroll's being let into possession of the residue of the land, would be a sufficient part execution to bind him.

But the proof that Moses ever had such a right as is alleged, utterly failed. He was an occupant of part of the land in his life time. But that he ever had a lease or other title from his father, so as to constitute it his estate, does not appear; nor is the amount or boundaries of his supposed land ascertained. It rather appears to have been a permissive occupancy. The whole land divided belonged to the father, and he disposed of it, as his own, to his sons.

Were the statute not in the way, I think the evidence of the contract alleged, altogether too loose to make it the ground of a decree, under the circumstances of this case. The evidence is all in writing, and will verify my remark.

Were the evidence not only sufficient to take the case out of the statute of frauds, but so explicit as to be made the ground of a decree, there are other difficulties which I have felt, and which I will mention without concluding anything on them.

It is not a reasonable construction of anything testified to by any witness, to conclude that the import of John Carroll's engagement was, that he was to hold the land in trust entirely for his sister Jane, during her life,

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and then for her children, by way *of remainder, after her death; nor, (by the by) is that the way in which the bill states the contract. Such modes of verbal arrangement are too unusual, to render it reasonable to believe such was the case, in this instance. When contracts of that complexity are entered into, parties are disposed to put them in writing. It would be unsafe, (in contracts relating to land,) to infer from a conversation such as took place in 1819, distinct limi-

tations of such property. Witnesses are too liable to be mistaken, especially after the lapse of thirty years, to allow of this. The inherent evidence is better than the recollection of any witness in such a case. The intention plainly was to keep the land for Jane, she being the object of affection, and the mention of her children was not made with an intention to give them any title, but by way of indicating that their mother should have a shelter for them. Such is my inference from the testimony, so far as I think it credible.

Then, considering the land as Jane's. I am of opinion with my brother Wardlaw, that, as leasehold, it went to her executor, Joseph Carroll:—and he not claiming it, (as the bill says,) as part of her estate, was bound by the adverse holding of John Carroll and Minor Carroll.

John Gallagher, her husband, did not act in his life time to destroy her right by survivorship. The law, applicable to leasehold estate, is well stated by a good elementary writer, (Wms. on Ex'ors,) thus: "The law gives a qualified interest to the husband in the chattels real, of which the wife is, or may be, possessed during marriage; viz: an interest in his wife's right, with a power of divesting her property during the coverture. If, therefore, he so disposes of his wife's terms, or rather chattels real, by a complete act in his life time, her right by survivorship will be defeated. But if he leave them in statu quo, and the wife, be the survivor, she will be entitled to them to the exclusion of the executors or administrators of her husband." John Gallagher did not act to reduce his wife's leasehold into a right in himself; nor did he alienate it. It survived to her,

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*and according to *Payne v. Harris*, 3 Strob. Eq. 39, went to her executor; who was barred. The title was in him. It did not "descend, or come" to Jane's distributees; and the statute of 1824, saving the bar of the statute, where titles descend upon a number of persons, some of whom are infants, does not apply. The statute having begun to run against the executor, though it had not completed its bar in his life time, run on, and was not suspended in the interval between his death, and the grant of administration to Matilda Poag, his successor. I incline to the opinion, this is the law on this part of the case, though I do not think it necessary so to decide.

I return to the statute of frauds, and make that the foundation of my decree.

It is ordered that the bill be dismissed.

The complainants appealed from the decree of his Honor, Chancellor Johnston, and moved this Court to reverse the same on the grounds:

1. Because the defendants not having pleaded the statute of frauds, they are precluded from setting it up as a defence.

2. Because John Carroll having procured Jane Gallagher's share of Moses Carroll's land to be run into his plat, on his parol assurance to hold the same for her and her children, it would operate as a fraud, to permit him, or those claiming under him, to set up the statute of frauds as a bar.

3. Because the long possession of John Gallagher and family, under the parol partition of 1819, takes the trust contract out of the statute, inasmuch as the consideration of said contract was Jane Gallagher's share of her brother Moses' lands.

4. Because, under the circumstances, the complainants are entitled to have partition of the land in dispute, in right of Moses Carroll.

5. Because the trust contract is proved

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with sufficient certainty *to entitle complainants to have an account for the value of the land, and rents, and profits.

6. Because the statute of limitations does not apply, and there was no one against whom it could run; that in any event the infant complainants are not barred.

7. Because John Carroll at no time did any act declaring his intention to discharge himself of his trust, but on the contrary, after he dispossessed Absbier, admitted complainants' title to the land.

8. Because the grant covering the land was obtained by Minor Carroll, upon the lease of complainants, the beneficiary owners of the same, upon which alone he could have obtained it.

9. Because an executor is not to be deemed in possession of chattels real before entry.

Smith, for appellants.
Williams, contra.

PER CURIAM. This Court sees no reason to disturb the conclusion to which the Chancellor has come: and it is ordered that his decree be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and
WARDLAW, CC., concurring.
Decree affirmed.

CASES IN EQUITY.

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT CHARLESTON, SOUTH CAROLINA—JANUARY TERM, 1853.

CHANCELLORS PRESENT.

HON. JOB JOHNSTON.

" BENJ. F. DUNKIN.

" GEORGE W. DARGAN,

" F. H. WARBLAW.

5 Rich. Eq. *187

*ROBERT S. BAILEY, and Others, v. KER
BOYCE and Others.

(Charleston, Jan. Term, 1853.)

[*Executors and Administrators* ⇨391.]

The defendant concurred with his co-executor in acts, as (1) an agreement to sell, and (2) an answer in Equity concurring in the prayer of the purchaser's bill that the sale be confirmed, whereby the co-executor was enabled, without necessity, to sell the testator's land on credit: the debt was lost through the neglect of the co-executor to record a mortgage of the premises, given to secure the payment of the purchase money:—*Held*, that defendant was liable, to a devisee, for the loss; but not liable to another devisee, who was also executrix, and as a party to the purchaser's bill had also concurred in the prayer.

[*Ed. Note*.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1589; Dec. Dig. ⇨391.]

[*Infants* ⇨105.]

An infant not bound by a decree to which she was not regularly a party, may nevertheless affirm it and claim its benefit.

[*Ed. Note*.—For other cases, see *Infants*, Cent. Dig. § 302; Dec. Dig. ⇨105.]

[*Executors and Administrators* ⇨123.]

Where one executor concurs with a devastating co-executor in an act by which the latter gets possession of the funds wasted or lost, and

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which without such act of concurrence could not have happened, the consenting, though innocent, executor becomes responsible for him who has committed the waste or default.

[*Ed. Note*.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 496-530; Dec. Dig. ⇨123.]

[*Equity* ⇨319.]

Where an answer, neither signed nor sworn to by the defendant, is filed in his name, and

purports to be signed by his solicitor in his behalf, and the case proceeds to a hearing and judgment, such defendant is bound by the decree, unless he can shew that the solicitor who acted for him was not in truth authorized to do so.

[*Ed. Note*.—Cited in *Bulow v. Witte*, 3 S. C. 322; *Latimer v. Latimer*, 22 S. C. 263; *Sanders v. Price*, 56 S. C. 4, 33 S. E. 731; *McCullough v. Hicks*, 63 S. C. 547, 41 S. E. 761.

For other cases, see *Equity*, Cent. Dig. § 621; Dec. Dig. ⇨319.]

[*Judgment* ⇨492.]

Nor can such a decree be questioned, or treated as void, on a collateral issue: it must stand good until vacated on a proceeding instituted specifically for that purpose.

[*Ed. Note*.—For other cases, see *Judgment*, Cent. Dig. § 930; Dec. Dig. ⇨492.]

[*Attorney and Client* ⇨72.]

Evidence that the solicitor who signed defendant's answer—not signed or sworn to by defendant—had not been employed by him, reviewed and declared insufficient.

[*Ed. Note*.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 102-104; Dec. Dig. ⇨72.]

Before Dargan, Ch., at Charleston, June, 1852.

This case came up upon the report of Mr. Tupper, one of the Masters, and exception thereto. The report is as follows:

"The late George Henry appointed the defendants, Ker Boyce and John Magrath, the executors of his last will and testament, both of whom qualified. In January, 1847, the complainants filed their bill in this Court, praying, among other things, an account of the estate of the testator. In investigating the matters of account, which have been referred to me, a question has arisen as to the

liability of the defendant, Boyce, for a loss sustained by the estate of his testator, from the nonrecording of a mortgage taken to secure a debt due to the said estate.

"To the proper understanding of this question, the following statement is necessary:—George Henry, at the time of his death, which occurred in 1837, was seized of a lot of land on the south side of Market-street, in this city; in May of the year 1839, an agreement, in writing, was entered into between one Thomas D. Fell and the defendants, Ker Boyce and John Magrath, executors of the said George Henry, for the sale of the said lot to Fell for the sum of \$2700, on the following terms: one-fourth of the purchase money to be paid in cash, and the balance in a bond, payable with interest annually, in one, two and three years, secured by a mortgage of the premises. After the execution of this agreement, it was discovered that the executors had no authority to sell the said lot, which had been devised by their testator to his widow and his infant daughter,

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in equal proportions. For the purpose of securing a good title, Thomas D. Fell, on the 6th June, 1840, filed his bill in this Court, setting forth his agreement for the purchase of the said lot, the payment by him of the cash portion of the purchase price, and the execution of the bond and mortgage required by the terms of the said agreement, also the delivery to him of the possession of the said premises, the inability of the said executors to legally convey the said property, and praying the aid of this Court in perfecting his title to the same. To this bill, answers, admitting the allegations of the complainant and seeking a confirmation of the sale, were put in by the defendants, Ker Boyce and John Magrath, and also by William T. Woodward and Eliza, his wife, who was the widow of the said George Henry; and also by his infant daughter, Ann Henry, by her trustees, Ker Boyce and John Magrath. The answers are all signed by the solicitor of the defendants, but not by the parties themselves. On the 8th June, 1840, an order was made, referring the case to J. W. Gray, to examine into the facts and report thereon. In compliance with this order, the Commissioner reported that, 'George Henry, the testator, died seized and possessed of the said lot of land situate on the south side of Market-street, in the city of Charleston, which it is proposed to sell to Thomas D. Fell, the complainant, for \$2700. That by the provisions of the will of George Henry, his estate was to be equally divided between his wife and infant daughter; and in the event of his wife's marrying again, his executors, Ker Boyce and John Magrath were made trustees of his said daughter's share of the estate, part of which is the lot in question.'

"I find that Mrs. Henry has lately married

again, and the interest of her said daughter is placed under the trusts of the will. That Thomas D. Fell has agreed to become the purchaser of the said lot of land for the sum of two thousand seven hundred dollars, payable as follows: one-fourth cash, and the residue in a bond with interest payable annually, in one, two and three years from date, secured by a mortgage of the property; that as the executors have no power

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under the will to sell, *and as the infant daughter of George Henry cannot consent to the sale by reason of her minority, a good title cannot be made without the aid of this Court. I find that the property has been unproductive to the estate of Henry, since the great fire of April 1838, by which the buildings were consumed; and I have taken the testimony of a witness, who is well qualified to form a judgment of the value, and find that the price offered by Fell is a full and fair consideration, and I respectfully submit to your Honors that the said offer be accepted and the title made to the purchaser as desired.'

"Upon the coming in of this report, it was ordered, 'that it be confirmed, and that the Commissioner of this Court do make titles for the said lot of land to the said Thomas D. Fell, upon his complying with the terms of the contract, as set forth in the said report. The share of the infant, Ann Boyce Henry, to be held by the said executors under the trusts of the said will of the said testator, George Henry. And the costs and charges to be paid out of the estate of George Henry, deceased.'

"Subsequent to these proceedings, Thomas D. Fell mortgaged the said lot to the Bank of the State, to secure a loan negotiated by him under the Act for rebuilding the city of Charleston. Under this mortgage the lot was sold, and the proceeds applied to Fell's debt to the Bank. The mortgage made by Fell to secure the payment of his bond to the estate of Henry, for the purchase of this lot, has never been recorded, and still remains unsatisfied. Upon these facts the complainants in the cause now before the Court, rely to charge Mr. Boyce with the amount of principal and interest due upon the bond given by Fell, for the credit portion of the purchase of the lot in Market-street. On the other hand, it is contended on behalf of Mr. Boyce, that he had nothing to do with the bond and mortgage from Fell, or with the proceedings instituted by him, to perfect his title. That in no way was he connected with either the possession of, or the default in not recording the said mortgage, and the evidence adduced in support of these positions, is relied upon to discharge him from all liability

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or loss resulting to the estate by *reason of the said default. The testimony of Mr. Phillips, who represented Fell in the proceed-

ings in this cause, establishes the fact that Mr. Boyce was a party to the original agreement, between the executors of Henry and Fell, for the sale of this property. With this exception I have been unable to discover any thing to connect Mr. Boyce with this transaction. There is no proof that he knew of Fell's having complied with the terms of this agreement. Mr. Phillips says: that he never saw Boyce on the subject, all his conferences were with his co-executor, John Magrath. It is true, that the answer of the executors to the bill of Fell admits that he had complied with the terms of the agreement; but Boyce's name is not signed to the answer, and the testimony of A. G. Magrath, who represented the executors, justifies the conclusion that Boyce knew nothing of the proceedings in this Court. He deposes, that about this time Ker Boyce was very frequently absent from the city; that John Magrath appeared to be acting executor of the estate of Henry; that the bond and mortgage of Fell were in John Magrath's possession; and that he gave instructions as to the proceedings referred to. The evidence of Mr. Gray strengthens this opinion. He says: "I executed a title to Thomas D. Fell, of the lot of land in Market-street, on the 12th of June, 1840, upon satisfactory evidence being furnished me, that the terms of sale, as in the proceedings, had been complied with." The evidence referred to by Gray, is a certificate signed "John Magrath, executor of the estate of George Henry," in which he says: "I have sold Mr. T. D. Fell the lot in Market-street, &c." Mr. Gray further states, that the bond and mortgage executed by Fell were never in his possession; that no money was ever paid to him, except his costs, which were paid by A. G. Magrath. The fact that Boyce may have remained passive, and not obstructed his co-executor in receiving the credit proceeds of the sale of this property, will not, I conceive, make him answerable for any default on the part of Magrath, and there is nothing before me which shews that the possession of the latter of the securities belong-

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ing to the estate of Henry, was *the result of any act on the part of Boyce. The interest claimed by the complainants in the proceeds of the sale of this lot is derived through Ann Boyce Henry, the daughter of the testator, who was a minor at the time this property was sold by order of this Court. If it should appear that she was not, properly, a party to the proceedings under which this order was made, it may be that the complainants will find, in their present title to the land, a stronger reason than any here given, for the nonallowance of their claim."

On an exception to the report, his Honor made the following decree:

Dargan, Ch. This case was submitted without argument. It comes before me on report and exception. The Master's report, as to

the facts, is full and perspicuous, and no further statement is necessary.

The exception relates to the liability of the defendant, Ker Boyce, for a loss sustained by the estate of his testator, from the non-recording of a mortgage taken to secure a debt due to the estate.

The debt thus lost was for the proceeds of the sale of a lot of the testator, on the south side of Market-street, which was sold to one Thomas D. Fell by the defendants, Ker Boyce and John Magrath, as executors of George Henry, for \$2,700, to be paid in the manner specified in a written agreement executed by the said defendants. Fell executed a bond for the purchase money, and a mortgage of the premises to secure the payment of the purchase money. This was the mortgage, the non-registry of which, occasioned the loss to the estate. The mortgage was otherwise irregular; for its execution by Fell preceded any conveyance of title to him.

After the execution of the agreement to sell, by the executors, it was discovered that they had no authority to sell, the lot in question having been devised by the testator to his wife and daughter, in equal proportions. On the 6th June, 1840, Fell filed a bill in Equity, setting forth the agreement, the pay-

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ment *by him of the cash portion of the purchase money, and his giving a bond, and mortgage of the premises, to secure the payment of the balance; and prayed for a confirmation of the sale, and for the aid of the Court in perfecting his title. To this bill, the defendants, Boyce and Magrath, filed answers, admitting the allegations of the bill, and also concurring in the prayer of the bill for the confirmation of the sale, and that the complainants should have good titles. The widow, and infant daughter of the testator, were also made parties to the proceedings, and filed answers. The answer of the testator's infant daughter was put in by the trustee under the will, and was, therefore irregular. Whether she had a guardian ad litem does not appear.

The case was referred to Master J. W. Gray. On a favorable report from him, the Court confirmed the sale, and ordered titles to be made to Fell, by the Commissioner of the Court, on his complying with the terms of the contract, as set forth in the said report. Titles were executed, and delivered to Fell, in pursuance of this order; but no new mortgage was executed by him to the Commissioner, or to the executors; Fell having, prior to the filing of the bill, complied with all the terms of the sale as set forth in the agreement. The construction which I put upon the decree is, that it intended to confirm the sale, and perfect the title, and to leave the bond and mortgage in the hands of the executors, to be disposed of in conformity with the devises and trusts of the will.

Subsequent to these proceedings, Thomas

D. Fell mortgaged the said premises to the Bank of the State, to secure a loan negotiated by him under an Act for rebuilding the City of Charleston. Under this mortgage the lot has been sold, and the proceeds applied to the payment of the debt of Fell to the Bank. The mortgage to secure the debt due to the estate of George Henry, in consequence of its not being recorded, has been postponed to that in favor of the Bank. The debt due to the estate of Henry has never been paid, with the exception of the one-fourth of the purchase money received as the cash instal-

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ment. *Fell is insolvent. John Magrath is also insolvent. And the question is, whether Boyce is liable?

The defence of Boyce rests upon the assumption, that the money, (cash instalment,) the bond and the mortgage, went into the possession of his co-defendant, John Magrath; that the whole transaction was managed by him; and that the loss has resulted from his default alone. The evidence adduced to establish the state of facts thus assumed, is, to my mind, inconclusive. But admitting the facts, as above stated, to be true, there are still other facts, having an important bearing upon the question, which are also indisputably true. Boyce did, jointly with his co-executor, execute the contract of sale to Fell. The bond and mortgage were given jointly to the two executors, Boyce and Magrath. On the bill filed by Fell for a confirmation of the sale, and for the perfection of his title, they both filed answers, and both concurred in a prayer that the sale should be confirmed, and the title of the complainant should be perfected.

This is precisely the case of *Mathews v. Mathews*, McM. Eq. 410. In the latter case, the testator, George Mathews, devised the real estate in question to his five younger children. He appointed Mrs. Martha Ann Mathews his executrix, and William Savage Elliott his executor—of whom the latter alone proved the will, and acted in the execution of it. He sold the land to Edward Gamage, and afterwards filed a bill, in which Mrs. Mathews joined, for the confirmation of the sale. In pursuance of an order of the Court, the Master in Chancery executed titles to Gamage, received the purchase money, and paid it over to the executor, W. S. Elliott. On a bill filed by the devisees of the testator, George Mathews, against Mrs. Mathews, the executrix, for an account, it was decided, that she was accountable for the devastavit of her co-executor, (who was insolvent,) in regard to the fund arising from the sale of the real estate. This case is much stronger in favor of the party who did not receive the money, and who, personally, committed no devastavit, than the one now be-

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fore me for judgment. In *neither, was

there a necessity to sell for the payment of debts. And in both, the innocent executor concurred with the devastating executor in an act, by which the latter was enabled to get possession of the fund, and which, without such concurrence, he could not have done. Chancellor Harper, in his decree in the case cited, says "it is to be observed, that, as executors, they had nothing to do with the land. There does not appear to have been any necessity to sell for the payment of debts; and in procuring a sale of the land, they seem to have volunteered to act as trustees. And though it is said in the cases, that when a trustee joins in a receipt, or conveyance, by which his co-trustee is enabled to receive the money, he is not responsible, because it was necessary for him to join for conformity—yet, in this case, I think there was no necessity for her to join; there was no necessity for her to volunteer as trustee." The case of *Brice v. Stokes*, 11 Ves. 319, decided by Lord Eldon, and cited by Chancellor Harper, is an exceedingly strong one in support of his view of the subject.

In Toller's Law of Executors, it is laid down as a well settled rule, that "where, by an act done by one executor, any part of the estate comes to the hands of his co-executor, the former will be answerable for the latter, in the same manner as he would have been for a stranger whom he had enabled to receive it." Upon this rule the Court founded its decree in *Johnson v. Johnson*, 2 Hill, Eq. 289 [29 Am. Dec. 72]. See also the case of *Crosse v. Smith*, 7 East, 246.

The case of *Atcheson v. Robertson*, 3 Rich. Eq. 132 [55 Am. Dec. 634], was a case of personal estate where there was a testamentary authority to sell, and a necessity to sell for the payment of legacies, and where both the executors had equal authority. The act of one of them would have been as authoritative as the act of both. The receipt of one, in discharge of a debt due the estate, would have been good, even though the one giving the discharge on receiving the money, might not have been in possession of the note, or evidence of the debt. In that case, the two executors concurred in the sale of the person-

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al estate. They both signed *the account of sales returned to the Ordinary. They afterwards divided between them the notes which were given for the proceeds of the sale. One of them died insolvent, having committed a devastavit; and it was decided that the surviving executor was not accountable for the devastavit of his co-executor. But that case was clearly distinguished in the judgment of the Court from that of *Mathews v. Mathews*; and the latter intended to be left intact.

The exception is sustained. It is ordered and decreed, that Ker Boyce and John Magrath do jointly account for the sum of \$2,-

700. the proceeds of the sale of the lot of the testator, in Market-street; with interest thereon, to be calculated in the same manner as if the purchaser, Thomas D. Fell, had paid the purchase money according to the terms of the sale, expressed in the agreement. It is further ordered and decreed, that the account be referred back to Master Tupper, to be adjusted according to the principles of this decree.

Defendant, Boyce, appealed for the following reasons:

1. That the default or miscarriage by which the mortgage of Fell was lost, was not committed by him.

2. That he was not responsible for the other executor. If the other executor had received the money and lost it, this defendant would not have been bound. That the other executor received the bond, and lost it—and for the same reason, the defendant is not bound for the loss of the bond.

3. That the complainant, Eliza Britton, was as much a party to the proceedings in Equity, as this defendant, and defendant is not bound to indemnify her against the miscarriage of that suit.

4. That the only act which he did was innocent and lawful, for which he is not answerable at all, and much less for remote and consequential damages.

Petigru, Lesesne, for appellant, cited Hill on Trustees, 310; Attorney General v. Randall, 2 Eq. Ca. Abr. 742; Jacomb v. Harwood, 2 Ves. sen. 267; Leigh v. Barry, 3 Atk.

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583; *Shipbrook v. Hinchinbrook, 16 Ves. 477; Bacon v. Bacon, 5 Ves. 331; Lewin on Trustees, 241.

Brewster, contra, cited Wms. on Ex'ors., 1548; Underwood v. Stevens, 1 Merl. 712; Saddler v. Hobbes, 2 Bro. Ch. R. 97, note c, 98 note, Perkins' edit.; Chambers v. Minchin, 7 Ves. 186; Nelson v. Carrington, 4 Munf. 332; Hauser v. Shepman, 2 Ired. Ch. 594; Clark v. Clark, 8 Paige, 393; 2 Story Eq. § 1283, et seq.

The opinion of the Court was delivered by

DARGAN, Ch. It is very clear that the infant daughter of George Henry was not properly represented in the proceedings instituted by Thos. D. Fell, against the executors and devisees of the said George Henry, for the purpose of perfecting his title to the lot which had been previously sold to him by the executors. The infant devisee had no guardian ad litem; but an answer was filed in her name by the trustees appointed by the will. She would not be bound by the decree, for every formality requisite to bind an infant, by the judgment of the Court is wanting. Nevertheless, it is unquestionable that she may affirm the contract irregularly made in her behalf, and seek a recovery of the purchase money.

It is not denied, but that the legal propositions by which the defendant, Boyce, is made liable in the circuit decree, are correctly expounded. Nothing can be clearer upon the authorities, than the principle, that where one executor concurs with a devastating co-executor in an act by which the latter gets possession of the funds wasted or lost, and which without such act of concurrence could not have happened, the consenting, though innocent, executor becomes responsible for him who has committed the waste or default.

The law being thus clear, the only question open to discussion is one of fact. Did Boyce concur with his co-defendant, Magrath, in the sale and the judicial proceedings by which the testator's real estate, devised to his wife and infant daughter, was conveyed to Fell? If there be no such evidence, he

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must *be discharged; but if there be satisfactory evidence of such concurrence on his part, he must be held accountable.

In the first place, it is worthy of remark, that there was no necessity to sell this lot for the payment of the testator's debts. The personal assets in the hands of the executors were more than ample for this purpose. I do not perceive that it would help the case of the defendant, Boyce, if such necessity to sell had existed; though some of the cases seem to lay stress on this fact. Nor was there any necessity for a partition at that time. Neither of the two tenants in common was moving for a partition. It was, therefore, merely a voluntary and speculative sale, brought about by parties who had no interest or title in the property.

But the question, as I have said, is as to the concurrence of Boyce. The evidence on this point is, to my mind, irresistible. I will not comment upon it in detail, but will attempt merely to group together the principal facts. John Phillips, who was counsel for Fell in the proceedings in Equity, instituted for the purpose of perfecting Fell's title to the Market-street lot, says: "There was a written agreement between Thomas D. Fell and Ker Boyce, and John Magrath, for the sale of this property by the said executors to the said Fell. This agreement was submitted to witness by Fell, upon which he instituted the proceedings in Equity to obtain titles to said property." Mr. Phillips also says, that "there was a mortgage to John Magrath and Ker Boyce, as executors." It is hardly to be presumed, that Fell would have executed a mortgage of the lot, without first having obtained titles or some written agreement by which he thought the lot was assured to him.

On discovering that the executors had no power under the will to sell and convey the real estate, Fell filed his bill, as has before been stated. He made the executors and the testator's widow and infant daughter (who

were devisees) defendants. He charges in the bill, that the two executors had entered into an agreement to sell him the lot for the sum of \$2,700, to be paid in certain instalments. He asserts that they had let him into

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*the possession, in pursuance of the agreement. He prays that the Court would decree him a title, in conformity with the terms of the agreement. The two executors filed a joint answer: in which they admitted all the allegations of the complainant's bill, and concurred in the prayer thereof: that Fell should have his title perfected by a decree of the Court. Here it would seem, that there was evidence of Boyce's concurrence, which sophistry could not assail, nor scepticism doubt.

But the zeal and the ingenuity of counsel, has raised a question on this evidence. On an examination of the joint answer of Boyce and Magrath to the bill of Fell, which is of record, it appears that neither of them signed the answer; nor was the answer sworn to. It was signed "A. G. Magrath, defendant's solicitor." It is contended that this answer is no evidence of Boyce's concurrence, because there is no evidence that A. G. Magrath was his solicitor, or was authorized to sign an answer for him. The negative parol evidence, on this point, is very inconclusive. The validity of the objection must, therefore, rest upon the abstract proposition, that a defendant is not bound by a decree of the Court, unless his answer has been sworn to, or signed, or there be proof that the person who signed the answer for him was, in fact, his solicitor. It requires but little reflection to perceive, that the doctrine contended for, would be exceedingly dangerous, if admitted. It would render null many decrees, and subvert many titles. I think it has been a very general practice, in many parts of the State; and, perhaps, in no place more common, than in this city, to consider the answer as sufficient, if signed by the defendant's solicitor. If the answer was not sworn to, it, of course, could not be evidence for the defendant. And if the plaintiff desired a discovery from the defendant, he would except to the answer for this omission. It so happens, that in the very case I am now considering, there are several answers not sworn to, or signed by the defendants in person. I do not justify this loose and reprehensible practice, which, doubtless, leads to many evils and abuses. These, I can not now pause to notice. But what I

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would say, is this, *that where an answer has been filed in the name of a defendant, and purports to have been signed, by his solicitor, in his behalf, and the case proceeds to a hearing and judgment, such a defendant is bound by the decree, unless he can shew that the solicitor, who undertook to act for him in the premises, was, in truth,

not authorized to do so. Neither can such a decree be questioned, or treated as void on a collateral issue, but it must stand as the decree of the Court, until it is set aside and vacated, on a proceeding instituted specifically for that purpose. Every Court must be presumed, when it proceeds to deliver its judgment, to have adjudged the fact, that the parties to be affected by its judgment, were properly represented before it; and upon this presumption the decree must stand, until it is reversed by a competent jurisdiction. Chancellor Harper has considered this subject in *Winslow v. Barry*, and we suggest, that his opinion be reported in connection with this case.(a)

(a) The following is the opinion of Chancellor Harper, in the case of *WINSLOW v. BARRY*. HARPER, Ch. But, with respect to Mrs. Winslow, it is urged, that a married woman can not alienate her inheritance in any other manner than that pointed out by the Act of Assembly upon the subject. But there is no doubt that she may alienate it by the sanction and decree of a Court of Equity, and the decree made by the Court does sanction and confirm her conveyance, and settle the title of the parties. It is argued, as I understand it, that she ought not to be considered a party to that suit, because her answer does not appear to be signed or sworn to: and authority was quoted to shew that these are requisite. But this is a misconception. It is said, 4 *Bridg. Dig.* 26, Title, Answer VI., 122, referring to *Bunb. 251*,—that "a defendant ought to sign his answer, or for such default an injunction may be continued. But quære, whether if plaintiff takes an office copy of the answer it is not a waiver of that informality." It would seem from this that it is for the plaintiff's security that the signing is required. In *Barley v. Pearson*, 3 *Atk.* 439, it was moved to suppress an answer for want of being signed.—Upon a search for precedents it was certified, that there were precedents both ways; some signed and some not signed by the parties. In support of the motion was urged the difficulty of convicting for perjury, in case of a false answer. Lord Hardwicke acknowledged the difficulty, but refused to make the order, as there were precedents both ways. He said, however, that he would consider of some method of making the practice uniform in future. This was in 1746; accordingly in 1748, (2 *Atk.* 290,) he made an order reciting the difficulty, and directing in future all answers to be signed by the party. There is a similar rule in the Court of New York. *Blake's Ch.* 118. Now it might be well to enforce the order of Lord Hardwicke, by directing the officer not to file the answer until it is signed and sworn to; or by directing it, on motion, to be taken from the file during the pendency of the suit. But no one has conceived that this is ground, for vacating a decree once pronounced. As to the swearing, that is evidently a matter for the security of the plaintiff, which he may waive, if he will. But surely, it is not for the defendant, or those claiming under him, to take advantage of the informality of his own answer. If, in point of fact, Mrs. Winslow was not served with process, or apprised of the suit, and did not authorize the appearance by Counsel, it is possible that she, or her heirs, a majority of whom, by the by, are before the Court seeking to support the deed, might, by proper proceedings for the purpose, and by shewing

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those facts, set aside *the decree; if indeed she had not afterwards recognized the fact of her being a party to the suit, by the deed of separa-

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*Ker Boyce, therefore, in this case must be presumed to have been a proper party in *Fell v. Ex'ors of Henry*. And that Mr. Magrath was duly authorized by him, to represent him in the premises. This is a presumption well supported by the evidence of Mr. Magrath, who says, that he "was employed to represent the executors." He says further, that "he was employed in the usual way to represent these parties." The conclusion of the Court is, that Boyce's concurrence in the sale to Fell, has been sufficiently proved: and the further conclusion of the Court, as a matter of law, is, that he is liable for the neglect, or omission of his co-executor to record the mortgage, from which loss has accrued to the estate.

The Court is further of the opinion, that there is merit in the third ground of appeal of the defendant Boyce. Mrs. Eliza Henry (testator's widow, now Mrs. Britton,) was also an executrix of the will of George Henry. She was a party to the bill of Thomas D. Fell. She assented to and concurred in the sale. The very same principle which subjects Boyce to liability, ought to exempt him from liability to her for her part of the loss.

The judgment of this Court is, that the defendant, Boyce, is to account only for the moiety of the purchase money of the said lot, which belonged to Anna B. Bailey, the infant daughter of the testator, George Henry. And so much of the Circuit decree as orders an account for the moiety of the purchase money of said lot, that was due to the testator's widow (now, Mrs. Britton,) be reversed; it is ordered and decreed, that the

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*Circuit decree be so modified: that in all other respects it be affirmed, and the appeal be dismissed.

DUNKIN and WARDLAW, CC., concurred.

JOHNSTON, Ch., being connected with some of the parties, did not sit in the cause. Decree modified.

tion of 1825, reciting it, and by what is called her will. Or they might perhaps have a remedy against the counsel who signed without authority. But, undoubtedly, while the decree stands unreversed upon the record, I am bound to respect it. Such was the decision in *Cruger v. Daniel*. The presumption is, that all persons were regularly made parties, whose rights appear to be decreed upon as parties. Any other practice would plainly be pernicious and impracticable. I must then declare the rights of the parties established, according to the provisions of the deed.

Ex parte J. D. L. VANDERSMISSEN and LOUISA CATHARINA COLLETON, His Wife. In Eq. January, 1829: Decree Book 1827 to 1830.

Application to take answer from off file, because not signed or sworn to, comes too late after decree. It seems, that if the proceedings are acquiesced in, the defendant is bound. Before HARPER, Ch.

5 Rich. Eq. 202

BENJAMIN PERRY, Adm'r of Isaac P. Droze, v. BENJAMIN LOGAN and Others.

(Charleston. Jan. Term, 1853.)

[Descent and Distribution ⇨41.]

Under the statute of distributions, uncles and aunts of the half-blood are entitled as next of kin, in exclusion of first cousins of the whole blood.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 116; Dec. Dig. ⇨41.]

[Perpetuities ⇨4.]

Where a testator directs his real estate to be sold by his executors, and bequeaths "the proceeds," such "proceeds" being regarded in Equity, as personality, a limitation over, upon the death of the legatee, "leaving no lawful issue," is not too remote; and it makes no difference that the executors neglected to sell, and that the legatee occupied and enjoyed the land.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. § 30; Dec. Dig. ⇨4.]

[Conversion ⇨15.]

Wherever a testator directs his land to be converted into money, and, as money, to go to the objects of his bounty, the bequest is, in Equity, regarded as one of personality.

[Ed. Note.—Cited in *Farmer v. Spell*, 11 Rich. Eq. 543; *Farr v. Gilbreath*, 23 S. C. 513; *Colton v. Galbraith*, 35 S. C. 534, 14 S. E. 957; *Clarke v. Clarke*, 46 S. C. 242, 24 S. E. 202, 57 Am. St. Rep. 675; *Mattison v. Stone*, 90 S. C. 149, 72 S. E. 991.

For other cases, see Conversion, Cent. Dig. §§ 28-37, 52; Dec. Dig. ⇨15.]

[Executors and Administrators ⇨225.]

A claim for an account of rents and profits rejected as stale.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 789-800, 802, 803, 805; Dec. Dig. ⇨225.]

[Wills ⇨593.]

Testatrix, declaring that she had given Jane, one of her several legatees, less than the others, directs each of her other legatees to give Jane his or her bond for \$150, and charges their legacies, respectively, with the payment of that amount to Jane, in case bonds should not be given; after the death of testatrix the bonds were given:—*Held*, that the bonds were not subject to the provision of a codicil to the will, which directed that "whatever property" the testatrix had given three named legatees, Jane being one, should, in a certain event, go to others.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1307; Dec. Dig. ⇨593.]

[Wills ⇨594.]

Devise to three, and if all "shall die without lawful issue, and before they arrive at the age of twenty-one years," then over: all died without issue, two before arriving at age, and one after:—*Held*, that the limitation had failed—the double contingency on which it was to take effect not having happened.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1314; Dec. Dig. ⇨594.]

[Wills ⇨547.]

Request to seven residuary legatees "equally to be divided amongst them forever"; one having died before testator, *held*, that his share had lapsed and become intestate property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1179; Dec. Dig. ⇨547.]

[Wills ⇨602.]

Request to one absolutely, and should he "die leaving no lawful issue," then to four per-

sons, naming them, "to be equally divided be-

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tween" them: one of the four died *before the testator:—*Held*, that, as to the one-fourth which he would have been entitled to upon the happening of the contingency, had he survived the testator, the estate of the first taker was indefeasible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1351–1359; Dec. Dig. ⚡602.]

[Wills ⚡602.]

Where an estate is given to one absolutely in the first instance, and is made defeasible upon a contingency, on the happening of which it is to go over to a third person, if such limitation over cannot take effect, as, for instance, because of the death of such third person before the testator, the estate of the first taker is indefeasible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1357; Dec. Dig. ⚡602.]

This cause was heard at Colleton, extra sittings, July, 1852, before Dargan, Ch., who made the following decree:

Dargan, Ch. Isaac P. Droze departed this life in the month of October, A. D., 1850, intestate, and in the possession of real and personal estate. The complainant, Benjamin Perry, is his administrator. The intestate left an uncle of the half-blood, to wit, Benjamin S. Logan, residing in the State of Alabama; an aunt of the half-blood, viz., Martha M. Chipman, wife of Henry Chipman, residing in the State of Michigan; and various other relations claiming to be cousins german of the whole blood, who are named in the bill, and whose names it is unnecessary that I should particularly mention.

All these persons are parties to the bill; and their relationship, as therein stated, is admitted to be correct. The question between these parties is, whether the uncle and aunt of the half-blood are entitled to take in exclusion of cousins german, who are the children of the intestate's deceased uncles and aunts of the whole-blood.

Independent of any authority in the way of a judicial decision, I should have very little difficulty in coming to a conclusion upon this question. The case must, of course, be determined by the statute of distributions. It obviously falls under the 7th, 8th, and 9th sections of the first clause, which are as follows:

"7th. If the intestate shall leave no lineal descendant, father, mother, brother, or sister of the whole-blood, or their children—or brother, or sister of the half-blood, or lineal ancestor, then the widow shall take two-thirds of the estate, and the remainder shall descend to the next of kin.

"8th. If the intestate shall leave no widow,

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the provision *made for her, shall go, as the rest of the estate is directed to be distributed in the respective clauses, in which the widow is provided for.

"9th. In reckoning the degrees of kindred, the computation shall begin with the intestate,

and be continued up to the common ancestor, and thence down to the person claiming kindred, inclusively, each step inclusively being reckoned as one degree."

Now, the intestate, Isaac P. Droze, left no relations of the description mentioned in the seventh clause; and it follows, as a matter of course, that his estate must be distributed in the manner directed in the eighth and ninth clauses. In ascertaining who are the next of kin, the half-blood come in equally with the whole-blood. (2 Bl. Com. 215, 216; 2 Id. 504, 505; *Guerard v. Guerard*, 4 Des. 405, note.) The distinction between these two classes of heirs is dropped in reading the statute, as soon as we get through those cases which are specifically provided for. Having proceeded thus far, the rest follows. Adopting the statutory mode of computation, (which was that of the civil law,) the conclusion cannot be avoided, that an uncle or aunt, whether of the whole or half-blood, is one degree nearer to the intestate than a cousin german. And the surprise with me is, that a doubt should exist, after the principle was settled, that, as next of kin, the whole and half-blood should come in *pari passu*. But the question has been settled long since by judicial interpretation. *Karwon v. Lowndes*, 2 Des. 210. And, more recently, in *Edwards v. Barksdale*, 2 Hill, Eq. 416.

The Court is of the opinion that Benjamin S. Logan, the intestate's uncle of the half-blood, and Martha M. Chipman, the intestate's aunt of the half-blood, are entitled to the whole of the said intestate's real and personal property, equally to be divided between them. And it is so ordered and decreed.

And it is further ordered and decreed, that they have leave to apply, at the foot of this decree, for a writ of partition, and for all orders that may be necessary to carry this decree into effect.

Another question arises in this case. How

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much of the estate *of which the intestate Isaac P. Droze died seized and possessed, was he entitled to transmit to his next of kin, or heirs at law. It is admitted, that some portion of his estate was derived under the will of his grand-mother, Mary E. Droze. He thus derived the three negroes, Frank, William, and Maria, set forth in the inventory of the intestate's estate, and another negro, named Gabriel, who was sold by the intestate in his lifetime. The testatrix, Mary E. Droze, having given various legacies to her seven grand-children, in words which would convey an absolute estate; by a codicil thereto, and of the same date, she provided as follows:

"Should my grand-children, Isaac P. Droze, John L. Droze, and Jane L. Droze, die leaving no lawful issue, it is my will, that whatever property I have given them,

be equally divided between my grand-children, Josiah Perry, Benjamin Perry, Mary E. Waring, and Eliza E. Bass, to them and their heirs forever."(*a*).

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*The controversy relates both to personal and to real estate. In the judgment of the Court, the words of the codicil, in reference to the personal property, are sufficient to create, and do create, a good limitation over to the Perrys, on the happening of the contingency upon which it was made to depend. The word "leaving" qualified the generality of the word "issue," and makes the limitation to depend upon the first taker dying without issue living at his death.

(*a*) The following are copies of the will and codicil of Mary E. Droze. They both bore date March 22, 1824:

I, Mary E. Droze, of the Parish of St. George, in the State aforesaid, being of sound and disposing mind, memory, and understanding, do make my last will and testament, as follows: I give and bequeath unto my grand-daughter, Mary E. Waring, the wife of Joseph Ioor Waring, the following negro slaves, to wit: Peggy, Rachel, Sibby, Ben, Toby, and Charlotte, together with the future issue, and increase of the females, from the date of this, my will, forever, her executors, administrators and assigns forever. I also give to my said grand-daughter, forever, my draught horse, called Diamond. Also, I give and bequeath the following slaves, to wit: Maria, Andrew, Cinderella, Edward, Amelia, and Priscilla, to my grand-daughter, Eliza E. Bass, wife of Thomas E. Bass, for and during her natural life, for her sole and separate use; and from and after her death I give and bequeath the said last mentioned slaves to such child or children, as my said grand-daughter, Eliza E. Bass, shall have living at the time of her death, (the lawfully begotten issue, however, of any deceased child or children shall take the slaves that his, her, or their parent or parents would be entitled to, if living at the time of the death of the said Eliza E. Bass,) to them, their executors, administrators, and assigns. It is also my will, that the future issue and increase of the said slaves bequeathed to my said granddaughter, Eliza E. Bass, from the date of this, my will, shall be included in the said bequest, to her and her children. Also, I give and bequeath all my household furniture to my said two grand-daughters, Mary E. Waring and Eliza E. Bass, to be equally divided between them, forever. Also, I give and bequeath unto my great-grand-daughter, Mary E. Perry, daughter of my grand-son, Josiah Perry, all my stock of cattle, forever. Also, I give and bequeath unto my grand-son, Josiah Perry, his executors, administrators, and assigns, forever, my waiting-man, Peter, my driver, Ned, and Moses, son of Priscilla. Also, I give and bequeath to my grand-son, Benjamin Perry, his executors, administrators, and assigns, forever, the following negroes, to wit: Sam, Cain, and Delia, with her future issue and increase, from the date of this, my will. Also, I give and bequeath to my grand-son, Isaac P. Droze, his executors, administrators, and assigns, forever, my negroes Frank, Dick, and Hannah, with her future issue and increase from the date of this, my will. Also, I give and bequeath to my grand-son, John L. Droze, my negroes Gabriel, Hayne, and Clarissa, with their future issue and

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*increase, from the date of this, my will, to him, his executors, administrators and assigns, forever. Also I give and bequeath unto my grand-daughter, Jane L. Droze, Binah, Hagar's daugh-

John L. Droze and Jane L. Droze each pre-deceased Isaac P. Droze, leaving no issue. On the death of Jane intestate, her brothers John and Isaac, who survived her, being the only persons interested, divided the estate between them without an administration.

On the death of John, his brother Isaac, his sole heir at law and distributee, took possession of all his estate without an administration. Thus all the property derived by the Drozes from the estate of Mary E. Droze, centered in the possession of the complainant's intestate, Isaac P. Droze. And the contingency having happened upon which

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it was to go over to the *Perry family, the administrator must deliver to the remaindermen such of the property as is in esse, and must account for such portion thereof as is destroyed, or is not forthcoming. I mean the personal estate; for I give a different construction to the will as to the real estate. I am also of the opinion, that all the personal property which passed to the Drozes under the residuary clause of Mary E. Droze's will, including their share of the lapsed legacy to Josiah Perry, is subject to the limitation, in favor of the Perrys, created by the codicil. And the same having been paid over to Isaac P. Droze by J. J. Waring, the executor of Mary E. Droze, (John

ter, to her, her executors, administrators, and assigns, forever. In consequence of my having given to my said grand-daughter, Jane L. Droze, but one negro, I will and direct that my said grand-children, Josiah Perry, Benjamin Perry, Mary E. Waring, Eliza E. Bass, Isaac P. Droze, and John L. Droze, do give unto my executors, hereinafter named, their several and respective bonds, with good security, conditioned for the payment of the sum of one hundred and fifty dollars, with interest from the day of my death, which said bonds shall severally and respectively be made payable to the said Jane L. Droze, on her attaining the age of eighteen years, or day of marriage. And I do hereby charge the several and respective legacies bequeathed to my said grand-children, Josiah Perry, Benjamin Perry, Mary E. Waring, Eliza E. Bass, Isaac P. Droze, and John L. Droze with the payment of the said sum of one hundred and fifty dollars each, with interest as aforesaid, in case from any reason such bond and security shall not be given. Also, I will and direct that my said seven grand-children shall pay each an equal proportion of the debts that I may owe at the time of my decease.

All the rest, residue and remainder of my estate, real and personal, I direct to be sold and disposed of by my executors, as soon as possible after my death; and the proceeds I give and bequeath to my said seven grand-children, equally to be divided amongst them forever.

Lastly, I nominate and appoint my grandson, Josiah Perry and the said Joseph Ioor Waring, executors of this, my last will and testament, hereby revoking all other and former wills by me, at any time heretofore made.

Codicil.—Should my grand-children, Isaac P. Droze, John L. Droze and Jane L. Droze die, leaving no lawful issue, it is my will, that whatever property I have given them, be equally divided between my grand-children, Josiah Perry, Benjamin Perry, Mary E. Waring, and Eliza E. Bass, to them and their heirs forever.

and Jane Droze having died before they received their legacies,) the estate of the said Isaac P. Droze must account for the property so received by him. And it is so ordered and decreed.

And it is further ordered and decreed, that the slaves and their issue, and the other chattels now in existence, that Isaac P. Droze, John L. Droze, and Jane L. Droze derived under the specific legacies given to them by the will of Mary E. Droze, as also all the slaves and chattels now in existence, which they derived under the residuary clause of the said will, be delivered up by Benjamin Perry, the administrator of Isaac P. Droze, to be equally divided among Eliza E. Bass, Benjamin Perry, (the complainant,) and J. J. Waring, the administrator, and E. Waring. It is further ordered and decreed, that the administrator of the said Isaac P. Droze do account to the persons last named, (himself among the number,) for the value of the negro Gabriel, sold by the said Isaac P. Droze in his life time; the value of Gabriel to be estimated at the death of the said Isaac P. Droze; and for the interest, on the estimated value of Gabriel, from the death of the said Isaac P. Droze. And that the said administrator do, in like manner, account for the value of any other negro of the stock which Isaac P. Droze derived from the estate of Mary E. Droze, which he may have sold; and that he do, in like manner, account for any moneys, or choses in action, which Isaac P. Droze may have received from the estate of Mary E. Droze,

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under the residuary clause of her *will; and that he account for the hire of the negroes subject to the limitation of the will, from the first day of January next, after the death of the said Isaac P. Droze, namely, from the 1st January, 1851.

I must now direct my attention to other questions raised in the pleading. One of the tracts of land in the possession of Isaac P. Droze at his death, namely: "the settlement place, containing 714 acres," more particularly described in the bill, was derived under the residuary clause of Mary E. Droze's will; and it is contended, that this property also, now passes to the Perrys, under the limitation of the codicil. A limitation over, if the first taker should die without leaving issue, or leaving no issue, has a different construction, and is valid or invalid according as it may relate to personal or real estate. Where real estate is the subject of the limitation, it is construed to be after an indefinite failure of issue, and fails for remoteness. The word "leaving," in such a case, is not restrictive. *Forth v. Chapman*, 1 P. Wms. 665; *Mazyck v. Vanderhorst*, Bail. Eq. 48. It is the opinion of the Court, that the limitation fails as to the real estate, and that the tract of land in question, was the absolute estate of Isaac P. Droze, and descendz

to his heirs at law. And it is so ordered and decreed.

A further question arises under the following circumstances. In the will of Mary E. Droze is a clause in these words: "In consequence of my having given my granddaughter, Jane L. Droze, but one negro, I will and direct that my said grand-children, Josiah Perry, Benjamin Perry, Mary E. Waring, Eliza E. Bass, Isaac P. Droze, and John L. Droze, do give to my executors herein-after named, their several and respective bonds, with good security, conditioned for the payment of the sum of one hundred and fifty dollars, with interest from the day of my death; which said bonds shall severally and respectively be made payable to the said Jane L. Droze, on her attaining the age of eighteen years, or day of marriage. And I do hereby charge the several and respective legacies bequeathed to my said grand-children, Josiah Perry, Benjamin Per-

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ry, Mary E. Waring, *Eliza E. Bass, Isaac P. Droze, and John L. Droze, with the payment of the said sum of one hundred and fifty dollars each, with interest as aforesaid, in case, from any reason, such bond and security shall not be given." Josiah Perry pre-deceased the testatrix. His legacy lapsed and was distributed under the residuary clause. John L. Droze and Jane L. Droze both died before the settlement of the estate of Mary E. Droze, and before this part of the will was carried into execution. The rights of Jane, and the obligations of John and of Isaac, were thus all combined in the person of the latter. There remained, the obligations imposed by the will upon Benjamin Perry, Mary E. Waring, and Eliza E. Bass, to be carried into effect. The executor, J. J. Waring, took the bond of Benjamin Perry for \$150; as also that of Eliza E. Bass for the like sum, according to the direction of the will, and delivered them to Isaac P. Droze as the sole distributee of John and Jane, on his attaining the age of twenty-one years; and in like manner, and at the same time, delivered his own bond to Isaac P. Droze for \$150, on account of the charge created by the will upon the legacy given to his wife, Mary E. Waring. These three bonds have been satisfied, by payments made to Isaac P. Droze in his life time. And as the testatrix in the codicil desires, that should her grand-children, John, Jane, and Isaac Droze, die leaving no issue, whatever property she had given them, should be equally divided between her grand-children, Josiah Perry, &c., it is contended, that the amounts paid upon these three bonds fall within the same category as the other property given to the Droze family, and are in like manner subject to the limitation of the will. I confess, that my mind has wavered on this question. I have had difficulties. I, at first, had a

strong conviction, that the proceeds of these bonds were not subject to the limitation of the will; subsequent reflection has shaken the strength of this conviction. I am still inclined, though doubtingly, to my original opinion. The proceeds of these bonds constituted no part of the estate of the testatrix. It was over and beyond the total aggregate of her estate; all of which she had

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disposed of by the specific, *and residuary clauses of her will. And I am impressed, that the testatrix intended only to limit "all the property which she had given" out of her own estate, and not the sums, which, for the purpose of equalizing the deficiency of the legacy to Jane L. Droze, she had charged upon the legacies of all her other legatees. It is the opinion of the Court, that the proceeds of these bonds do not pass under the limitation created by the codicil of the will. And it is so ordered and decreed.

One further question remains. A considerable portion of the property of which Isaac P. Droze died seized and possessed was derived under the will of his father, Hugh Droze. This testator, speaking in his will, after various dispositions of his property in favor of his three children, John, Jane, and Isaac Droze, declares as follows: "Provided either of my children shall die, before he or she shall arrive at the age of twenty-one years, and without lawful issue, then, his or her share shall go to the survivor or survivors, in equal proportions; but provided all my said children shall die without lawful issue, and before they arrive at the age of twenty-one years, I give and devise the same lands and tenements to Josiah Perry, Mary Elizabeth Waring, Benjamin Perry, and Elizabeth Esther Perry, the children of Isaac and Eliza Perry, deceased;" and in a subsequent part of the will, speaking of the personal property, with language slightly variant, he declares as follows: "Provided either of my said children shall die without lawful issue, or before he or she shall attain the age of twenty-one years, then, his or her portion shall be equally divided between those who shall reach the age of twenty-one years; but provided either of my said children shall die before the age of twenty-one years, leaving lawful issue, then the share of such deceased child shall go to his or her issue equally, when they shall attain the age of twenty-one; the increase, in the mean time, to be devoted to their maintenance and education. But, if all my said children should die without issue, and under the age of twenty-one years, then the whole of my personal estate shall go to Josiah Perry, Mary Elizabeth Waring, Ben-

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jamin Perry, and Eliza *Esther Perry, the children of Isaac and Eliza Perry, deceased, their executors, administrators, and assigns."

The children of Hugh Droze have all died

without issue. Two of them, John and Jane, died under the age of twenty-one years; but Isaac, the survivor, lived some time after he attained that age. It is, notwithstanding, claimed on the part of Benjamin Perry, Mrs. Bass, and the representatives of Mrs. Waring, that the limitation now takes effect in their favor. The contingencies upon which these parties were to take, was a double one. Not only were all the children of the testator to die without issue, but they were all to die under the age of twenty-one years, before the limitation in favor of the present claimants could take effect. The estate which the children of the testator took under the will, was a fee, defeasible upon a complicated condition: all of which has not happened. It has been urged in the argument, that the word "and," should be construed "or," with the view, it is said, of carrying into effect the intention of the testator. There is no doubt of the propriety of this kind of construction, in cases calling for it. It is to be remarked, however, that the disjunctive conjunction is more frequently construed into copulative, than the converse. The Court should certainly be cautious in altering, by construction, the language of a will, where the effect would be to cut down an estate previously given. This mode of interpreting wills is a very delicate exercise of jurisdiction, and should only be resorted to for the purpose of carrying into effect the manifest intention of the testator—such manifest intention being made clear by a strong explanatory context. I see nothing in this will, to justify a resort to this mode of construction; nothing to shew that the intention of the testator, or the general scheme of his will, was different from that which the plain sense of the words employed would import. It is my opinion, therefore, that the condition on which the limitation was to take effect, has not happened; and that the property which Isaac P. Droze derived from the estate of his father, Hugh Droze, is the absolute estate of the said Isaac P. Droze, and is sub-

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ject to partition among *his heirs at law, and distributees herein before declared. And it is so ordered. And it is further ordered and decreed, that the costs of suit be paid out of the assets of the estate of Isaac P. Droze.

The remainder-men under the will and codicil, appealed on the grounds

1. Because, his Honor erred in decreeing, that the proceeds of the bonds, directed by the will of Mary E. Droze, to be given by her legatees to Jane Droze, and which were paid to Isaac P. Droze, did not pass under the limitation, created by the codicil to her will.

2. Because, if the will is not an equitable conversion of the land into money, then it is respectfully submitted, that his Honor erred in decreeing, that the limitation of the will and codicil of Mary E. Droze, as to the real estate, fails, and that the same became the absolute estate of Isaac P. Droze.

3. Because, by the residuary clause of Mary E. Droze's will, her executors are directed to sell her lands, as soon after her death as possible, and the proceeds of the sale are bequeathed to her grand children, which is an equitable conversion of the said lands into money, and therefore, it is submitted, that his Honor erred in decreeing, that the said lands became the absolute property of the said Isaac P. Droze, by reason of the remoteness of the limitation over.

4. Because, the lands of the testatrix being converted by her will into money, will pass, with the rest of her personal estate, as personality, under the limitation in the codicil to her will, to the persons to whom she has bequeathed it in remainder; and his Honor should have so decreed and ordered on account for the rents and profits of the land, or for interest on the value thereof.

5. Because, his Honor erred in decreeing an account against the estate of Isaac P. Droze, only for such slaves as were sold by him, as tenant for life, whereas, it is respectfully submitted, that the remainder-men, are

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entitled to a full account for all *slaves or other property, that are not forthcoming or produced, either by reason of a sale thereof, by tenant for life, or by reason of their death or destruction, from negligence, or wilful abuse, and ill treatment, or from other causes.

6. Because, his Honor erred in decreeing, that all the property derived by Isaac P. Droze, under the will of Hugh Droze, was his absolute estate.

The first cousins of the whole-blood, appealed on the ground,

Because, his Honor erred in decreeing, that Benjamin S. Logan and Martha M. Chipman, wife of Henry Chipman, as uncle and aunt of the half-blood, are entitled to the whole estate of the intestate, Isaac P. Droze, in exclusion of the first cousins of the whole-blood.

Benjamin S. Logan and Henry Chipman and his wife Martha, appealed, on the grounds,

1. Because, it is respectfully submitted, that, as the testatrix, Mary E. Droze, devised the residue of her estate to her seven grandchildren, equally to be divided among them, and one of them, to wit: Josiah Perry, died in the lifetime of the testatrix; the effect is, that the testatrix died intestate as to one seventh-part of the residue of her estate, and the said one-seventh part vested in Benjamin S. Perry, Mary E. Waring, Eliza E. Bass, Isaac Perry Droze, John L. Droze and Jane L. Droze absolutely; and that as a consequence of these propositions, a distinction should be made between that which Isaac P. Droze took as a residuary legatee, and that which he took as one of the next of kin; and the same distinction applies to those parts of the estate which he took through his brother and his sister, and that so much as came to

them, in the character of next of kin, is not subject to any limitation over.

2. Because, a distinction is also to be made as to the legacies, residuary and specific, bequeathed to Isaac Perry Droze, for, in the event that has happened, (that of his dying without leaving issue,) one-fourth part of the same is given over to Josiah Perry; but as Josiah Perry died in the lifetime of testatrix,

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the *bequest to him fails, and the estate of Isaac Perry Droze in that one-fourth part is not divested; and the same will hold good as to the interests which Isaac Perry Droze took through his brother and sister. The consequence of which propositions is, that the representatives of Isaac Perry Droze should account to Benjamin Perry, Mary E. Waring and Eliza E. Bass, for three-fourth parts of those legacies bequeathed to him and his brother and sister, and no more.

Perry, Treville, for remainder-men.

Henderson, Petigru, for Logan and Chipman and wife.

Edwards, for first cousins.

The opinion of the Court was delivered by

DARGAN, Ch. The Circuit decree in this case decides many questions; and the appeals of the different parties have involved the necessity on the part of this Court of reviewing them all.—It will not be necessary, however, that I should discuss all the questions raised in the appeal, or consider them seriatim.

The testatrix, Mary E. Droze, after having given specific legacies to her grand-children, Isaac P. Droze, John L. Droze, Jane L. Droze, and to others, by the residuary clause of her will, devised and bequeathed as follows: "All the rest, residue and remainder of my estate, real and personal, I direct to be sold and disposed of by my executors as soon as possible after my death; and the proceeds I give and bequeath to my said seven grandchildren, equally to be divided amongst them, forever." And by the codicil of her will, she declared her intentions in regard to the Drozes, in manner and form as follows: "Should my grand-children, Isaac P. Droze, John L. Droze, and Jane L. Droze, die leaving no lawful issue, it is my will, that whatever property I have given them, be equally divided between my grand-children Josiah Perry, Benjamin Perry, Mary E. Waring, and Eliza E. Baas, to them and their heirs forever."

Upon the question of limitation arising on the construction of the codicil, the Circuit Court held this language: "The controversy relates both to personal and real estate. In

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the judgment of *the Court, the words of the codicil in reference to the personal property are sufficient to create and do create a good limitation over to the Perrys, on the happening of the contingency upon which it was made to depend. The word 'leaving,' qualified the

generality of the word 'issue,' and makes the limitation to depend upon the first taker dying without issue living at the time of his death." The Circuit decree proceeds to say: "A limitation over, if the first taker should die without leaving issue, or leaving no issue, has a different construction, and is valid, or invalid, according as it may relate to personal or real estate. When real estate is the subject of the limitation, it is construed to be after an indefinite failure of issue, and fails for remoteness. The word leaving, in such a case, is not restrictive. *Forth v. Chapman*, 1 P. Wms. 665; *Mazyck v. Vanderhorst*, Bail. Eq. 48. It is the opinion of the Court, that the limitation fails as to the real estate, and that the tract of land in question was the absolute estate of Isaac P. Droze, and descends to his heirs at law."

The doctrines thus asserted in the Circuit decree, and the distinction drawn between a limitation of personal estate, and a limitation of real estate, under the words of this will, are unquestionably correct; and this Court fully concurs in the views that have been expressed.

But there is an aspect of the case, which was not presented on the Circuit trial, nor considered by the Chancellor, which prevents the distinction between personal and real estate in this respect, from being material or applicable to the case. In this Court, according to the equitable doctrine of conversion, there was no real estate to pass under the limitations of this will, although there was real estate disposed of by it. The will gave no land to the beneficiaries; but directed that the real, as well as the personal estate should be sold by the executors: and it was the "proceeds" of the sale that the testatrix gave, to be equally divided among her seven grand children.

Wherever it is apparent from the words of the will, that the testator meant, that his real estate, as such, should not pass into the possession of the objects of his testamentary

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bounty: *but that his real estate should be converted into money, and as money, that it should come to those for whom he designs the benefaction, in Equity it will be regarded as a bequest of personal property. Under such circumstances, it will be treated in all respects, as if the conversion had been made by the testator in his life time. This doctrine is fully sustained by the authorities. 1 Rep. on Leg. 343, 356, 358, 365; *Walker v. Deme*, 2 Ves. jr. 176; *Rouch v. Haynes*, 8 Ves. 591; *Wright v. Wright*, 16 Ves. 191; *Cook v. Duckenfield*, 2 Atk. 568; *Durour v. Motteux*, 1 Ves. Sen. 320. To these, numerous other cases might be added, were it necessary.

The lands devised in the residuary clause of Mary E. Droze's will, by the directions to the executors to sell them, and to pay the proceeds to the persons named, by virtue of this doctrine of equitable conversion, assumed

under the will itself, the form and qualities of personal estate. It follows, that all the limitations of the will, under these circumstances, must be considered as limitations of personal property; and in a question, whether the limitation is valid, the same rules of construction must apply, which apply in the limitations of chattels. The limitation, therefore, is good as to all the property given to the Drozes, by the residuary clause of the testatrix's will. At her death, the real estate descended to her heirs at law, subject to be divested by the sale and conveyance of the executors. And though the land has not to this day, been sold by the executors, this omission will not alter the case. In Equity, that which should have been done, will be considered as having been done, and the parties in interest be put in the same positions respectively, as they would have occupied, had the directions of the will been fully executed.

The question I have been considering, is raised in the third ground of appeal taken by the complainant, and the parties who are in like interest with him; which ground is, therefore, sustained.

The fourth ground of the same parties, raises a demand for rents and profits. We

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are of the opinion, that this claim can not be allowed. Rents and profits are, in a great measure, within the discretion of the Court. This is a stale claim. Isaac P. Droze was in possession of the land for a great length of time: for thirty years it is said; and, during that period, there was no demand or accounting for rent. Thirty years' possession, under these circumstances, would raise a presumption of almost any fact that would discharge the claim. And when it is said, that he acknowledged the rights of the parties now claiming, we understand him to have had reference to their title, under the limitations of the will, rather than to an account for rent. Nor, do we think that the executors are liable to pay rent since the death of Isaac P. Droze, unless they have used the land, or otherwise made a profit out of it. It appears that they sold the negroes soon after the testator's death, and could not have cultivated it, after that sale, for the benefit of the estate. They may, however, have leased it: in which case, and in any case, they are liable to the extent of the profit they have realized. This ground of appeal can not be sustained.

Benjamin S. Logan, and Henry Chipman and Martha, his wife, appeal on the following grounds: "1st. Because it is respectfully submitted, that as the testatrix, Mary E. Droze, devised the residue of her estate, to her seven grand-children, equally to be divided between them: and one of them, namely, Josiah Perry, died in the life time of the testatrix; the effect is, that the testatrix died intestate as to the one-seventh part of the residue of her estate; and the said one-

seventh part vested in Benjamin Perry, Mary E. Waring, Eliza E. Bass, Isaac P. Droze, John L. Droze, and Jane L. Droze absolutely: and that, as a consequence of these propositions, a distinction should be made, between that which Isaac P. Droze took, as a residuary legatee, and that which he took as one of the next of kin; and the same distinction applies to those parts of the estate which he took through his brother and sister, and that so much as came to them in the character of next to kin, is not subject to any limitation over." The Circuit decree is silent on the subject of this appeal. It was not discussed on the trial, and escaped my attention.

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*The facts assumed in the ground of appeal, above recited, are true, and the conclusion inevitable. There was, on account of the lapsed legacies to Josiah Perry, a partial intestacy: and, of course, the intestate property cannot pass under the limitations, or dispositions of the will.

Josiah Perry pre-deceased the testatrix. The specific legacy to him of the three negroes, Peter, Ned and Moses, lapsed into the residuum of the estate, which passed under the residuary clause. The residuary estate, thus augmented by the lapse of the specific legacy to Josiah Perry, was given to the seven grand-children of testatrix, equally to be divided among them. Of these, Josiah Perry, himself, was one. His share of the residuum which was one-seventh, lapsed and became intestate property. It was divisible under the statute of distributions among the six remaining grand-children of the testatrix, namely: the Drozes, Isaac, John, and Jane; Benjamin Perry, Mrs. Waring, and Mrs. Bass, one-sixth to each of them. And, indisputably, such portions of the intestate property of Mary E. Droze, as Isaac P. Droze derived through his brother John, and his sister Jane, are not to be accounted for, under the limitations of Mary E. Droze's will.

The second ground of appeal by the same parties is, "because a distinction is also to be made, as to the legacies residuary and specific, bequeathed to Isaac P. Droze: for, in the event that has happened, (that of his dying without leaving issue,) one-fourth part of the same is given over to Josiah Perry; but as Josiah Perry died in the life time of the testatrix, the bequest to him fails, and the estate of Isaac P. Droze, in that one-fourth part, is not divested: and the same will hold good, as to the interests which Isaac P. Droze took, through his brother and sister. The consequence of which proposition is, that the representatives of Isaac P. Droze should account to Benjamin Perry, Mary E. Waring, and Eliza E. Bass, for three-fourth parts of those legacies bequeathed to him, his brother and sister, and no more."

The position assumed in this ground of appeal, is correct. It relates to the share given

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by the will to Josiah Perry, in the *property bequeathed to the Drozes, in the event of their dying without leaving issue. She gave each of them one-seventh part of her residuary estate: and in the event of their dying without leaving issue, it was to go over to the Perrys, of whom, Josiah was one. But, Josiah, as has already been stated, died before the testatrix. It is contended, in opposition to the views of the appellants, that Josiah's share in the remainder which now takes effect, (all the Drozes having died without leaving issue,) or rather, would have been Josiah's share, had he survived the testatrix, has also elapsed, and is intestate property of Mrs. Droze; and, as such, subject to distribution. To make this matter plainer, I will divest it of some of its complexities.

I will suppose that the testatrix has given certain property to Isaac P. Droze, which, by the terms of the direct bequest, would be an absolute estate: and in the event of his dying without leaving issue, she gives it to Josiah Perry. This is substantially the case here. And the position assumed on the part of the next of kin of Mrs. Droze is, that Josiah Perry's interest in the remainder over, or what would have been such, had he survived the testatrix, has lapsed and is intestate property.

This proposition would be true, had the testatrix not given to the Drozes, by the terms of the direct gift, an absolute estate. The Chancellor has held, and this Court concurs, that the residuary clause of Mrs. Droze's will, gives to the legatees therein named, a fee, which, by the codicil, is, as to the legacies given to the Drozes, made defeasible, in the event of their dying without leaving issue. Where an estate is given to one absolutely in the first instance, and is made defeasible upon a contingency, on the happening of which it is to go over to some third person, the estate given to the first taker is not to be defeated, because the event upon which it is to take effect, or the person who is to take, is insufficiently described; nor because the limitation is illegal, or void for any cause. The same rule applies where the person who is to take under the limitation has died in the life time of the testator. The absolute estate first given can only be defeated where the limitation over

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can take effect. This *ground of appeal is sustained, and the decree must be reformed accordingly. The share in the remainder which Josiah Perry would have been entitled to, had he survived the testatrix (which is one-fourth part) is the proper estate of the said Isaac P. Droze: for which his legal representatives are not accountable under the limitations of the will.

As to the other questions decided by the Circuit decree, to which exceptions have been taken by the different appellants, it is unnec-

essary to make any comments: this Court concurring in the views expressed by the Chancellor.

It is ordered and decreed that the Circuit decree be modified and made to conform with this decree. In all other respects the Circuit decree is affirmed, and the appeals dismissed.

It is further ordered, that the matters of account be referred to the Master, and that the parties to the cause have leave to apply to the Circuit Court for any orders that may be necessary to carry this decree, and the Circuit decree as thus modified, into effect.

WARDLAW, Ch., concurred.

DUNKIN, Ch. I concur, except on the first ground of appeal. My opinion is, that the bonds passed under the description of property given to the legatee.

JOHNSTON, Ch., absent.
Decree modified.

5 Rich. Eq. 220

EPHRAIM S. MIKELL v. J. JENKINS MIKELL.

(Charleston, Jan. Term, 1853.)

[*Executors and Administrators* ⇨118.]

Defendant, an administrator, employed slaves of his intestate for a temporary purpose, on his own plantation: the slaves left the plantation of defendant to return to that of the intestate, and were never seen alive afterwards: the Court, concluding, on the evidence, that the slaves were destroyed in prosecution of a willful

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act on their part, *after they had left the employment of defendant, and after proper precaution on his part, held, that defendant was not liable for the loss.

[Ed. Note.—Cited in *White v. Smith*, 12 Rich. 602; *Henry v. Graham*, 9 Rich. Eq. 354.

For other cases, see *Executors and Administrators*, Cent. Dig. § 474; Dec. Dig. ⇨118.]

[*Executors and Administrators* ⇨118.]

The act of an administrator in employing the slaves of his intestate in his own service, is not illegal.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 472-482; Dec. Dig. ⇨118.]

[*Executors and Administrators* ⇨91.]

The care and diligence which a prudent man bestows on his own affairs, is the test by which the responsibility of trustees is determined: they are not insurers against losses from casualties and misfortunes, which ordinary sagacity and diligence could not prevent.

[Ed. Note.—Cited in *Rhame v. Lewis*, 13 Rich. Eq. 301.

For other cases, see *Executors and Administrators*, Cent. Dig. § 397; Dec. Dig. ⇨91.]

Before Wardlaw, Ch., at Charleston, February, 1851.

This case was heard on exceptions, by the plaintiff, to the report of the Master. The decree of the Chancellor, which contains

every thing necessary to a full understanding of the case, is as follows:

Wardlaw, Ch. The plaintiff in this case claims an account from defendant of his transactions as administrator of the estate of plaintiff's father, Ephraim Mikell, jr., deceased, and as guardian of plaintiff's estate. The defendant made regular returns of his transactions as administrator, to the Ordinary of the District, until May, 1839, when he was appointed by this Court, guardian of plaintiff's estate; and afterwards the defendant made regular returns as guardian, to one of the Masters of this Court, until October, 1848, when the plaintiff having attained full age, the defendant put him in possession of the plantation, and delivered to him the slaves and other chattels, and the bonds, moneys and other assets, remaining of the estates committed to the defendant. Master Gray, to whom it was referred to take testimony in the cause, and to report generally as to the matters in controversy between the parties, reports that all the accounts of defendant have been verified by proper vouchers, and that no objection had been submitted to him respecting them; and that the only controversy in the cause, as to which alone evidence had been offered, was as to the liability of defendant as administrator for three negroes which had belonged to the estate of his intestate, and which were lost in the fall of 1837; and as to this matter the Master decides against the claim of the plaintiff. The case comes before me on exceptions to the report rejecting this claim.

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*It appears, by the evidence, that the defendant in the fall of 1837, was managing as administrator of his intestate, a plantation called the Blue House plantation, in the interior of Edisto Island, and about seven miles from Peter's Point; and that he was then owner, and managing in his own right, a plantation on Bailey's Island, which is separated from Edisto Island by a creek about one hundred yards wide, but the landing on Bailey's Island is distant from Peter's Point, the opposite landing on Edisto Island, about four hundred yards. That the defendant having an unusually large blow of cotton on his plantation on Bailey's Island, which might suffer from exposure, ordered four of the slaves, Jenmy, Class, Amy and Ket, under his control as administrator on the Blue House plantation, to proceed to Bailey's Island and aid in picking out his cotton; and these slaves proceeded accordingly, and remained on defendant's plantation for three days, from Tuesday morning until Thursday evening. On Thursday evening, in calm weather, the overseer of defendant, under his order, provided a large and safe boat for the transportation of the four slaves from Bailey's Island to Peter's Point, and saw the boatmen on board, and the four slaves pro-

ceeding towards the boat, but did not see them aboard the boat. Except the risk of being driven out to sea in boisterous weather, the passage across the creek is regarded as safe as transportation for equal distance on land, allowing for the difference between water and land. The passage is frequently made by children going to school, and by negroes going to church. There is no cause of danger betwixt Peter's Point and Blue House; yet, the three slaves last named, after they passed from the ken of the overseer, were never again seen in life by a competent witness, and the corpse of one of them is the only evidence of their fate. A few days afterwards, the dead body of Class was found on South Edisto beach, and at the same time and place were found the dead body of George, a slave of Ephraim Mikell, sen., the owner of Peter's Point, and a small paddle boat upturned, belonging to Sampson, another slave of E. Mikell, sen. Early in the morning of Friday, the next day after the four

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slaves had been ordered to be sent back *to Edisto, the overseer found the boat in which they were directed to be transported, at the landing in Bailey's Island, and the boatmen at their proper employment. Jemmy, one of the four slaves, returned to the Blue House plantation in proper time, and he is still alive. From all the circumstances of the case, I conclude that the four slaves were safely transported from Bailey's Island to Peter's Point, on Thursday evening, and that in an attempt, moved by their own will, to return in the night to Bailey's Island in a small boat, three of them were drowned.

Much testimony was offered before the Master as to the usage upon Edisto Island and the neighboring Islands as to the removal of slaves from one plantation to another, and the interchange of work upon emergencies. The testimony itself was vague and conflicting. It was not contended that any local usage on this subject, however fully proved, could change the general law; and the evidence was only urged upon the Court, as exhibiting the mode in which masters practically exercised their dominion over slaves and discharged the duty of neighbors. In this point of view, it was unnecessary or inadequate. Judges, who are members of a slave-holding community, either know without the testimony of witnesses how masters should exercise their rights over slaves, or they are not to be controlled by proof of provincial practices. The first exception of plaintiff which objects to this testimony is sustained.

It was argued on the part of defendant, that any liability of the defendant for the slaves lost was extinguished by compensation for the loss made in the will of Ephraim Mikell, sen., grandfather of plaintiff. This will, after a devise to the plaintiff of the Blue House plantation, (previously given

by parol to plaintiff's father) and of negroes upon certain limitations, which it is unnecessary to consider, declares as follows; "I gave to the father of my grandson during his lifetime as much of my property as I could afford to give to any one of my children; a part of which property he has already inherited, which in addition to the above named negroes and land, is all that I can leave him in justice to my other chil-

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dren." If there be any *reference in this declaration to the loss of the three negroes, it is too indistinct for the basis of a legal conclusion; but if the intention of the testator in this devise were palpably manifest to make satisfaction to his grandson for the loss, the defence would not be much stronger. No case would then be presented to the legatee of election between inconsistent provisions of the same instrument, or of implied satisfaction of any demand of the legatee against the estate of the testator. No hinderance would be interposed to the prosecution of his claim against a third person for the unlawful or negligent use of his property. Of course, extrinsic evidence of the intention of the testator in this respect, if at all competent, would be feebler in its influence. It is unnecessary, however, to pursue this discussion, as the testimony does not extend to any declaration of the testator, as to his motive or purpose in the devise; and does not proceed beyond some indefinite understanding in the family of testator after his death; which understanding was as likely to be produced by the defendant as any one else. The second exception of plaintiff objecting to the proof of compensation, is sustained.

The third exception is merely formal, objecting to the omission of testimony which was supplied.

The question still remains as to the liability of the defendant for the loss of the three slaves.

The plaintiff, in his fourth exception, puts defendant's liability on the ground, that it was an "illegal act in him to employ these slaves for his own benefit without an equivalent to plaintiff, and at a risk not necessary for plaintiff's interest." The bill contains no express suggestion of this claim, which turns out to be the only matter of dispute between the parties. If the plaintiff had proceeded, frankly, according to the truth of the case, to charge the defendant for this injury exclusively, and the doctrine of the exception be well founded, the case would not have been within the jurisdiction of this Court. If the loss resulted from the illegal act of the defendant, the proper remedy of the plaintiff would be trespass; and if the loss resulted from the negligence of defend-

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ant, then case would be *the remedy. This Court, to avoid multiplicity of suits, may

legitimately investigate and decide such matters, when they are incidental to a general account or other topic of equitable cognizance; but when they stand alone, it is not the province of Equity to give damages. It is a mistake, however, to treat the act of the defendant in employing these slaves in his own service as an illegal act. The cases quoted in argument of *Wright v. Gray*, 2 Bay 464, and *McDaniel v. Emanuel*, 2 Rich. 455, where persons were held to strict accountability for unauthorized use of the property of others, have no application. The defendant, as administrator, was the legal owner of the slaves in question, and he might, in his discretion, have employed the slaves altogether in his own service; incurring of course liability to the creditors and distributees for the full value of the hire of the slaves while so employed. If an administrator or other trustee should remove slaves belonging to the trust from their proper employment, for the sake of lucre, this would be a proper case for charging him with hire at the highest estimate of witnesses, and for measuring his responsibility in every respect with strictness; still we could not denounce the act as illegal, however contrary to a nice sense of honor. In the present case, there is no complaint that hire for three days of the four slaves is not charged against the administrator; and it is but just to him to remark, that he swears in his answer, and there is some evidence of the fact, that he had several times allowed his own slaves to work on the trust estate without compensation. It is to his credit too, that his management generally was diligent and successful.

The defendant, if liable at all, is liable for a breach of his trust, in not managing the estate entrusted to him with the care and diligence which a prudent man bestows on his own affairs. A more stringent rule as to the responsibility of trustees would defeat itself by deterring thoughtful, honest, and prudent men from engaging in the discharge of duties, so hazardous as well as onerous. Where one has faithfully endeavoured to execute a trust, it would be neither

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reasonable nor *equitable to make him an insurer against losses from casualties and misfortunes which ordinary sagacity and diligence could not prevent. The Court cannot expect trustees to take more care of trust estates than of their own. *Taveau v. Ball*, 1 McC. Eq. 462; *Massey v. Banner*, 1 Jac. and W. 249; *Jones v. Lewis*, 2 Ves. Sen. 240.

In this case, the property lost consisted of slaves— chattels that have intelligence and will, who are capable by their own acts of defeating a high degree of care and circumspection on the part of others. Ferry-men are held by our law to the strict responsibility

of common carriers; yet if a slave, on his passage in a ferry boat, should elude the common care of the ferryman, jump overboard and drown himself, the owner of the ferry would not be liable. *Clark ads. McDonald*, 4 McC. 223. So here, as I conclude that the slaves were destroyed in prosecution of a wilful act on their part, after they had left the employment of the defendant, and after proper caution on his part, I concur with the Master, that no liability on this account attaches to the defendant. The exception is overruled. It is ordered and decreed, that the bill be dismissed.

The plaintiff appealed on the grounds

1. That his Honor should have sustained the fourth exception to the Master's report, and decreed the defendant liable for the value of the three negroes of the minor, viz., *Class*, *Ket* and *Amey*; and their wages or interest; the said negroes having been removed from the minor's plantation, and used at a distance therefrom, by the said defendant for his own benefit, and having been lost in or by reason of such improper use.

2. That the decree, so far as it overruled the fourth exception and dismissed the bill, is contrary to equity, and ought to be reversed.

Yeaton & Macbeth, for appellant.

Magrath, contra.

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**PER CURIAM*. The Court concur in the judgment of the Chancellor. The decree is affirmed.

DUNKIN, DARGAN and WARDLAW, CC., concurring.

JOHNSTON, Ch., absent at the hearing.
Decree affirmed.

5 Rich. Eq. 227

HENRY T. STREET and Others v. EDWARD R. LAURENS and Others.

(*Charleston*, Jan. Term, 1853.)

[*Equity* ⚡431.]

Construction given to a decree of the Circuit Court in another cause.

[*Ed. Note*. For other cases, see *Equity*, Cent. Dig. §§ 1048-1051; Dec. Dig. ⚡431.]

[*Equity* ⚡398.]

Where a Master in Equity is ordered by the Court to invest funds in his hands, and neglects to do so, his sureties for the term during which the default, in neglecting to invest, is committed, are liable. That the Master, by re-election, becomes his own successor giving new bond with other sureties—does not discharge them.

[*Ed. Note*. Cited in *Whitmore v. Langston*, 41 S. C. 389; *State ex rel. Causey v. Causey*, 93 S. C. 394, 76 S. E. 707.

For other cases, see *Equity*, Cent. Dig. § 863; Dec. Dig. ⚡398.]

[*Equity* ⚡398.]

So, also, where a Master commits default in not depositing money in Bank, as directed by the Act of 1840, his sureties for the term

during which the default is committed, are liable.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 863; Dec. Dig. ⚡398.]

[Equity ⚡398.]

The sureties of a Master were sought to be made liable for the default of the Master in not investing funds of a certain estate, as directed by an order of the Court:—*Held*, upon the evidence, that certain bonds, payable to the Master, were not in fact investments for that estate, and therefore the sureties were not exonerated—although, during a subsequent term of the same Master, the bonds were paid to him, (and the money wasted,) as belonging to that estate.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 862, 863; Dec. Dig. ⚡398.]

[Equity ⚡398.]

A Master having committed default in not investing funds, his sureties were charged interest, with annual rests, until he went out of office, and with simple interest from that time.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 863; Dec. Dig. ⚡398.]

Before Dargan, Ch., at Charleston, July, 1852.

Edward R. Laurens was elected Master in Equity for Charleston in December, 1836: he was re-elected in December, 1840: again re-elected in December, 1844: and again in December, 1848. He remained in office until May, 1851, when he resigned. His mother, Eliza Laurens, was one of the sureties on

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his *official bonds of his first and second terms. She died in 1842, leaving a will, of which he was the executor.

This bill was filed by Henry T. Street, and others, heirs of Timothy Street, against Edward R. Laurens, as executor of his mother, John Laurens, Eliza Laurens, Henry Laurens, and John R. Laurens, her devisees, to render her estate accountable for certain funds of the estate of Timothy Street, which came into the hands of Edward R. Laurens as Master, prior to December 9, 1844, when his second term of office expired.

The bill was taken pro confesso against him. The other defendants answered, admitting the liability of the estate devised to them for the debts of Mrs. Laurens, but denying knowledge of any debt due by her on account of the official bonds of her son.

One of the Masters, Mr. Tupper, was directed to take an account of the sums owing by Mrs. Lawrence to the complainants, on the bonds to which she was a party, as the surety of Edward R. Laurens; and he submitted his report, dated June 15, 1852, as follows:

"I have been attended by the solicitor for the complainants, and the solicitors for the defendants; and having heard the allegations of the said parties, and their proofs thereon, I have taken an account of the estate of the late Timothy Street, which came into the hands of Edward R. Laurens, as one of the Masters of this Court, and not accounted for, during the official terms for which Mrs. Eliza

Laurens was bound as one of the sureties of the said Edward R. Laurens.

"Mr. Laurens was first elected to the office of Master in Equity, in 1836, and on the 12th day of December, in that year, executed his bond in the penal sum of thirty thousand dollars for the faithful discharge of the duties of said office. In 1840 he was re-elected, and on the 12th day of December of that year executed a like bond. The name of Mrs. Eliza Laurens appears as a surety on both of these bonds. The term for which the latter bond was given, expired on the ninth day of December, 1844, when upon the

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third election of Mr. Laurens, *a new bond was executed, to which Mrs. Laurens was not a party.

"For any default, therefore, occurring between the date of the first bond, to wit, the 12th December, 1836, and the expiration of the second term, the 9th December, 1844, Mrs. Eliza Laurens was liable as one of the sureties of Mr. Laurens.

"Timothy Street, the father of the complainants, died in the year 1833, intestate, leaving a considerable estate in realty, or which he was seized, as to part, in his own right, and as to other portions, as tenant in common, with Thaddeus Street and Daniel Boinest, who had been partners in trade, and to whom administration of his estate was committed after his death. By a decree of Chancellor DeSaussure bearing date the 23d day of January, 1836, and made in a cause then pending in this Court between the said administrators and the widow and children of the said Timothy Street, for a division of the real estate of the said intestate, it was ordered: that the said real estate be sold; that so much of the proceeds of said sale as belonged to the distributees of Timothy Street, be paid over to the Master of this Court, and that the said Master do invest in his official name the amount coming into his hands from the sales aforesaid, on account of the distributees of Timothy Street, in such manner as may be agreed on by himself, and the administrators of Timothy Street, to be held for the use of the legal distributees of Timothy Street, and transferred to the parties who may be decided to be entitled thereto."

"Thomas O. Elliott, who, at the time of the pendency of these proceedings, was one of the Masters of this Court, received under the above decree, as a part of the proceeds of the sales of the real estate, belonging to the distributees of Timothy Street, a bond of Benjamin Smith, dated 27th January, 1836, for four thousand four hundred and fifty-five dollars; also, in cash, four hundred and eleven dollars. The latter sum was invested by the said ~~Smith~~ in July, 1836, in a bond of M. I. Keith, secured by a mortgage of a pew in St. Peter's Church, of Charleston.

Both of these bonds were transferred by Mr.

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Elliott to his successor, Mr. Laurens, upon the election of the latter in December, 1836. Upon the bond of Benjamin Smith, Mr. Laurens received, from the year 1837 to the year 1840 inclusive, the annual interest accruing thereon; and on the 10th February of the latter year, the principal of the said bond in full. I have admitted these receipts, by Mr. Laurens, as proper charges in this account, upon the evidence of B. F. Smith, which accompanies my report in the case of Thaddeus Street, et al. v. Angelique Street et al., filed the 2d July, 1851, and upon inspection of the original bond, with the acknowledgment of the several payments endorsed by Mr. Laurens.

"The bond of M. I. Keith, I am of opinion, cannot be allowed as a charge against the late Master, so as to bind the estate of Mrs. Laurens. Some time previous to 1842, this bond was placed by Mr. Laurens in the hands of the late George B. Eckhard, for collection; on the 4th May, 1842, the pew in St. Peter's Church, mortgaged to secure the payment of this bond, was sold by Master Gray, but the proceeds of sale (\$126.25) were not paid over to Master Laurens until the 15th March, 1845, after the last term had expired, for which Mrs. Laurens was bound as one of the sureties of Mr. Laurens. To secure the balance still due upon this bond, after the above payment, Mr. Eckhard received from the obligor, probably in 1842, a bond of James Hamilton and D. H. Hamilton, conditioned for the payment of a sum considerably exceeding the amount of Keith's bond, for which it was substituted. The Hamiltons' bond was not paid until 1850, six years after the termination of Mrs. Laurens' liability on the official bonds of the late Master.

"In 1839, Master Laurens received, on account of the complainants, from the sale of certain real estate under the decree before referred to, a bond of Henry T. Street conditioned to pay six thousand two hundred and fifty dollars, also a bond of George B. Locke for \$5,416.67, both bearing date the first day of April, 1839. From the evidence appended to my report of the 2d July, 1851, before referred to, and from the original bonds produced before me, it appears that

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the interest arising on the *bond of H. T. Street was paid annually to Mr. Laurens, up to the 24th of June, 1843, when the principal was paid in full. It also appears that the interest was regularly paid on the bond of George B. Locke, to the 1st April, 1844, the last year for which Mrs. Laurens was bound. I have, therefore, allowed as proper charges in this account, the moneys received by Mr. Laurens on the bonds of Street and Locke, previous to the expiration of his second official term.

"Under the decree of Chancellor DeSaussure, Mr. Laurens sold, in 1840, a house and lot in Queen-street, and received from Daniel Bolnest, the purchaser, his bond bearing date the 22d April, 1840, for \$4,500, being the moiety of the proceeds of said sale belonging to the complainants, as distributees of Timothy Street; on this bond Mr. Laurens received \$317.35, on the 22d April, 1841, and \$588.40, on the 23d July, 1843—these payments being endorsed in the handwriting of the late Master on the back of the original bonds produced before me. I have allowed them as charges in the account.

"The defendants, by their solicitors, have submitted to me evidence upon which they rely to sustain the following credits, claimed by them in discharge of their liability upon the account as established by the proof of the complainants.

"[1.]
1840, February 28, cash paid by Mr. Laurens for note of Thaddeus Street at 12 months, \$4,455 00

"In Master Laurens' annual report of funds for the year 1841 and 1842, this credit appears in his account with the estate of Street, and seems to have been vouched before the Chancellor. The investment of funds, by the Master, in promissory notes, unsecured by mortgage or otherwise, would not, I presume, under ordinary circumstances, receive the sanction of the Court; in this case the order of Chancellor DeSaussure authorizes the investment of moneys received by the Master for the estate of Street, 'in such manner as may be agreed on by the Master, and the administrators of Timothy Street.' The note taken by Mr. Laurens in this case, was the note of the acting

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*administrator of this estate. Both the Master and administrator must, therefore, have agreed to the investment. In allowing this credit, I have been influenced, not so much by the foregoing consideration, as by the fact, that Mr. Street paid the principal of his note in full on the 1st March, 1842. I have charged Mr. Laurens with the principal of this note on the said day, and with the interest as of the dates when it fell due. A different conclusion as to this credit would probably have been arrived at, had the allowance of it in any manner changed the account, or the liability of the parties sought to be charged by these proceedings.

"[2.]
1841, June 22, Cash p'd by Laurens for \$ 616 55
State 6 per ct. Stock at 105 \$ 616 32
1841, Dec. 14, Cash p'd by Laurens for 224 88
State 6 per ct. Stock at 105 236 12
1841, Dec. 14, Cash p'd by Laurens for 517 10
State 6 per ct. Stock at 105 542 95
\$1,357 53 \$1,425 40

"From the Stock Ledger of the State Treasury Office it appears that, at the above dates, scrip representing State six per cent. stock (Fire Loan) for the above three amounts (the two first redeemable, in 1860, and the third, in 1870,) was transferred by Mrs. Louisa Ingraham to 'Edward R. Laurens, Master in Equity, for estate of Street;' this stock remained in the name of Mr. Laurens for this estate until May, 1849, when it was transferred by him upon the books of the Treasury Office as follows:

To Edward R. Laurens, Master in Equity, for Bailey v. Boyce.....	601 16
To Edward R. Laurens, Master in Equity, for Balthazar & Co.....	14 37
	<hr/>
	615 55
To Edward R. Laurens, Master in Equity, for Estate of Merritt.....	224 88
To Edward R. Laurens, Master in Equity, for Balthazar & Co.....	434 04
To Edward R. Laurens, Master in Equity, for Estate of Merritt.....	64 06
	<hr/>
	\$1,357 53

"It is clear, from the date of the foregoing

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statement, that although the estate of Street has lost the above stock by its transfer to other estates represented by the late Master, still the credit claimed upon this account by the defendants must be allowed. On the 9th day of December, 1844, when the liability of Mrs. Laurens upon the bonds of the Master ceased, this stock was held, by Mr. Laurens, in trust for the distributees of Street. The default occurred in 1849, during a term subsequent to the period for which Mrs. Laurens was bound. The defendants, I think, are entitled to the benefits of the above investments. The interest, however, received previous to December, 1844, from this stock, is a charge which may properly be claimed by the complainants, and I have accordingly allowed it.

"[3.]

1842, March 1, Cash paid by Mr. Laurens for	\$4,500
State 6 per cent.	
Stock at 105.....	\$4,725 00

"Proof is furnished by the certificate of William Laval, State Treasurer, that on the above day Mr. Laurens invested in his official name for the estate of Street \$4,500 in State 6 per cent. stock. In May, 1845, from this stock he transferred \$2,000 to the estate of Stoney. In January, 1848, he received \$833.34, that being the one-third redeemable at that time, and the balance, \$1,666.66, was taken in new scrip. In May, 1849, this new scrip was, with some other stocks, divided by Mr. Laurens between the cases of Kenderson v. Henderson, and Boyce v. Boyce. This credit, for the reasons assigned in determining the preceding one, must also, I think, be allowed. The first default here arose in May, 1845, after the second term of Mr. Laurens had expired. I have inquired, and find that State 6 per cent. stock, at the dates when

the two last credits are claimed, was selling at \$105; the price alleged to have been paid by Mr. Laurens.

"[4.]

Cash paid by Mr. Laurens for \$143.37	
City 6 per cent. at 110.....	157 70
Cash paid by Mr. Laurens for City 5 per ct. at par.....	250 00
Cash paid by Mr. Laurens for City 5 per ct. at par.....	892 42
	<hr/>
	\$1,142 42

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"From the books of the City Treasurer, it appears that City 6 per cent. stock of the issue of 1838 and 1839, for \$157.70, was transferred to Mr. Laurens for the estate of Street, in October, 1844. This stock remained unchanged in the hands of Mr. Laurens until his resignation, in 1851, when it was turned over to me as his successor, and by me transferred to the distributees of T. Street. In April, 1844, at the same office, City 5 per cent. stock of the issue of 1824, for \$250, was placed to the credit of Mr. Laurens for this estate. In 1846, this stock, being then redeemable in full, was paid to Mr. Laurens by the City Treasurer. The dividend book of this office shows that in October, 1842, there was also standing in the name of the late Master, for the estate of Street, City 5 per cent. stock of the issue of 1835 for \$454.85; and that in April, 1844, this sum was increased by other purchases to \$892.42. This investment continued unchanged in the hands of Mr. Laurens after December, 1844. Scrip representing \$669.32 of this stock was transferred to me by Mr. Laurens, and by me assigned to the complainants. I have allowed this credit, there appearing no default in respect to these investments during Mr. Laurens' first and second terms. Two quarters interest is charged as received on this stock in 1844.

"[5.]

1. 1841, January 19, Cash paid by Mr. Laurens for bond of Mrs. Eliza Laurens.....	\$1,082 33
2. 1842, July 10, Cash paid by Mr. Laurens for bond of Mrs. Eliza Laurens for \$766.80, with interest from 14th March, 1839	962 57
3. 1843, July 3, Cash paid by Mr. Laurens for bond of Mrs. Eliza Laurens for \$633.20, with interest from 14th March, 1839	856 01
4. 1843, July , Cash paid by Mr. Laurens for bond of Mrs. Eliza Laurens...\$2,207 58	
5. 1843, July, , Cash paid by Mr. Laurens for bond of Mrs. Eliza Laurens... 635 06	

Interest from 19th January, 1841, on.....	\$2,842 58
	3,367 87
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	\$6,268 78

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"The original bonds here referred to have been submitted to me. They are all signed Eliza Laurens, and payable to 'Edward R. Laurens, Master in Equity, his successors in

office, and assigns.' The dates and amounts are as above stated. On each of these bonds there is this acknowledgment: 'Received payment in full on the within bond. Edward R. Laurens, Master in Equity.' The following endorsements appear on the back of these bonds:

"On 1st bond—'19th January, 1841, Eliza Laurens to Master in Equity for Estate Street, \$1,082.33.'

"On 2d bond—'14th March, 1839, Mrs. Eliza Laurens to Master in Equity, bond \$766.80.'

"On 3d bond—'14th March, 1839, Mrs. Eliza Laurens to Master in Equity for Warren Andrews, et ux, bond \$633.20.' Warren Andrews, et ux, stricken out.

"On 4th bond—'19th January, 1841, Eliza Laurens to Master in Equity for Estate McLeod, 2,207.58.' Estate of McLeod stricken out, and 'January, 1845, for Estate Street' added.

"On 5th bond—'19th January, 1841, Eliza Laurens to Master in Equity for Estate H. P. Holmes, \$635.'

"To fix upon these bonds the character of investments for the estate of Street, the defendants rely upon a schedule of debts against the estate of Mrs. Eliza Laurens, rendered, in January, 1846, to the Ordinary of Charleston District, by Edward R. Laurens, executor of said estate. In this schedule the above bonds are represented to be held by the estate of Street, and the testimony of Mr. Guenther is introduced to show that when this statement of the liabilities of Mrs. Laurens was prepared, these bonds were in the Master's office, where they had been since 1842. There is nothing upon the face of the bonds, that proves them to have been investments for the estate of Street. They furnish, in themselves, no more evidence that they ever belonged to this estate, than to any other estate in the Master's office. They are made payable to 'Edward R. Laurens, Master in Equity,' without reference to the persons beneficially interested in them. Upon the back of two of these bonds, the words are written 'for estate of Street.' If this be

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*sufficient to determine that they belonged to the estate of Street, then of the remaining bonds one must be held to have been the property of the 'estate of Holmes,' another of 'Warren Andrews, et ux.,' and the third, having no endorsement upon it, to either, or to none of them. It does not appear to me that these bonds were taken in compliance with the Act of 1840, which directs that funds invested by the Master shall be invested in his official name, in trust for the persons or estates entitled thereto. Nor does it appear that these bonds were taken by the Master with the concurrence of the administrators of the estate of Street, as directed by the decree of Chancellor DeSaussure; nor in accordance with the general practice of this Court, to require other security than the per-

sonal responsibility of the obligor. From the books turned over to me by my predecessor, it does not appear that any account was kept by him with the estate of Street; and the late Master's annual reports of funds to the Court, from 1836 to 1844, do not show that the bonds of Mrs. Laurens were ever held by him as investments for the estate of Street. In 1844 the account with this estate is dropped from the report of that year, and does not again appear in any subsequent report. Evidence is furnished from the books of the Bank of the State, that at the several dates, when it is alleged the investments in these bonds were made, there was little or no money in this Bank to the credit of the estate of Street. Either the deposits required by law had never been made, or the funds had been drawn before the times when these investments are claimed to have been made. The only evidence then, which goes to establish that these five bonds of Mrs. Laurens were ever held for the estate of Street by Mr. Laurens, as Master in Equity, is the schedule of debts rendered to the Ordinary by Mr. Laurens, as executor of the estate of Mrs. Laurens. The aggregate sum of the debts stated in this schedule is \$61,911.67—much the largest portion of this amount is made up of bonds of Mrs. Laurens other than those put down to the estate of Street. A considerable number of these bonds are designated in

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the schedule as belonging to estates which, I find, were at the time in the hands of the late Master, under various proceedings then pending in Court. The books and reports of Edward R. Laurens as Master—and which contain his accounts with these estates—do not corroborate his return as executor, in respect to these bonds. Of the eight estates in the Master's office, to which, according to this schedule, Mrs. Laurens was indebted by bond, not one of them is charged by either the books or reports of the late Master, with the purchase on their account of these securities. It does appear to me, that this return to the Ordinary of the executor of Mrs. Laurens, cannot determine what investments were made by the late Master for estates entrusted to his care by this Court.

"An account of the receipts and disbursements by Mr. Laurens, as executor of his mother's estate, vouched before the Ordinary in January, 1847, in which account the said estate is charged with \$7,681.87, alleged to have been paid by the executor in January, 1846, to the estate of Street, is relied on by the defendants to show that the money, said to have been invested by the late Master for this estate in the bonds of Mrs. Laurens, was restored to the estate of Street by the payment of these bonds; and that, if the funds were misapplied by the late Master, the default occurred subsequent to this payment in 1846, and consequently after the date of Mrs. Laurens' liability as one of the sure-

ties on the official bonds of the said Master. In this account the estate of Mrs. Laurens is credited with \$37,000, received from John Laurens, as the price of Mepkin Plantation. It is, however, admitted, that John Laurens paid in fact only \$22,000 in cash, and settled the balance by assuming to pay Mrs. Laurens' bond to Sir Claudius Hunter, trustee of Mrs. Henderson, for \$15,000; and that, with the exception of this last sum, the amounts credited to the estate of Mrs. Laurens in this account, were actually received in money by Edward R. Laurens, executor, on the 6th January, 1846.

"The defendants, by their solicitors, have urged before me that the fact, that the estate of Mrs. Laurens was not made available for the payment of her debts until 1846, and the

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ad*ditional fact, that by a provision of her will, the bulk of her estate was to be kept together until her grand-son, John Laurens, should attain his majority, which he did in that year, are circumstances going to show the inability of Mr. Laurens, as executor, to have paid these bonds before the time stated in his account to the Ordinary, as the date of their liquidation. To this the complainants, by their solicitors, oppose the principle of law, that when a payee and the legal representative of an obligor are one and the same person, payment of the debt will be presumed one year after the death of the obligor. This, it is contended, fixes the default in respect to the money invested in these bonds, assuming the investment to have been regular, within the second term for which Mrs. Laurens is liable as a surety of the late Master, to wit, in 1843, one year after the death of Mrs. Laurens, which occurred in 1842, and one year before the expiration of her suretyship in 1844. It is not necessary for me to consider these questions, as I am of opinion that the evidence furnished by the account of the executor of Mrs. Laurens is as inadequate, standing alone, to establish the fact of the payment of these bonds, as of their ever having been investments for the estate of Street. I have nothing before me which sustains the statement of this account, that these bonds were paid to the estate of Street by the executor of Mrs. Laurens. The receipts endorsed upon these bonds are without date, and they are signed by the late Master, without reference to the estate for whose benefit the money was received. There is no entry in the books turned over to me by Mr. Laurens, or any intimation in his annual report of funds to the Court, that the money for these bonds had been received by him as Master for the estate of Street. And at the date when it is alleged that these bonds were paid, it is evident, from the books of the Bank, as well as from the original checks which have been exhibited to me, that Mr. Laurens, as executor, drew no money for the estate of Street, from

the account kept by him in the said Bank with the estate of Laurens: nor deposited, as Master in Equity, any funds received from

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the estate of Laurens, *to the credit of the account kept by him in the said Bank with the estate of Street.

"I have disallowed the five bonds of Mrs. Laurens, in stating the account between the parties to this cause.

"6.—Commissions—one per cent. on the whole amount received by Mr. Laurens from 1836 to 1844, for the estate of Street.

"I have allowed this credit.

"In stating the account herewith submitted, I have calculated interest to the 9th of December, 1844, with annual rests, according to what I understand to be the rule of this Court in cases of this kind. The balance on that day I find to be \$11,490.37. On this sum I have charged compound interest, calculated at half yearly periods to the date of this report, in conformity with the 16th section of the Act of 1840, defining the liabilities of Master in Equity, and I find the sum so ascertained against the estate of Eliza Laurens to be (\$19,271.85,) nineteen thousand two hundred and seventy-one dollars eighty-five cents."

The cause was heard upon the report, and exceptions thereto by the defendants, on 7th and 8th July, 1852. His Honor pronounced the following decree:

Dargan, Ch. This case was heard on the Master's report and exceptions. The report is so full and clear, that it will be necessary for me to add nothing in explanation of the facts, and very little in illustration of the principles by which the decision of the questions made should be governed.

In the first exception, the defendants, John Laurens and Eliza his wife, Henry Laurens and John R. Laurens, who are legatees under the will of Mrs. Eliza Laurens, deceased, contend that the estate of the testatrix, (the said Eliza Laurens,) to which they are now entitled under the limitations of her will, should not be subjected to the payment of the plaintiffs' claims arising on the official defalcations of Edward R. Laurens as Master in Equity, because they say, that none of the

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*defaults and devastavits of the said Edward R. Laurens in reference to the funds of the plaintiffs in his hands, occurred during those two official terms of the said Edward R. Laurens, for and during which the said testatrix was his surety. If the facts upon which the exception is predicated be proved, it must of course be sustained.

Mr. Laurens was four times elected as Master in Equity for Charleston district. His mother, Mrs. Eliza Laurens, was one of his sureties on his official bonds for his first and second terms. Her liability commenced on the 12th December, 1836, and ceased on the 9th December, 1844, when Mr. Laurens,

having been elected the third time, gave another bond to which Mrs. Eliza Laurens was not a party. For any devastavits which Mr. Laurens may be proved to have committed between the dates mentioned, the estate of Mrs. Eliza Laurens will be liable.

It is not denied, that the assets of the estate of Timothy Street, for which the plaintiffs seek a recovery in this bill, came into the hands of Mr. Laurens during his first two terms; in other words, during the time for which Mrs. Laurens was bound as one of his sureties. But it is contended, that his default related to cash received by him, and not paid to the rightful owner; and that, when he was elected for the third time and qualified, he became debtor for that cash to himself as his own successor. And, upon the principle, that where the rights of creditor and the obligations of a debtor, of payer and payee, combine in the same person, the debt is discharged, it is contended, that these funds of the estate of Timothy Street, though paid to him before that time, must be considered as having been paid by himself to himself, at the commencement of his last term, and the liability for the waste, therefore, thrown upon the sureties of his last official bond. I think I have fairly stated the argument, and it would be a sound legal proposition, if it were true, that Mr. Laurens had no other duty to discharge in regard to the funds of the estate of Street, than simply to receive and safely keep them, and had, in

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fact so kept *them, during the time that Mrs. Eliza Laurens was his surety. *Vaughan v. Evans*, 1 Hill Ch. 414; *Enicks v. Powell*, 2 Strob. Eq. 196.

But the rule upon which the exceptants rely, is subject to modifications and exceptions. It would not apply to a case where consequential damages resulted from the nonfeasance or misfeasance of an act, which the official duty of the Master required him to perform: as not taking a mortgage and security when he was required; or taking these securities in so negligent or defective a manner as to render them ineffectual for the purposes intended. In these, and similar cases, the damages resulting in one term, would not be considered as payable to himself as his own successor in his succeeding term, but the liability would attach permanently upon the sureties of the first official bond. And so, where the loss has resulted directly from the act of the Master; as where the fund has been lost by him from carelessness, or at play; or has been applied by him to the payment of his own debts, or to his own use in any way, or was otherwise misappropriated. And so, also, in my judgment, where the purpose of giving greater security and productiveness to a fund, and removing it as far as possible beyond the control of the Master, and the hazards to which it might be exposed in his hands, the

general law, or a special order of the Court directs him to make a particular disposition of the fund, which he omits to do, and loss results directly, or indirectly; the liability must be referred to the official bond of that term during which the default was committed.

During the first official term of Edward R. Laurens, on the 23d January, 1836, by an order made in *Street & Bolnest v. Street*, confirming certain sales made by the Master under a previous order of the Court, that officer was directed "to invest, in his official name, the amount coming into his hands from the sales aforesaid on account of the distributees of Timothy Street, in such manner as may be agreed on by himself and the administrators of Timothy Street, to be held

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for the use of the *legal distributees of Timothy Street, and to be transferred to the parties who may be decided to be entitled thereto.

"And it is further ordered," says the record, "that on the sale of any part of the residue of the real estate in the bill mentioned, the proceeds thereof be partitioned as follows, viz: one-half thereof to Thaddeus Street, and the remaining half to the distributees of Timothy Street, deceased, to be paid to the Master of this Court, and distributed among the representatives of Timothy Street by the further order of this Court."

It does not appear that there was any residue of real estate ever sold, or that any such existed. The plaintiffs seek a recovery for the proceeds of no other sales than those mentioned in the clause of the decree first quoted. For the purposes of this case, therefore, the clause of the decree last quoted may be left out of view.

The fund for the payment of which the Master's report subjects the estate of Mrs. Eliza Laurens to liability, is a portion of that which the said decree requires the Master to invest. This he never did; unless certain bonds of Mrs. Eliza Laurens, mentioned in the second exception, be considered an investment under the provisions of the decree.

It is to be observed, that the decree not only orders the fund to be invested in the Master's official name, for the use of the distributees of Timothy Street, but directs that the securities themselves, (not the money,) should be transferred to the parties who may be decided to be entitled thereto. If the duties imposed by the decree upon the Master had been performed, the fund would have been safe. He could not have called it in without the special order of the Court. If he had invested it in public securities, or in Bank stocks, or the shares of joint stock companies, the trust would have been blazoned upon the certificates. They could not have been transferred without the trans-

eree receiving them with notice of the trust, and thus making himself liable to the cestui que trusts. And if he had invested them in private securities, in the manner prescribed by the decree, the same result would have

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happened. Thus, *the plaintiffs have lost a portion of their funds in the hands of the late Master, (now hopelessly insolvent,) directly, in consequence of his omission to perform a reasonable and proper duty prescribed by an order of the Court. The loss results directly from the default, for without it, the fund would have been safe. The loss results from the default as clearly as in a case where a Master omits to take a mortgage, or omits to record it, or to take sureties to a bond for the purchase money of property sold by him, when those duties are required of him, and loss results from his omission to perform them. And this default having occurred during his first term, it became, I think, a fixed liability on the sureties of the official bond of that term. It is not one of those cases in which his liability is transferred by operation of law from the Master to himself, as his own successor, and to the discharge of his sureties of the preceding term. There would be danger in carrying this rule of transferring liabilities by operation of law too far. If applied to cases like the present, it would have the effect, where the same person has held an office for several consecutive terms, to accumulate the liabilities of his whole official career upon the sureties of the official bond of the last term; thus rendering the security of the public against the consequences of official default incomplete; to say nothing of the injustice to the last sureties by the operation of a principle, which must, in some sense, be regarded as a fiction of the law, and which they never think of when they become bound. I think it is sufficient, if the rule be applied to those cases where the liability of the officer is simply for receiving and not paying over money, unconnected with other circumstances of default, from which loss proceeds. I have no authority or precedent for carrying it further; and I will not.

There is another view of the question arising on the first exception, at which I must now glance. The Act of 1840, (11 Stat. 113,) requires the Masters and Commissioners in Equity to deposit in Bank all money received by them in their official capacity, when

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the Court does not otherwise direct. *The late Master did deposit in Bank the wasted assets of the estate of Timothy Street. But he checked it all out again to the last cent, during the two terms for which Mrs. Eliza Laurens was his surety. It cannot be doubted, that the Act means, when the Master has deposited a fund, that he should let it remain on deposit. It would be the merest trifling to say, that his making a deposit is

a compliance with the requisition of the law, when he forthwith withdraws it on his own private check. As he did not check it out by the order of the Court for the purpose of investment, or in payment of the parties entitled, he must have checked it out for his own private uses. The manner of checking, as to the amounts and dates, also leads to this conclusion. If the fund had been suffered to remain on deposit, as the law intended, it would have been secure. His checking it out, without justifiable reasons, or an attempt at explanation, was an application to his own, or improper uses. It was a misappropriation of the fund, which, occurring during the official terms, for which Mrs. Eliza Laurens was responsible, fixed a permanent liability on her.

If the provisions of the Act of 1840 were faithfully observed, questions like this could never arise. It would greatly enhance the security of suitors in this Court, and diminish the liability of sureties. It would free the fiscal officer of the Court from any temptations to an abuse of his trust. And it would most effectually prevent the perplexing questions which arise between the different sets of sureties on the official bond of a Master, who has held office for several successive terms.

The Master's report has not subjected the estate of Mrs. Laurens to any greater liability than would be warranted by the foregoing opinion of the Court. And the first exception is therefore overruled.

As to the second exception, I shall add but a word or two of concurrence in what the Master has said in his report. His views on the subject are entirely satisfactory. I think it preposterous, on this evidence, to set up these bonds as having been intended as an investment of the funds of the estate of

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*Timothy Street. As to their having been so charged, in the settlement of the estate of Mrs. Laurens, and as to the fact of Edward R. Laurens, her executor, having received credit for the amount of these bonds, as for so much money received by him, on them, for the estate of Street, I think, in the first place, that the said settlement, as evidence, was inadmissible, being *res gesta* between other parties than the plaintiffs; and in the second place, if admissible, it was inconclusive. The second exception is overruled.

The third exception is also overruled. The most rigid rule of calculation is applied, where the accounting party is a defaulter and refuses to account. I think the mode of computation sufficiently lenient in this case.

The fourth exception is sustained. This is not a case which comes within the provision of the Act of 1840, to which the Master refers. That Act, (Sec. 13, p. 114,) declares, "If any Master or Commissioner in Equity shall be ordered by the Court to invest the funds in his hands, and the accumulations

of interest thereof, when received by him, as fast as received, in stock or other funds yielding interest, and he shall neglect to do so, he and his sureties shall be chargeable with compound interest upon all such sums, to be calculated at half-yearly periods, from the time when such sums, and the interest thereon, were received, respectively."

In this case, the Master was ordered to invest the fund, but not the accumulations of interest. It is clearly not a case under the Act, whose provisions, in this respect, are highly penal. I am not to extend its penal operation by construction—particularly in the case of a surety, who has been guilty of no default, and whose duty is only to respond to the defaults of her principal. Every case of payment by a surety is one of hardship. They are favored in Equity; at the same time, they are made rigidly to respond to all just and fair demands against their principal. All that the provisions of the Act of 1840 requires, is full indemnity for the in-

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terest upon interest, which he would *have received, if the accruing interest had been invested, in pursuance of the order.

In this case, the parties entitled to the fund will be fully indemnified, if they receive the fund ordered to be invested, with simple interest thereon, from the time when it should have been invested. The opinion of the Court is, that the estate of Mrs. Eliza Laurens is not responsible for any defalcations of Edward R. Laurens, after the expiration of his last term of office, for which she was the surety. It is further the opinion of the Court, that the estate of the said Eliza Laurens is only to be charged with interest on the amount of the indebtedness of the said Edward R. Laurens, at the expiration of the last term for which she, the said Eliza Laurens, was his surety, with simple interest thereon from that time to the time of payment. It is so ordered and decreed. It is further ordered and decreed, that the Master's report be recommitted, and made to conform with this decree.

The defendants appealed, on the grounds:

1. The decree of 1836 directs the Master to invest the proceeds of the Broad-street house, and the Pinckney and Meeting street lots. The Pinckney and Meeting street lots never came to the hands of Mr. Laurens. The proceeds of the Broad-street house came to his hands, and were invested. So that the liability of Mr. Laurens is on account of the sale of the East Bay and Queen street property only, which form part of what the decree of 1836 calls the residue. But there is no direction to invest the proceeds of that residue; and the money received by E. R. Laurens was, in contemplation of law, in his hands, when his office expired on the 9th December, 1844, and was transferred to the responsibility of his subsequent sureties. So that the decree ought to have been in favor of the defend-

ants; and the decree in favor of complainants is founded in a mistake in fact.

2. That the bonds which were paid out of

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Mrs. Laurens's *estate, to the Master, in 1846, ought to stand as a credit against any default to which her estate was liable, at the time of her decease.

3. That the evidence taken by the Master is sufficient to raise the presumption that they were entered into by Mrs. Laurens for the express purpose of covering the liabilities of her son to the estate of Street, or to some other suitor; and it would not make any difference whether they were applied to one suitor or another. That the estate of Street has had the benefit of them so far as this, that the payment of these bonds in 1846, creates a demand against the sureties who were responsible.

4. That as between the sureties of 1844 and the prior sureties, the sureties of 1844 are in the same situation as if they had become the sureties of a new Master, who received and wasted the bonds which the estate of Mrs. Laurens has paid.

5. That notwithstanding the irregularity of Edward R. Laurens in vesting the funds of Street in the bonds of Mrs. Laurens, payable to the Master, without designating the parties beneficially entitled, the successor of Mr. Laurens and his sureties would have been liable for the misapplication of them, if such successor, being a different person, had received them, and claimed and received payment for them, as bonds taken for the benefit of the estate of Street.

6. That in every view of the subject, the equities of the legatees of Mrs. Laurens are entitled to preference, not only over the sureties of the bond of 1844, but over the creditors.

7. That interest should be charged according to the rule laid down in *Dixon v. Hunter*, (3 Hill, 204,) and not in the manner stated in the Master's report, and confirmed by the decree.

Lesesne, Petigru, for appellants, cited *Schnell v. Schroder*, Bail. Eq. 334; *Joyner v. Cooper*, 2 Bail. 263; *Gray v. Brown*, 1 Rich. 353; Act 1840, § 16, 20, 26, 11 Stat. 108; *United States v. Eford*, 1 How. 250; *Baker v. Preston*, Gilmer, 232; *Arlington v. Merricke*, 2 Saund. 403; *So. Ca. Society v. Johnson*, 1 McC. 41; *People v. Jansen*, 7 Johns. R. 332.

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**Magrath, Memminger*, contra, cited *Field v. Pelot*, McM. Eq., 399; *Pratt v. Northam*, 5 Mason, 95; *Raphael v. Boehm*, 11 Ves. 106; 12 Ves. 127; 7 Johns. Ch., 623; 1 McC. Ch. 220; 2 McC. Ch. 10, 203, 265; *Hill on Trustees*, 374.

The opinion of the Court was delivered by

DARGAN, Ch. The first question made under the appellants' first ground of appeal

depends upon the construction of the decree of 1836, in the case of Thaddeus Street and Daniel Boineest, against the widow and children of Timothy Street, decreed. That decree is in the following words.

"1. The report of the Master in this case having been read, it is ordered that the same be confirmed. It is further ordered and decreed, that the contract for the sale of the house and lot at the corner of East Bay and Broad street, in the proceedings set forth, be confirmed, and that the Master, on compliance with the terms of sale, do execute titles therefor to the said Benjamin Smith.

"2. It is further ordered and decreed, that the two lots in Pinckney-street and the two lots in Meeting-street be sold by Thaddeus Street, either at public or private sale, with the approbation of the Master of this Court, and that the Master do execute titles therefor to the purchasers, provided he approve the price and terms of sale agreed on.

"3. It is further ordered, that the two stores on East Bay-street, the warehouse in Gillon street, and the lot and dwelling house in Queen-street, be sold by Thaddeus Street, at such time hereafter as by himself and Mrs. Street, the widow of Timothy Street, may be deemed expedient, and that the Master do execute titles therefor to the purchaser, provided he approve the price and terms of sale agreed on.

"4. It is further ordered, that the proceeds of the sale of the house at the corner of East Bay and Broad streets be partitioned as follows: viz. one third part thereof paid to Thaddeus Street, one third part thereof to Daniel Boineest, and the remaining third part thereof to the Master of this Court, for

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the distributees of Timothy Street, deceased. That the proceeds of the sales of the lots in Pinckney-street be also partitioned equally between Thaddeus Street and the distributees of Timothy Street and that the moiety belonging to the distributees of Timothy Street, together with the proceeds of the lots in Meeting-street, be paid to the Master of this Court.

"5. It is further ordered, that the Master do invest, in his official name, the amount coming into his hands from the sales aforesaid, on account of the distributees of Timothy Street, in such manner as may be agreed on by himself and the administrators of Timothy Street, to be held for the use of the legal distributees of Timothy Street, and transferred to the parties who may be decided to be entitled thereto.

"6. And it is further ordered, that on the sale of any part of the residue of the real estate in bill mentioned, the proceeds thereof be partitioned as follows: viz. one half thereof to Thaddeus Street, and the remaining half to the distributees of Timothy Street, deceased, to be paid to the Master of this Court, and distributed among the representa-

tives of Timothy Street, by the future order of this Court.

(Signed) Henry W. DeSaussure "

January 23, 1836.

From a proper interpretation of this decree, does it appear that the Master was directed to invest the shares of the heirs of Timothy Street in the proceeds of all the sales ordered in the decree?

On the part of the appellants, it is contended, that there was no order for the investment of the proceeds of the sale of the two stores on East Bay, the warehouse in Gillon-street, and the dwelling house in Queen-street. To sustain this view, reference is made to the sixth or last clause of the decree, which, it is said, relates only to the lots which have been mentioned above; and this clause decrees a distribution, and orders the shares of the distributees of Timothy Street to be paid to the Master, but does not order an investment.

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*It was for the share of the heirs of Timothy Street in these lots that the defendant, Eliza Laurens, is made liable by the Circuit decree. And the argument is, that as E. R. Laurens, the Master, was not ordered to invest this fund, he has committed no default or devastavit, for which Eliza Laurens, as his surety, would be liable. This, I think, would be giving a narrow and erroneous construction to the decree. The first, second and third clauses direct a sale of all the real estate belonging to the parties that are mentioned or described in the pleadings. And by the fifth clause it is "ordered, that the Master do invest, in his official name, the amount coming into his hands from the sales aforesaid, on account of the distributees of Timothy Street." It would be illogical, and a perversion of language, to say that the part of the order quoted, which directed an investment, did not relate to all the sales which had been previously ordered.

If this be the true construction, it is asked, for what purpose was the sixth clause intended? This question admits of an easy and satisfactory solution.

An attentive consideration of the decree will show that its objects were three-fold. The first object was to order a sale; the second was to effect a distribution; and the third was to provide a proper investment and security of the share of the heirs of Timothy Street, who were infants. The fourth clause directs a distribution of all the lots which had been ordered to be sold in the three preceding clauses, except the two stores on East Bay, the warehouse in Gillon-street, and the dwelling house in Queen-street. This is followed by the fifth clause, which orders the Master to invest, in his official name, the amount coming into his hands from the sales aforesaid, (that is, the sales which had been previously ordered,) on account of the distributees of Timothy Street.

This is followed by the sixth clause, which, without modifying or contradicting in any manner the previous parts of the decree, simply decrees a distribution of the proceeds of the sales of the two stores on East Bay, the warehouse in Gillon-street, and the dwell-

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ling house in *Queen-street, which had not been done in any previous part of the order. The Court is of the opinion that the decree of 1836 admits of no other reasonable or consistent interpretation.

Having arrived at this conclusion, it follows, that by the terms of the decree, the Master was bound to invest the share of the heirs of Timothy Street in the proceeds of all the sales ordered by the said decree. This he has not done; and the consequence is, that the shares of the heirs of Timothy Street are not now forthcoming, having been wasted by the said Master. And this default having been committed within those official terms for which Mrs. Eliza Laurens was his surety, she becomes liable to the distributees of Timothy Street, upon the principles laid down in the Circuit decree. I do not know that I could make these principles any clearer than I have in that decree. Suffice it to say, that this Court fully concurs in the views that I have therein expressed. And, in fact, they were not controverted on this trial.

But, admitting the construction of the decree of 1836 contended for on behalf of the appellants, and that the Master was not ordered to invest this fund by that decree, this Court is of the opinion that the Master committed a default, in not depositing the fund in Bank, as required by the Act of 1840. And this default having been committed during those official terms for which Mrs. Laurens was his surety, she becomes, on that account, liable. The master did deposit the fund in Bank, in his official name, for the estate of Street, but he very soon afterwards drew it all out, on his own private checks. This course of the Master, to deposit money in Bank, and to draw it out again on his own private check, is not a compliance with the provisions of the Act of 1840, according to their true intendment. The object was to afford security to the parties, whose funds were in the keeping of the Master. But what security would it be to deposit, and then to check out the fund? The Court would be wanting in the discharge of its duty, if a Master were permitted, by such subterfuges as this, to evade the plain intent of the law.

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*Furthermore: Mr. Laurens not only checked out the funds of the estate of Timothy Street, which he had deposited, but he misappropriated them. An inspection of his Bank account, and other evidence reported by the present Master, convince us, that he not only checked out the fund, but

that, in checking it out, he applied it to his own private use. And this devastavit, having occurred during the official terms for which Mrs. Laurens was his surety, that alone would make her liable. For it cannot be presumed that he paid over to his successor, (who in this instance was himself,) a fund which he is proved to have misappropriated, and applied to his own use, previous to the appointment of his successor. I need say no more on this branch of the case.

The second ground of appeal relates to the bonds of Mrs. Laurens to the Master, (Edward R. Laurens,) the amount of which, the appellants contend, should be allowed, as credits on the claim of the plaintiffs. For the evidence on this subject, I refer to Master Tupper's report, where it is given in much detail. The bona fides of these transactions is very questionable. There are not wanting circumstances to warrant the suspicion that they were not intended as securities for any estate in particular, but that they were designed to be applied and used as Mr. Laurens' emergencies might require. The consideration of these bonds does not appear. They are all payable to Edward R. Laurens, Master in Equity, his successors in office or assigns. On each of them is endorsed an acknowledgment of payment in full by Mr. Laurens, which is without date. The bonds do not show upon their face to what estate they belong, or for what purpose they were given. On the first bond, 10th January, 1841, is endorsed "Eliza Laurens to Master in Equity, for estate of Street, \$1,082.33." On the second bond, dated 14th March, 1839, is endorsed "Eliza Laurens to Master in Equity, bond for \$766.80," with no indication of its belonging to any estate. On the third bond, dated 14th March, 1839, is endorsed "Mrs. Eliza Laurens to Master in Equity, for Warren Andrews et ux, bond for

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634.30." The words "Warren Andrews et ux" are stricken out, and there is no further explanation. On the fourth bond, dated 19th January, 1841, is endorsed "Eliza Laurens to Master in Equity, for estate of McLeod, \$2,207.58." The words "for the estate of McLeod" are stricken out, and "January, 1845, for estate Street," are added. On the fifth bond, dated 19th January, 1841, is endorsed "Eliza Laurens to Master in Equity, for estate of H. P. Holmes, \$635."

Mr. Laurens was the executor of Eliza Laurens. In a settlement of her estate, he presented these five bonds as demands against that estate, as being held by him for the estate of Street, together with many other bonds of a similar character, belonging, as was stated, to other estates, amounting, in the aggregate, to \$61,911.67. For all of which, it seems, Mr. Laurens, as executor, was allowed credit, on balancing his accounts.

Under these circumstances, the appellants

seek to set up the amount of the five bonds before mentioned, against the claims of the plaintiffs pro tanto. It is admitted that these bonds cannot be regarded as investments for the estate of Street. But it is argued, that having been actually paid by Mrs. Laurens for the estate of Street, to Master Laurens, as his own successor, and after the expiration of the time when the former was bound as his surety, they should be allowed as payments, though they might not be allowable as investments.

If they were not intended as investments for the estate of Street, then their payment or non-payment is of no concern to that estate. The Court perceives no sufficient evidence to connect those bonds with the estate of Street. The fact that Mr. Laurens was allowed credit for the amount of those bonds, in the settlement of his mother's estate, as due to the estate of Street, does not conclude the plaintiffs on this point. They were not parties to those proceedings. They can still deny, and do deny, that they had any concern or interest in those bonds. In this view of the case, the payment or non-payment of the bonds becomes, as to these parties, an immaterial fact. I will not enlarge further

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upon this subject, but again refer to *Mr. Tupper's report. This Court concurs, as the Circuit Court did, in the views therein expressed.

Such being the decision of this Court upon the second ground of appeal, the consideration of the other grounds of appeal becomes unimportant.

It is ordered and decreed that the Circuit decree be affirmed, and that the appeal be dismissed.

JOHNSTON, DUNKIN and WARDLAW, CC., concurred.

Decree affirmed.

5 Rich. Eq. 254

CATHERINE GIBSON v. LOUISA F. MARSHALL, T. L. ROGERS, and Others.

(Charleston. Jan. Term, 1853.)

[Dower \hookrightarrow 82.]

A writ for the admeasurement of dower, issued from the Court of Equity, should direct the commissioners to make an assignment of dower, or an assessment in lieu of it, (in the alternative,) according to the provisions of the Act of 1786.

[Ed. Note.—Cited in *Holley v. Glover*, 36 S. C. 419, 15 S. E. 605, 16 L. R. A. 776, 31 Am. St. Rep. 883; *Frierson v. Jenkins*, 75 S. C. 475, 55 S. E. 890.

For other cases, see Dower, Cent. Dig. § 321; Dec. Dig. \hookrightarrow 82.]

[Dower \hookrightarrow 99.]

The return of commissioners in dower, like the report of the Master, is under the control of the Court; it is intended to satisfy the conscience and judicial discretion of the Chancellor;

and though neither corruption nor misfeasance on the part of the commissioners be charged, the Court may, on ex parte affidavits, showing error or mistake, refuse to confirm the return, and refer it to the Master, to take evidence and report upon the facts.

[Ed. Note.—Cited in *Gibson v. Marshall*, 6 Rich. Eq. 215; *Mellichamp v. Seabrook*, 2 S. C. 371; *Irwin v. Brooks*, 19 S. C. 102; *Fooshe v. Merriwether*, 20 S. C. 340.

For other cases, see Dower, Cent. Dig. § 347; Dec. Dig. \hookrightarrow 99.]

The late William Gibson, jun., died possessed of real and personal estate, which, by his last will, he devised to his three children, and to the defendant, Louisa F. Marshall. He made no provision in his will for his widow, who is the complainant, and at the time of his death was living with him and their children in one of his houses. Soon after his death, his executors, under one of the provisions of the will, sold the real estate, subject to her claim of dower, (of which the purchasers had full notice,) and the defendants, Marshall and Rodgers, became the purchasers. This bill was filed by his widow,

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for an account *of the rents, and for an admeasurement of her dower. Upon hearing of the case, at Charleston, September, 1851, before Dunkin, Ch., the following decree was made:

Dunkin, Ch. It is ordered and decreed, that a writ do issue for the admeasurement of complainant's dower in the premises described in the pleadings, situate in Franklin-street and in Smith-street, respectively. That the writ be directed to Thos. D. Condry, David Lopez, C. C. Trumbo, M. McBride and Thos. Farr Capers, requiring them, or a majority of them, to execute the said writ, according to the provisions of the Act of Assembly, in such case made and provided, and that they make a return of their proceedings in the premises, under their hands and seals, as therein directed, for the final judgment and determination of the Court.

The complainant, Catherine B. Gibson, appealed from so much of the decree as directed the Commissioners to execute the writ for the admeasurement of dower "according to the provisions of the Act of Assembly in such case made and provided," on the grounds:

1. Because the several Acts of Assembly, in relation to dower, merely give the doweress an additional process and remedy, if she chooses to accept their provisions, and file her petition in Common Pleas; but without that, do not deprive her of any right she previously had, of pursuing her remedy by writ of dower at common law, or by bill in this Court, in which case the admeasurement of dower is governed by the common law, and not by statute.

2. Because, having elected to proceed in this Court, she declines to accept the pro-

visions of the statute law, and is entitled to have her dower admeasured accordingly, and cannot be compelled to accept a commutation in money under the statute, which she had the privilege of doing by petition in Common Pleas.

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*The case was not reached during the sitting of the Appeal Court in January, 1852. Pending the appeal, the plaintiff sued out a writ of dower, requiring the Commissioners to admeasure and assign one-third of the lands specifically to the plaintiff, for her dower, without any reference to the discretion of the Commissioners, under the Act, to assess a sum of money in lieu of dower, if, in their opinion, the lands could not be fairly divided without manifest disadvantage. For this defect, a motion was made by the defendants, at March sittings, 1852, that the writ be set aside. The motion was made before Johnston, Ch., who made the following order:

Johnston, Ch. The motion now made by the defendants stands upon a different footing from the one made a few days ago. Then it was moved that it be referred to one of the Masters, to take testimony, whether the conclusions to which the Commissioners in partition had come, were not unreasonable and unjust. The motion was refused, because it proposed to transfer the functions properly belonging to the Commissioners to the Master.

The present motion is to set aside the writ, for irregularities and imperfections upon its face, calculated to influence the return of the Commissioners.

The order of Chancellor Dunkin was, that a writ issue, for the admeasurement of the plaintiff's dower, under the statute.(a) The plaintiff, on that occasion, contended that she was entitled to have an actual assignment of her dower, at common law, and not such an assignment, or an assessment in lieu of it, (in the alternative,) under the statute; and an appeal was taken from the Chancellor's order, because it directed the proceeding to be had under the statute.

The form adopted by the plaintiff, in issuing the writ of partition under the order, was such as to give her all the advantages she would have possessed, had the order been

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granted *her for which she contended: or if her appeal had been heard and sustained: and I think the writ should be recalled, for this irregularity.

The proper form of the writ presents a very important question of practice, because the Commissioners are required to take an oath to execute it, according to its mandates. If these be limited, so as to set forth but a part of their duties, the necessary consequence is, that they are compelled, by their

very integrity, to fall short of their whole duty.

The form of this writ is such as to require the Commissioners to make an actual admeasurement and assignment of the dower without more; and by swearing to execute the writ, the Commissioners were made to bind and confine themselves to the specific act of admeasurement: and it may be, that their return of an actual assessment has followed from the limit thus set to their powers.

The form adopted, which is contrary to that which has ever prevailed under the statute, is sought to be justified by what appears to me to be a very narrow construction of its provisions. It is said that it requires a writ to be issued, commanding the Commissioners to admeasure the dower, etc., and that the writ must go forth with that mandate alone. And that, although the statute proceeds to empower the Commissioners to assess a sum in lieu of dower, in case they cannot admeasure the latter without disadvantage to some of the parties, this power should not appear in the directions contained in the writ.

The necessity for the full power of the Commissioners (in the alternatives contemplated by the Act) being set forth, by way of directions, appears from the fact that the Commissioners are required to take an oath to execute the writ. If, as was argued, the Commissioners, though sworn to admeasure the dower, are at liberty to notice their power under the statute not to admeasure it, but to assess a sum as a compensation for it, this plainly amounts to this, that the Act contains a dispensation to them, absolving them from the only specific act, which, it is said, the writ can properly direct them to do,

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and which *the statute specifically binds them by oath to do. This cannot be.

If the writ is intended to leave the Commissioners at liberty to perform their whole duty—if it is not intended to entrap and mislead them in the performance of it—let the writ go forth describing their duty to them. This can in no case do any harm; and it may in some cases obviate mistakes and injustice. The writ, as a matter of sound practice, should conform to the scope and true intention of the statute; and not be restricted to part of the duties it intends to authorize and require.

Such, as I have said before, is the form of writs of this description heretofore; and a departure from it should not be encouraged.

It is ordered, that a writ be framed by Mr. Tupper, one of the Masters, in conformity with this opinion; and issued to five Commissioners, two to be named by the plaintiff, two by the defendants claiming the land, and the fifth by said Master, requiring them, or a majority of them, to execute said writ. If either party, after notice, refuses or neg-

lects to name Commissioners, the said Master to name them in his place.

It is further ordered, that the writ in partition, heretofore issued, be set aside.

The injunction, heretofore ordered, to be continued until further order. And as it appears that the plaintiff has a decree, entitling her to have her dower laid off and assessed, the security required for the said injunction, in the previous order, is limited to the amount of damages and costs recovered against the plaintiff at law.

In the order of Chancellor Johnston all parties acquiesced.

The new writ thus directed was issued and executed. The Commissioners made their return, meting out and assigning the plaintiff's dower in the lot in Franklin-street, and assessing a sum of money, in lieu of her dower, in the lot in Smith-street. As to the assessment in the latter lot, the parties were satisfied; but the defendant, Marshall, con-

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tested the return as to the lot *in Franklin-street, and submitted affidavits, showing that the portion assigned to the plaintiff exceeded in value her interest, and embraced all the houses and improvements, and left a part of the lot, covered by water and mud, for the defendant's share. These affidavits, while they imputed no corrupt motive to the Commissioners, exhibited error of judgment, as to values, in distributing the lot.

Upon these affidavits, Chancellor Dargan, at July sittings, 1852, on motion of defendant, Marshall,

Ordered a reference to one of the Masters, to take evidence and report, whether the admeasurement made by the Commissioners, in assigning the plaintiff's dower in the lot in Franklin-street, was not contrary to the Act of 1824, illegal and inequitable.

From this order the plaintiff also appealed, objecting to the reference to the master on ex parte affidavits; and further, that the affidavits impute "no malpractice or error of principle to the Commissioners," and nothing beyond a mistake in valuation.

Campbell, for appellant.

Phillips, contra.

Payne v. Payne, Dud. Eq. 127; Brown v. Duncan, 4 McC. 346; Wright v. Jennings, 1 Bail. 280; Lesesne v. Russell, 1 Bay, 459; McCreary v. Cloud, 2 Bail. 344; Scott v. Scott, 1 Bay, 506; Hawkins v. Hall, 2 Bay, 449; Beaty v. Hearst, 1 McM. 33; 1 Des. 110, 115; Stock v. Parker, 2 McC. Ch. 382; Davidson v. Graves, Bail. Eq. 272; Brown v. Caldwell, Sp. Eq. 322; and Woodward v. Woodward, 2 Rich. Eq. 23, were cited.

The opinion of the Court was delivered by

WARDLAW, Ch. [Who, after stating the facts, and the proceedings that had been had in the cause, proceeded as follows:] It is manifest from this statement, that as the

plaintiff has elected to execute Chancellor Johnston's decree, by issuing her writ in conformity thereto, and actually accepting a

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commutation *for her dower as to the lot in Smith-street, she has little cause of complaint as to Chancellor Dunkin's decretal order. Still she may technically insist upon her grounds of appeal from this order, so far as the lot in Franklin-street is involved.

The question of procedure is important. The express enactments of the Act of 1786 provide merely a mode of obtaining dower, or its equivalent, in the Court of Common Pleas, and have no direct operation on the pre-existing and independent jurisdiction and remedies of this Court on the subject. It was the practice of this Court, before the Act of 1786, to compensate widows for dower by commutation in money. [Miller v. Cape] 1 Des. 110; [Miller v. Miller, Id. 111]; [Clifford v. Clifford] Id. 115. The value of the dower in money was then ordinarily ascertained by the Master, on reference to him for the purpose: but since the Act of 1786, the Court has usually employed the instrumentality of commissioners provided by the Act, to ascertain this value. Stock v. Parker, 2 McC. Eq. 382. There is no reasonable objection to this adoption of new machinery, to complete an old remedy. On the contrary, there is special propriety in making the procedure uniform in both Courts. The commissioners are not authorized by the Act to assess a sum of money in lieu of dower, until they have determined that the lands can not be fairly divided without manifest disadvantage. It is clear, that this Court, from the earliest epoch after its organization of which we have any report, pursued a procedure in execution of the principles of equity, different, in some respects, from that of like Courts in the country from which we derive most of our institutions: notwithstanding the Act of 1721 required this Court to conform generally to the usages and practices of the Court of Chancery in South Britain. In no other instance, perhaps, has our departure from the English practice been so great, as in this particular of commuting the share of a dowress, or of one entitled to partition, by sale of the premises or assessment, into its monied value, instead of making specific assignment. Our practice, however, is too inveterate and advantageous to be now disturbed.

The Act of 1791 authorizes the Court to sell

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the premises for *partition, only in cases of intestacy, yet this Court is in the constant practice, departing from the procedure of the Court of Chancery in England, of effecting partition by sale in cases of testacy. Pell v. Ball, 1 Rich. Eq. 387. No Act of the Assembly prescribes the term for advertisement of the sales of estates made by this Court, yet we habitually conform to the requisitions of the Sheriff's Act of 1839. It is ordered and

decreed, that the appeal from Chancellor Dunkin's decreta! order be dismissed.

It remains to consider the appeal from Chancellor Dargan's order, refusing to confirm the return of the commissioners, and directing a reference to the Master to take testimony as to the inequality and injustice of the specific assignment of plaintiff's dower in the lot in Franklin-street, and to report upon the facts. We suppose that in this Court, since we have substituted commissioners for the Master as our agent to ascertain the value of dower in the premises, the return of the commissioners is under our supervision to the same extent as would be the report of the Master in such case. In *Payne v. Payne*, Dud. Eq. 127, the Court says: "The return of the commissioners must necessarily be under the control of the Court. There would be great defect of justice, if the Court had not the power of correcting their errors, irregularities or partialities." Even in the Law Court, notwithstanding the Act of 1786 declares that the return shall be binding and conclusive upon the parties interested, it is decided, in *Beaty v. Hearst*, 1 McM. 33, that "there is no doubt that a Circuit Judge may withhold confirmation of such a return, either in dower, partition, or in any other proceeding, and allow further time, on such showing as satisfies him that there has been error or mistake, or any departure from established legal rules." It is not necessary that there should be any corruption or misfeasance on the part of the commissioners: it is enough, to set aside their return, that they have mistaken the extent and value of the interests or shares of the parties concerned. Their return is intended to satisfy the conscience

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and judicial discretion of the Chancellor, and any circumstance exhibiting error on their part may justify him in refraining to do that which seems to him to be inequitable. In the present case, we have not before us the particular affidavits upon which the Chancellor acted; but we have no reason to doubt that his judicial discretion in the matter was judiciously exercised. It was an act of indulgence to the plaintiff, to refer it to the Master, to take evidence on the point of the return on both sides; whereas, the Chancellor might have proceeded to act definitively upon the ex parte testimony.

The form of the order in this case, probably prepared by counsel, is liable to some just exception. The Act of 1824 has no application to the case, as the land was not alienated by the husband of demandant during coverture. So, too, there is impropriety in the seeming delegation by the Chancellor to the Master, to judge of the legality and equity of the conduct of the commissioners, in assigning the plaintiff's dower.

It is ordered, that the order of reference to Master Tupper, as to the assignment of

dower to the plaintiff in the lot in Franklin-street, be so modified as merely to require him to take evidence and report upon the facts as to such assignment. In all other respects the decrees are affirmed, and the appeals dismissed.

DUNKIN and DARGAN, CC., concurred.

JOHNSTON, Ch., absent at the hearing.
Appeals dismissed.

5 Rich. Eq. *263

*JOHN BOYCE, Adm'r v. W. W. BOYCE
and Others.

(Charleston. Jan. Term, 1853.)

[Execution ⇨288.]

Under a bill to marshal assets, filed by an administrator, the estate, real and personal, of the intestate was ordered to be sold by the Master, and creditors were enjoined from proceeding at law. A creditor, who had come in and proved his debt, had certain lands of the intestate levied on and sold under his fi. fa. at law, and purchased them himself. Near eight years afterwards, a supplemental bill was filed, to set aside the sale, and it was so ordered: *Held*, that defendant, the creditor, must account for rents and profits from the time of his purchase.

[Ed. Note.—Cited in *Scille v. Thomson*, 15 S. C. 368; *Hardin v. Melton*, 28 S. C. 48, 4 S. E. 805, 9 S. E. 423.

For other cases, see *Execution*, Cent. Dig. § 825; Dec. Dig. ⇨288.]

[*Executors and Administrators* ⇨473, 474.]

Where a bill to marshal the assets of an intestate, is filed, any creditor who comes in and proves his debt under the Master's notice, becomes a party to the decree, an actor in the proceedings, and is entitled to any order to speed the cause or carry the decree into successful execution.

[Ed. Note.—Cited in *Westfield v. Westfield*, 13 S. C. 485.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2041-2060; Dec. Dig. ⇨473, 474.]

This cause was first heard at Charleston, March, 1851, before Wardlaw, Ch., who made the following decree:

wardlaw, Ch. Of the voluminous pleadings in this case, a brief abstract may suffice for the questions now presented for decision.

The plaintiff filed his original bill, July 2, 1840, alleging that the personal assets of his intestate were greatly inadequate to the payment of the debts, and had been applied by him, as administrator, towards this end, so far as he could proceed safely—that the real estate was under mortgages to a large amount—that certain creditors had obtained judgments against him, and others had instituted and threatened suits—and praying the direction and aid of the court, in the administration of the assets, and injunction against creditors from proceeding elsewhere for the recovery of their debts. William W. Boyce, only co-heir with plaintiff of the in-

testate, the judgment creditors, and some of the mortgagees of the realty, were made defendants. On July 14, 1840, it was ordered by the Court, that the plaintiff account before the Master for the administration of the estate of his intestate—that the Master take an account of the real and personal estate of the intestate, and of the liens thereon, and report as to the most efficient mode of disposing of the same, and of satisfying the

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creditors, in the *order in which they were entitled to payment out of the real and personal assets—that the Master call in the creditors, by advertisement in the Gazettes, to prove their demands before him—and that all creditors of the intestate, whether parties to the suit or not, upon notice of this decree, forbear and be restrained and enjoined from proceeding at Law, or in Equity, or otherwise than therein provided, for the recovery of their debts; with leave to creditors to apply for the suspension or modification of the order. On July 25, 1840, after this decree for account and injunction, and with notice thereof, E. P. Starr, for Starr & Howland, took judgment in the City Court of Charleston, against the administrator, for the debt of the firm against the intestate. On January 29, 1841, the Master made a report upon the debts of the intestate, and among these included the debt of Starr & Howland, which was produced to him and proved by the attorney who had conducted said suit in the City Court; and his report was confirmed, and the Master was ordered to sell the real and personal estate of the intestate, and apply the proceeds of sale to the payment of the debts, according to their legal priority. Various reports were afterwards made by the Master, excusing the non-execution of the order of sale; and other directions for sale were given him by the Court. Afterwards E. P. Starr procured an execution, fieri facias, founded on the judgment of the City Court, to be levied on certain lots of intestate, and on July 5, 1842, after explicit notification of the decree of this Court for account and injunction, procured these lots to be sold by the Sheriff, and purchased the same for the price of \$80., being about the one two hundredth part of their value, took possession of them, and has ever since received the rents and profits. On April 29, 1850, plaintiff filed his supplemental bill against Starr and others, reciting the proceedings of the original bill, and excusing his acquiescence in Starr's possession, by the statements of his absence from the State, and his trust in the learning and energy of his counsel, to be stimulated, as he supposed, by the interested oversight of his brother and co-heir, and praying, among

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other things, that Starr should *deliver possession of the estate purchased by him, and account for the rents and profits. To this bill Starr demurs, on the ground that plain-

tiff, as administrator of the goods, chattels and credits, has no right to implead him as to the real estate; and pleads that he is in possession of the lots aforesaid by legal title, namely, by purchase of the whole at Sheriff's sale, under fi. fa., and by purchase of a mortgage of one portion thereof, and that this Court has no jurisdiction to try the titles to lands. The case comes before me upon this demurrer and this plea. I have much less difficulty as to the proper judgment on the points presented, than in expressing the reason for the judgment, without indicating opinions on matters which should be reserved for future adjudication. It is safer that my reasoning at this time should be in brief, perhaps inconsequent, than that I should seem to prejudge the grave matters in the case which remain behind.

1. As to the demurrer. The administrator with us, although peculiarly charged with the goods, chattels and credits, represents to some extent the real estate and the heirs: for on a judgment against him the land of the intestate may be sold, as in fact it was in the present case. Under the operation of the statute of Geo. 2, of force here, lands are liable, equally with personalty, for the debts of the deceased, and may be regarded as legal assets, in the hands of the administrator. In England, bills of conformity, as they are called, by an executor or administrator of an insolvent estate, for the directions of the Court, in the administration of the assets, are not very usual, nor much encouraged, (*Story Eq. § 544*; *Brooks v. Reynolds*, 1 Bro. Ch. R. 183); but with us, from the equal liability of real estates for debts, and from the indisposition of Courts to spur creditors in the race for diligence, they are common and favored. Our procedure is well justified in *Thomson v. Palmer*, 2 Rich. Eq. 35. "Such a bill is not known to the English practice; but it has been long established among us, is well known to every member of the profession, and is too wholesome to be abrogated. Among us, the real estate as well

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as the personal *estate, is liable for the debts of the deceased; but no order for the sale of the former, in aid of assets, can be obtained, except in this Court. It is manifestly for the benefit of all parties, when this is necessary, that the whole of the funds should be brought together, and all the creditors brought in, and that the estate should be administered in one suit. This practice adjusts conflicting claims without prejudice to the trustee, and without injury to any party, and prevents unnecessary litigation. Where the executor files such a bill, the practice is to select one or two of the principal creditors as defendants; and to bring in the others by an order. None of them need answer except when specially required," &c., "but all are enjoined, either by an order, or by injunction issued in conformity to an or-

der obtained, from suing elsewhere." This extract is so explicit, and so convincing, as to supersede the necessity of much remark upon either demurrer or plea. In the case under consideration, the administrator has exhibited a proper case against heirs and creditors, for the administration of the whole estate in one suit, under the direction of this Court.

2. Then as to the plea. This Court does not undertake to try the legal title to lands, except as incidental to matters of equitable cognizance; but it does undertake to determine whether the legal title has been honestly acquired, and may be honestly exerted. It may relieve against a legal title acquired by fraud, accident or mistake; or it may impress upon a legal proprietor, against his will, under equitable circumstances, the character of a trustee; or it may inhibit the unconscientious use and employment of any legal advantage. Without improperly dwelling on the circumstances of this case, it is enough to say that there is such suspicion thrown upon the transactions of the defendant, Starr, in acquiring his title, as to justify full investigation. A plausible case is made against him, requiring explanation on his part, of his disregarding the decree of this Court, which should have bound him as it did others, and of his buying up, at a sacrifice that startles common sense and justice, the assets which the Court had un-

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dertaken to administer. In the answer supporting his plea, he denies that a writ of injunction was served upon him, but he does not deny notice of the decree for account and injunction; he denies that he authorized his attorney to present his demand for proof, before the Master, but he does not deny his employment of this attorney to collect this demand, with general authority to pursue any mode that might seem proper, in his skill and discretion; nor that after notice he acquiesced in the particular mode of collection pursued by his attorney. The bill, so far as it is not contradicted by the plea, must be assumed to be true, in judging of the validity of the plea. Mitf. 300. If the defendant cannot be protected in his legal title, he is liable, as a matter of course, for rents and profits. *Martin and Walter v. Evans*, 1 Strob. Eq. 350. I am of opinion the defendant must answer the case made against him. It is ordered and decreed, that the demurrer and plea of the defendant, E. P. Starr, be overruled, and that said defendant make full answer, according to the practice of this Court.

At March sittings, 1852, the cause was heard before Johnston, Ch., who made the following decree:

Johnston, Ch. This case coming up for a hearing, and the bill, answers, previous orders and decrees, as also the report of the Master and the testimony taken before him

having been read and considered: it is, on motion of complainant's solicitor, ordered and decreed, that the purchase of the premises in Society-street, described in the pleading, by Edwin P. Starr, be set aside, and that he do deliver forthwith the possession of the same to James Tupper, one of the Masters of this Court; and that he, Edwin P. Starr, account before said Master for the rents and profits of said premises, from the time of his purchase and taking possession thereof.

It is further ordered and decreed, that the said Master do sell at public auction the said premises, on terms to be fixed by his discretion, and he also report upon the existing debts of, and liens upon, the intestate's es-

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tate, and how, in what proportions, *and in what order, they are entitled to claim the proceeds of the re-sale and of the rents and profits.

The defendant, Edwin P. Starr, appealed from so much of his Honor, Chancellor Johnston's decree, as directs the account of rents and profits to be taken from the time of the defendant, Starr's purchase and possession.

1. Because the account of rents should not go farther back than the filing of the bill.

2. Because the account of rents should not go farther back than four years prior to the filing of the bill.

[For subsequent opinion, see 6 Rich. Eq. 302.]

Memminger, for appellant.
Cunningham, for plaintiff.

The opinion of the Court was delivered by

DUNKIN, Ch. The defendant has, very properly, made no appeal from so much of the decree, heretofore pronounced, as set aside his purchase of the premises in Society-street, and declared him liable for the rents and profits. But it is insisted, that the account for rents and profits should not be carried beyond the time of filing the bill, or, at farthest, beyond four years prior thereto. Generally, it cannot be questioned that a party is responsible for the use of property which does not belong to him, and of which he has unlawfully obtained possession. On the other hand, in administering relief against a party who has acted under ignorance or mistake, and in favor of a party who has been supine or negligent, this Court exercises a discretion in relation to the account, which is necessarily modified by the circumstances. The rule declared in *Rowland v. Best*, 2 McC. Eq. 320, has been repeatedly recognized. "It is not an uncommon case for a party who lies by and permits another to occupy and enjoy property as his own, under an apparent good title, which he might and ought to have brought into discussion much earlier, to be restricted in his demand for an account of rents and profits, to the filing of the bill, or four years before."

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*The argument insists that the defendant is entitled to the benefit of this modification. The ground, upon which the decrees heretofore pronounced the defendant's purchase invalid, was, that he was a party to the decree of July 14, 1840, and that his subsequent proceedings in the City Court were in violation and contempt of the injunction thereby ordered. His possession, therefore, under the Sheriff's sale, was tortious in its inception. But it is said there was laches. It appears to the Court that this argument proceeds from a misapprehension of the character of the proceedings, and of the decretal orders of 1840 and 1841. The bill was to marshal the assets, real and personal. "The settled doctrine," says Chancellor Kent, *Thompson v. Brown*, 4 Johns. Ch., 643, "is that the decree to account, in such cases, is for the benefit of all the creditors, and in the nature of a judgment for all. All are entitled. And from the date of such decree an injunction will be granted to stay all proceedings of any of the creditors at law." "The establishment of this doctrine and practice," adds he, "is to be traced back to the decisions of Lord Hardwicke, Lord Camden and Lord Thurlow." The decree, therefore, of July, 1840, was for the benefit of all the creditors, and in the nature of a judgment for all. Every creditor who came in and proved his debt under the Master's notice, became a party to the decree, an actor in the proceedings, and was entitled to move for any order to speed the cause, or carry the decree into successful execution. It has been definitively settled that the defendant presented and proved his demand under the decree, and became thereby just as much an actor in the cause as the original complainant, or as any other creditor situated similarly with himself. If the estate was insolvent, and had been surrendered to the control and disposition of the Court, it might well be expected that thenceforth the creditors would be most diligent in stimulating the action of the Court. If proceedings under the decree were unreasonably protracted or suspended, the delay is not more chargeable upon one than another of those who were entitled to expedite them, not more to any other creditor than to

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the *defendant: and it is not unlikely that the irregular proceedings of the defendant, in the levy and sale of July, 1842, may have created obstacles in carrying into effect the decretal order of sale made by the Court, which did not previously exist.

This Court perceives no error in the decree of the Chancellor, and the appeal is dismissed.

JOHNSTON, DARGAN, and WARDLAW, CC., concurred.

Appeal dismissed.

5 Rich. Eq. 270

W. SIMONS and Wife et al. v. THE SOUTH WESTERN RAILROAD BANK and EDWARD R. LAURENS.

(Charleston. Jan. Term, 1853.)

[Trusts \Leftrightarrow 357.]

Where a Master in Equity borrowed money, and, to secure the payment, hypothecated certain certificates of stock which he held as Master, and in trust—the official character in which he held the stock, and the trust, appearing upon the face of the certificates—the lender was decreed to deliver up the certificates to the parties entitled, and account for all dividends he may have received.

[Ed. Note.—Cited in *Mathews v. Heyward*, 2 S. C. 244; *Webb v. Graniteville Mfg. Co.*, 11 S. C. 401, 32 Am. Rep. 479; *Salinas v. Pearsall*, 24 S. C. 184; *Rabb v. Flenniken*, 29 S. C. 285, 7 S. E. 597.

For other cases, see *Trusts*, Cent. Dig. § 546; Dec. Dig. \Leftrightarrow 357.]

Before Dargan, Ch., at Charleston, June, 1852.

Dargan, Ch. In the case of Jonathan Lucas and others, against William Hume and others, by a decretal order of the Court, (March, 1840,) Catharine Simons, then Catharine Hume, as one of the heirs at law of Mrs. Lydia Lucas, was declared to be entitled to a portion of the proceeds of the sale of a plantation called Middleburgh: which place was then ordered to be sold by the Master, on certain terms therein prescribed. The same decree directed a distribution of the proceeds of the sale into thirteen parts, corresponding with the number of the heirs at law who were to receive the same; and also directed their shares to be paid to them

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respectively. In regard to the share *of Catharine Hume, (who was then an infant,) as well as the shares of the other infant parties, the same decree ordered them to be paid to the guardians of the said infant parties, "if they have such guardians, and if not, to be invested by the Master for their benefit respectively, until demanded by the proper authority."

In pursuance of this decree, Middleburgh, on the 6th April, 1840, was sold by Edward R. Laurens, then one of the Masters in Equity, to Jonathan Lucas, for \$29,600. The sale was duly reported and confirmed. The share of Catharine Hume in the cash proceeds of the sale was \$794.10, which, by the directions of the decree, was invested by the said Master in 5 per cent. stock of the City of Charleston. The certificate was No. 124, and was in the name of "Edward R. Laurens, Master in Equity, in trust for Catharine Hume, a minor child of Catharine Hume, formerly Lucas, deceased, or his assigns, for \$794.10 of the issue of 1835." *

The share of Catharine Hume in the credit portion of the sales, afterwards received by the said Edward R. Laurens, was \$4,837.06. This was invested by him in a certificate of

State 3 per cent. stock, for \$7,441.53, bearing date the 16th July, 1847, in the name of "Edward R. Laurens, Master in Equity, in trust for Lucas and Hume, or his assigns."

On the 28th Oct., 1850, Edward R. Laurens, being pressed for money, negotiated a loan from the South Western Rail Road Bank for \$5,000, which he secured by his individual note, and a hypothecation of the two certificates above described, and another certificate of State three per cents., which stood in his name as trustee for Susan Randall.

The said certificates were deposited with the Bank, and endorsed in blank by the said Edward R. Laurens. The note of Edward R. Laurens to the Bank was renewed several times, and the last renewal remains unpaid, in possession of the Bank. On the 19th April, 1851, the Bank, wishing to sell the stock, filled up the blank assignments (endorsed upon the certificates) in favor of the said Bank;

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and, to be better able to make a sale *thereof, offered the certificates at the State and City Treasury, to be transferred in the name of the South Western Rail Road Bank. Before the transfers were made, the State Treasurer and City Treasurer received notice from the complainants, and from the sureties of Edward R. Laurens' official bond: in consequence of which the transfers have not been made.

Catharine Hume has intermarried with William Simons, and C. G. Memminger and Keating L. Simons are the trustees of their marriage settlement, by which the fund in question has been assigned to the said trustees, in trust for the uses of the marriage settlement. And the said Bank having refused to deliver up the said certificates of stock, the said Simons and wife, and the said trustees, have filed this bill for an account against the said Bank, and against the said Edward R. Laurens, and that they may be decreed to deliver up the said certificates, &c. Catharine Simons has died since the filing of the bill; but both the legal and equitable interest in this fund remain in parties before the Court.

Every principle of equity applicable to the subject demands that the South Western Rail Road Bank should be decreed to make restitution. One who purchases from a trustee, with notice of the trust, becomes himself chargeable with the equities of the trust, to the extent of his dealing, if the trustee's act is a violation, or an abuse of the trust. In this case, the Bank had notice, for the trust was unmistakably stamped upon the face of the certificates; and if they had followed up the indications thereby afforded, it would have led to the most complete information on the subject, and shown them the utter incapacity of Laurens to sell, much less to hypothecate for his own use the certificates of stock, which stood in his name for the benefit

of the wards of the Court. The morality of the transaction, on the part of the Bank, I do not impugn; but certainly there was great blindness. They were deceived, but they must take the consequences. If Laurens were to be considered a mere trustee, I should consider the plaintiffs entitled to relief.

But it is a mistake to suppose that a Mas-

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ter in Equity is a *trustee in the technical sense, in regard to the assets in his hands. He is a mere depository. He has no right or authority to make investments, or to call in, or change those that have been made, without the special order of the Court. Without such authority, he has no right to negotiate, or transfer any of the securities that are in his possession or under his control. Where bonds or other securities are payable to him, he may receive the money when due; and, as money is not easily identified, his misappropriation of it might be without remedy as to the money itself. Yet even as to the cash funds in his hands, if misappropriated, they would be followed in the hands of one who, in taking them, was aware of the abuse of the official trust.

It would be a great perversion of every principle of equity, if the plaintiffs' claims were not sustained.

It is ordered and decreed, that the defendant, Edward R. Laurens, do account for and pay over to the plaintiffs, who are the trustees of the marriage settlement of William Simons and Catharine his wife, all the moneys which have come into his hands, as late Master in Equity, which may be due to the said Catharine Simons, from the estate of Lydia Lucas, and that Master Tupper state the accounts.

It is further ordered and decreed, that the South Western Rail Road Bank do deliver up to the said trustees, the said certificate of City 5 per cent. stock, and the said certificate of State 3 per cent. stock, mentioned and described in the plaintiffs' bill; and that they account for the dividends they may have received thereon, (if they have received any;) and that all transfers and assignments of the said certificates be set aside and cancelled.

It is further ordered and decreed, that the defendants pay the costs.

The South Western Rail Road Bank appeared, and insisted, that these defendants took the securities mentioned in the pleadings in the course of business, as security for a

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loan. That *being purchasers for a valuable consideration, no decree ought to have been made against them.

That the defendants are entitled to the assistance of this Court, to recover from the sureties of Edward R. Laurens the amount advanced by them on the said securities, if the securities themselves are adjudged to the complainants.

Hanckel, Petigru, for appellants.
Memminger, contra.

PER CURIAM. We concur in the decree of the Chancellor: and it is ordered that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.
Appeal dismissed.

J Rich. Eq. 274

W. M. RIVERS, Adm'r, v. GREGG, HAYDEN & CO. and Others.

(Charleston. Jan. Term, 1853.)

[*Infants* ⚡50.]

An infant who has an allowance, from the Court or any other source, of a sum sufficient to provide himself with necessities suitable to his fortune and condition, is not liable, ordinarily, for necessities supplied on credit.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 114; Dec. Dig. ⚡50.]

[*Infants* ⚡50.]

If the creditor shows that the amount allowed him had been wasted, or in any way had been lost to the infant, and that he was in actual need of the necessities supplied, he would be liable—semble.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 114, 115, 117-127; Dec. Dig. ⚡50.]

[*Insurance* ⚡591.]

Creditors of infant taking a policy of insurance on the life of infant, and with his consent—they paying the premium and other expenses—are entitled, on the death of the infant, to the proceeds of the policy, to the extent of their debt; whether the policy be taken in their names, or in that of the infant.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1480; Dec. Dig. ⚡591.]

Before Dargan, Ch., at Charleston, June, 1852.

Dargan, Ch. William M. Eddings was a young man of large expectancies. He possessed an absolute and indefeasible estate, the value of which has been estimated by the

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Master at *thirty-five or forty thousand dollars. This includes the accumulated income of the defeasible estate to which he was conditionally entitled, under the will of his grandfather, William Eddings; which said income, by a decree of this Court, has been adjudged, since the death of William M. Eddings, to belong to his estate.(a) In addition to this, he would have been entitled, if he had attained the age of 21 years, to an interest in his grandfather's estate, estimated by the Master at seventy-five or eighty thousand dollars. His absolute and expectant estate would, therefore, together, have amounted to \$110,000 or \$120,000. His vested estate, exclusive of what his estate will receive from the decree of the Court on account of the in-

come of his conditional legacy, was only about \$10,000. He was born on the 22d November, 1830, and died on the 29th November, 1850. On his death, under 21 years, the whole of his conditional estate passed, under the limitations of his grandfather's will, to his only surviving brother, without its ever having vested, except as to the income, in William M. Eddings.

In March, 1840, his mother, Mrs. Mary Eddings, (now Mrs. Hughes,) was appointed by the Court of Equity the guardian of his person and estate. From 1840 to 1846, his guardian received from the executor, John A. Fripp, the sum of five hundred dollars per annum for his education and support. Her accounts had been regularly returned and vouched. In 1846, by an order of this Court, his allowance was increased to \$1,000. This allowance continued until 1848, when William M. Eddings was married. On that event, his allowance, by an order of the Court, was increased to \$2,500 dollars, which was ordered to be paid to him, and not to his guardian. His wife was also possessed of an estate, which, on her marriage, was settled on her, for her separate use, the income of which was between six and seven hundred dollars. This income went to the support of the family. The allowance ordered

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to be paid to William M. Eddings, which was intended for the support of himself and family, added to the income from his wife's estate, made an aggregate of \$3,100 or \$3,200 per annum. He had two children, one of whom died before him. He left a widow and one child, who survived him three months. The widow still survives.

On the 23d August, 1851, an order was made, referring this case to the Master, with leave to report any special matter. The Master was also ordered to publish a notice in one of the city papers, requiring all the creditors of the estate to present and prove their demands before the said Master, on or before the first September next ensuing. The accounts of the administrator of William M. Eddings were also referred to the Master, and the said administrator was ordered to pay to the Master any funds belonging to the estate that had, or might thereafter, come into his hands.

The Master now submits his report upon the matters referred. He states that the administrator has rendered his account, and that the same has been legally vouched. He finds a balance due the estate by the administrator, of \$4,104.37. No exception having been taken to this part of the report, it is ordered that the said report, in this respect, be confirmed, and become the decree of this Court.

In the same report, the Master also submits a statement of the claims of the creditors presented before him, and of the evi-

(a) *Rivers v. Fripp*, 4 Rich. Eq. 276.

dence by which they were supported. The Master, in his report, has discriminated between what he considers necessities, suitable to the fortune and condition of the intestate, and mere waste and extravagance; rejecting the latter and allowing the former. The creditors, whose claims have been rejected, have severally filed exceptions to the report, contending that the rejected items of their accounts, ought to have been allowed as necessities. I think the Master has allowed enough as necessities, in any point of view in which the case may be considered. And for this reason, all the exceptions filed by the creditors are overruled.

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*But the complainant (the administrator with the will annexed of William M. Edgings) has also filed exceptions to the report, in which he disputes the right of the creditors (under the circumstances) to claim any thing as necessities. And this brings up a very important question—a question which must be of deep concern to parents and guardians, and to that interesting class of the community, who, on account of their tender years and need of protection, the Court of Equity has under its own peculiar guardianship and care.

To show the great importance and necessity of this protection, I need not travel out of the facts of this case to present a striking illustration. Under the published order to prove their debts before the Master, creditors have presented demands against the intestate's estate to the enormous amount of \$14,205, all, or a very large part of which, was contracted within the last four years of his life, and principally within the last two years. Add to this, about \$9,000 for money actually received by the intestate, on account of his allowance, and on account of the income of his wife's estate, all of which came into his hands, and was consumed, and the aggregate is about \$23,000. Thus we find this infant, whose person and estate were under the protection and guardianship of the Court of Equity, whose estate in possession was only \$10,000, and whose indefeasible estate, eventually realized, was only \$35,000, living, for the last four years of his life, at the extravagant and wasteful rate of nearly six thousand dollars per annum. And this yet does not present a perfect view of his extravagance: for, as has already been observed, the principal part of the debts was accumulated within the last two years of his life, when his allowance was at its maximum, and when he also enjoyed the income of his wife's estate. He must have expended, after his marriage, seven or eight thousand dollars per annum. I was desirous to have gone accurately into this calculation; but the Master's report, and the documents and evidence submitted with it, did not afford the data.

When the Chancellor, by his order, grant-

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ed this infant, out of *his estate, an allowance of \$1,000 per annum, and after his marriage increased it to \$2,500 per annum, did he base his decree upon what, from the evidence before him, he supposed was necessary for the support and maintenance of himself and family, according to his fortune and position? If not, how futile was the preliminary inquiry as to what were his prospects and fortune? Did he grant him the annual \$2,500 for and in lieu of necessities; or did he mean that he should receive his allowance, and be armed with authority to contract debts, and charge his estate with the payment of double that sum in the way of necessities? If this latter principle is to prevail, then I undertake to say that the protection which this Court affords to the estates of infants is a bitter mockery.

The general rule certainly is, that an infant is bound by his contract for necessities. But there are exceptions equally clear and well settled. Necessaries, when the term is applied to an infant, are those things that are conducive and fairly proper for his comfortable support and education, according to his fortune and rank. So that what would be considered necessary in one case would not be so regarded in another. The rule is entirely relative in its operation. But what are necessities? Meat, lodging, clothing and education, if the means admit of it, certainly fall within the definition. To which may be added, in case of marriage, the support of wife, children and servants. All is relative, and is regulated by circumstances. But if an infant is furnished with these things by his parent or guardian, then the same articles, to the same or a less amount, supplied by another under contract, are not necessary to him. To another, not so supplied, they would be necessary. The same remarks apply, with equal propriety and force, where the infant is supplied by parent or guardian, or by this Court, with money to furnish himself with necessities. In some cases, circumstances make it proper, and imperatively demand, that the infants should have the disbursement of his allowance himself. In the case of marriage and house-keeping, the perpetually recurring wants and exigencies of the family render it

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impossible that the guardian should always be called on to supervise the disbursement of the fund allowed to the infant. Or if, being a youth of fortune, he is sent upon his travels in foreign lands, or even in his own country, the guardian cannot look to the expenditure of the money. It is necessarily entrusted to his own keeping. The brother of the deceased is now abroad, on his European travels. Previous to his departure, an application was made to this Court for a proper allowance to defray his

traveling expenses. The Court, upon due consideration, made an order for what was supposed to be a proper allowance, reference being had to the amount of his fortune. Suppose this young gentleman should expend his allowance, and, in addition, should contract debts to the same amount, for articles that, *prima facie*, would be regarded as necessities! Could these claims be supported, on its being shown that the infant had an allowance that was amply sufficient to defray all his necessary and proper expenses? I suppose not.

He who deals with an infant is presumed to know of his infancy. He is bound, at his own peril, to make the inquiry. It makes no difference whether the inquiries result in correct information, or the reverse. It is no excuse, if he honestly supposed, from his appearance or other circumstances, that the infant was an adult. The protection of this defenceless class of persons would be very inadequate, if this principle is not further extended. The only safe rule, for the security of infants and their estates, is, that he who credits the infant for necessities, should be bound to know whether the infant has been supplied with a sufficient amount of those articles by the parent or guardian, or from some other source. The consequence, if any other rule than this prevails, would be, that an infant's estate might be made liable for double the amount of necessities that were necessary for him.

I will not say that an infant, after being supplied with necessities, or a proper allowance in cash to procure them, may not, under some circumstances, be liable on a contract for necessities. Suppose, for example,

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after being furnished with all things *necessary for him, he should give them away, or sell them, or waste the proceeds in riot and debauchery. Or suppose, that after having placed in his hands, in money, an allowance sufficient for all his wants, he should be robbed of it, or should lose it by accident, or at games of chance. Then the infant would be reduced to want for the means of bare subsistence. Must he starve with a plenty in his coffers? Would he not be bound by a contract for necessities under these circumstances? This is stating the strongest imaginable case against the rule. But its wisdom is still manifest. In a case like that supposed, I would say that the infant would be bound. But I would further say, that the party who alleged this extraordinary state of facts must prove them. In other words, when it is shown that an infant is supplied with necessities by his parent or guardian, or with funds amply sufficient to procure them, the presumption of law and of reason must be, that he does not stand in need of credit, to obtain what is necessary for him. And after this *prima facie* showing, he who alleges that, notwithstanding this, the infant was

in a state of destitution, must take upon himself the burthen of proving the allegation. If he does this in a satisfactory manner, his claim should be allowed. But even then, it should be limited to bare necessities, and should not be allowed to embrace articles of luxury, which would otherwise be suitable to the infant's fortune and condition in life.

To illustrate these views further, I will advert to what I suppose would be the course which a case like this might take in a Court of Law. The plaintiff brings his action of *assumpsit* for goods, wares, &c. The affirmative is with him. He must prove his demand to be entitled to recover. The defendant, however, has pleaded infancy. This admits the account, and rests the defence upon the affirmation of a fact, which the defendant is bound to prove. If to this plea the plaintiff has replied, that the demand was for necessities suitable to the defendant's fortune and condition in life, the burthen of proof is again shifted. The plaintiff must prove his replication. This he does by showing,

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for example, that the account is for *board, clothing, education, &c. On this proof he would be entitled to recover. But if the defendant has rejoined, that the articles furnished were not necessary to him, because he was furnished with the same articles by his parent or guardian, here the proof of all the facts stated in the previous pleadings would become unnecessary. The defendant would be bound to prove his rejoinder. But if the plaintiff has filed a *sur-rejoinder*, alleging, that although the infant defendant was furnished with support and maintenance, or the means of procuring it, by his parent or guardian, yet, that by the defendant's improvidence or misfortune, he had wasted or lost his means, so that he was reduced to a state of destitution, and the articles furnished by the plaintiff were thus become necessary for the infant, here, the affirmative is again shifted, and the onus is with the plaintiff. In this Court, happily, special pleading never prevailed. But what is valuable and subservient to the ends of justice, in the philosophy of that system, is applied here in practice in a short hand way; though this Court never suffers itself to be baffled by its subtleties or entangled in its technicalities.

In a case like that before me, it is not sufficient for the creditor of an infant, for the purpose of obviating the objection that the infant was furnished with necessities, or the means of procuring them, by his parent or guardian, or from other source, to argue hypothetically, that the infant, notwithstanding, might have been in a state of destitution, which rendered the articles furnished by the plaintiff necessary for him. In a Court of Equity, as in a Court of Law, he must state the fact affirmatively, and prove it positively.

The conclusion is, that an infant who is furnished with necessaries, or the means in cash of procuring them, by his parent or guardian, or from any other source, is, *prima facie*, not liable for necessaries supplied by a stranger or tradesman on a credit; and that the party who seeks to evade the operation of the rule, and bring his claim under an exception, must prove the destitution and necessities of the infant. And I persuade

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myself *that the most specious objection to the rule has been sufficiently answered.

I was pressed in the argument at the bar with a recent English decision, which, I admit, is directly to the point, and opposed to my own conclusion in this case. But for this decision, I should not have deemed it necessary, or incumbent upon me, to elaborate my views upon the subject at such great length. The decision cited, though not binding upon me, is entitled to great respect. The case is that of *Burghart v. Hall*, 4 M. and W. 727. In this case, the infant had an allowance of £500 per annum, besides his pay as Captain in the Guards. Lord Lyndhurst had directed an issue to be tried by a jury. Lord Abinger, in charging the jury, had laid it down, that a tradesman would not be at liberty to furnish necessaries to an infant, when he might have known, if he had made the proper inquiries, that the infant was supplied with an income for his own support. Sir L. Shadwell had expressed the same opinion, in a case against the same party. *Mortara v. Hall*, 6 Sim. 465. In *Burghart v. Hall*, the Court of Exchequer granted a new trial, on the ground of misdirection of the presiding Judge, with the full concurrence of Lord Abinger, who retracted his former opinion, and alleged that he had been convinced by the argument of Mr. Earle, the counsel for the plaintiff. Lord Abinger, who delivered the judgment of the Court, stated the law to be, that an infant is capable, not only of entering into a contract for necessaries, for ready money, but also into any reasonable contract for necessities on a credit, though he has an income of his own, and an allowance that was amply sufficient for his support. I must be permitted to say, that the argument of Mr. Earle, though ingenious, has failed to convince me; and I prefer the first, and, in my opinion, the better judgment of his Lordship.

Lord Lyndhurst, deeming the decision in this case authoritative upon him, implicitly followed it, without any further argument or precedent, and gave a decree accordingly.

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*I find no case that goes this length. In *McPherson on Infancy*, 507, it is laid down that, "where the plaintiff has succeeded in showing that the supplies, in respect of which the action is brought, were suitable in themselves to the age and station of the defendant; the latter may show that he was supplied, no matter from what quarter, with

necessaries suitable to his situation; and in such a case, a tradesman cannot recover for any further supply." See *Bainbridge v. Pickering*, 2 W. Bl. 1325. And it has frequently been held, that a person furnishing necessaries to an infant, under these and the like circumstances, is bound to make inquiry whether the infant be not otherwise supplied. *Cook v. Deaton*, 3 Car. & P. 114; *Story v. Perry*, 4 Ib. 526; *Ford v. Fothergill*, 1 Esp. 21.

In the case last cited, it was held by Lord Kenyon to be incumbent on a tradesman, before he gives credit to an infant for what may *prima facie* be considered as necessaries, to make inquiry whether he is not provided by his friends. And in *Story v. Perry*, it was decided by Lord Tenterden, that a tradesman trusts an infant for necessaries at his own peril, and that he cannot recover, if it turns out that the infant has been otherwise supplied.

In a more recent case, *Burghart v. Augerstein*, 6 Car. & P. 690, it was ruled, that, where an action was brought against an infant for necessaries, it was competent for him to prove that he had been supplied with the same articles (clothes) from other tradesmen besides the plaintiff; and if the proof be that the defendant had been previously so supplied, the plaintiff could not recover, although the defendant had not paid the prior bills.

To the same effect are the cases upon this subject, decided by the Courts of South-Carolina. In *Connolly ads. Hull*, 3 McC. 6 [15 Am. Dec. 612], it was held, upon what was considered "a well settled principle, that an infant who lives with and is properly maintained by her parents, cannot bind herself to a stranger for necessaries." And the Court proceeds to observe, "whether the mother, in this instance, was able, and did maintain her daughters in a manner suitable

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to their condition, did not appear; but *it ought to be presumed, until the contrary be proved." In *Edwards v. Higgins*, 2 McC. Eq. 21, it was ruled, that an infant is not bound for necessaries, where he has a "natural or legal guardian to provide them."

It is a fallacy to suppose that a distinction can be drawn between the case where an infant is actually supplied with the necessities themselves, and that where he receives an allowance under an order of the Court, which he is to disburse himself, in their purchase. If it be urged that the infant may waste or misapply his allowance, and thus be reduced to a state of destitution, that would require his necessary wants to be otherwise supplied, it is obvious that the argument applies with equal force to the case where the infant is supplied with the necessary articles for his use and consumption. These he may sell, give away or waste, so that it may become necessary that he should have more, to save him from nakedness and

starvation. The party who alleges such state of destitution, as a justification for giving credit to an infant who is otherwise amply provided for, must take upon himself the burthen of proving it. And if he succeeds in this, he will have such relief as is proper under the circumstances. But until such a state of destitution is made to appear, it must be presumed that an infant who has an ample allowance in cash, does not need to be supplied with necessaries on credit.

To test this question still further: If the guardian had paid these accounts, would she have been allowed to charge them against her ward's estate? It is a waste of time to ask the question.

No guardian has the right, without the permission of the Court, or without special circumstances of necessity, to transcend the income of his ward's estate, in expenditures for his benefit. And the Court, in decreeing allowance, always has reference to the same general rule, from which it never departs, unless under special circumstances. And yet, it is contended that this rule may be violated by tradesmen, for their own profit and speculation. The truth is, that these claimants

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did trust *this unhappy youth at their own risk. They knew that they would be paid if he lived, and came to his inheritance. They, for a consideration, doubtless, resolved to take the hazard. That this is the case, is shown by the fact that two of them, whose claims are the largest, insured the infant's life in an amount sufficient, in one case, to save them from loss, and in the other to pay half the debt.

I think that the claims of these creditors should not be allowed, for the foregoing reasons. And I further think, that they are entitled to no commiseration. There are some unhappy circumstances connected with the case. There is but little doubt that the ill-fated youth was brought to an untimely grave, by the improper and unbounded credit which was extended to him by these persons, and others, for their own profit. E. W. Mathews, Esq. bears the following melancholy testimony. He says, "that William Eddings, the minor, was his nephew. He and the mother and grandfather of Mr. Eddings used every effort to keep him at school during his minority; but the large credit he obtained placed him beyond the control of his guardian and friends. His mother even refused him money to return from school, and he had to borrow the same to do so. From his knowledge of the circumstances of the case, he firmly believes that the system of credit extended to his nephew was the cause of his ruin and early death; and that such is also the opinion of the mother of Mr. Eddings. Mr. Eddings's mother used all her endeavors to check this system of credit, by refusing to pay a number of bills."

These creditors now come here for pay-

ment. They extended every facility to the inexperienced and infatuated victim of pleasure. They afforded the stimulus to his brief, giddy and fatal career. They turned a deaf ear to the remonstrances of his friends. The tears and entreaties of his mother were unavailing. It would be a gross perversion of justice to allow these claims. It is ordered and decreed, that the exception of the plaintiff to the master's report be sustained, and that the whole of the claims of creditors reported upon by the Master be rejected.

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*There are other matters in this case which I must now decide. The plaintiff's testator, William M. Eddings, in his lifetime, contracted a debt with the defendants, Gregg, Hayden & Co., who were jewellers, to the amount of about \$2,400, for goods and wares in their line of business. For the purpose, they say, "of giving greater security to their claim against the said Wm. M. Eddings," they, the said Gregg, Hayden & Co., with the assent of William M. Eddings, effected an insurance on his life, with a Boston Insurance Company. The policy was for the term of four years, and the sum of \$2,500. It bore date the 13th Oct., 1848. The premium on the policy, amounting to \$58, was paid by Gregg, Hayden & Co. It was negotiated in the name of William M. Eddings, who, in pursuance of a previous agreement, assigned the policy to Gregg, Hayden & Co. The premium was charged in their books against Eddings, but no part of it has ever been paid by him, or his legal representative. Since the death of Eddings, Gregg, Hayden & Co. have received from the Insurance Company \$2,500, with the consent of the administrator, and under an agreement with him, that the said sum of \$2,500 shall be held by them, subject to the order of this Court in the premises. They claim only so much of the nett proceeds of the said policy as will be sufficient to satisfy their demands against William M. Eddings, and offer to pay over the balance to the administrator. If they retain the nett proceeds of the policy they have been overpaid.

The defendants, Edgerton & Richards, also having demands against William M. Eddings, to the amount of \$4,531.71, effected an insurance upon his life, for the same purposes as in the case of Gregg, Hayden & Co., in the New-York Life Insurance Company, for the sum of \$2,000. The policy was dated the 15th March, 1847. It was taken in the name of Edgerton & Richards, who paid out of their own funds the premium and expenses for four years. It was all done with the knowledge and consent of William M. Eddings. After his death, they received from the Life Insurance Company of New-York the sum of \$1,983.87, according to the terms

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and condition of the *policy. They paid, in the way of premium, etc., during the four years, the sum of \$103. The nett proceeds

of the policy were \$1,880.87½—a sum not sufficient to pay one-half of their claim.

The administrator claims the whole nett proceeds of both these policies, as belonging to the estate of William M. Eddings. I have come to a different conclusion. I think that these parties, having negotiated these policies at their own expense, and for their own benefit and security, are fairly entitled to have the nett proceeds applied in the way intended, namely, as payments upon their claims against Eddings. They were obviously intended as collateral securities. A third party, who is sui juris, may become bound for the debt of an infant, though the infant should be discharged. And I apprehend it would make no difference whether the third party were a corporation or a natural person. If the creditor of an infant, for a consideration paid by himself, obtains a guaranty of the infant's debt from a third party, I see no reason why such third party should not be bound, nor why the creditor should not have the benefit of his bargain. This I think is the true nature of the transaction. The infant certainly is not entitled to the funds thence arising. This would be to give him the whole of the creditor's goods, on the plea of infancy, and, as a premium on the plea, the whole proceeds of the policies.

It is ordered and decreed, that the exception of Gregg, Hayden & Co. to the Master's report on this point be sustained; that the claim of the said Gregg, Hayden & Co. against Wm. M. Eddings be paid out of the nett proceeds of the policy received by them, with interest on their claim till they received payment from the said Life Insurance Company; and that they pay over the balance, if any, to the administrator of William M. Eddings, which they have offered to do in their answer.

It is further ordered and decreed, that the exception to the Master's report of Edgerton & Richards, which relates to the proceeds of the policy of Insurance received by them, be sustained, and that the said Edgerton &

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Richards be allowed to *retain the proceeds of the said policy, as a payment on their account against the said William M. Eddings.

It is further ordered and decreed, that the Master's report be conformed to this decree.

It is further ordered and decreed, that all the parties in this cause pay each his own costs; except the administrator with the will annexed of William M. Eddings, whose costs shall be charged upon the estate.

Appeals were taken by the plaintiff and the defendants, on all the disputed questions decided by the decree.

Cooper, for plaintiff.

Porter, for Gregg, Hayden & Co.

B. J. Whaley, for Gravely and others.

Wm. Whaley, for McKenzie and others.

The opinion of the Court was delivered by

DARGAN, Ch. The appellants have pressed their case upon the attention of the Court, with an ardent, but a commendable and decorous zeal. Much ability and research have been displayed in the argument of the cause. I have not, however, been shaken in the conclusions which I formed on the Circuit trial, and which I have expressed in the Circuit decree. In that decree, I have gone so fully into the consideration of the questions made on this appeal, that it seems to me unnecessary to say more on the present occasion. I will add but a few words.

In my summary of the South-Carolina decisions, I omitted to mention the case of Jones & Danforth v. Colvin, 1 McM. 14. This was a very similar case to that of Hull v. Connolly, 3 McC. 6 [15 Am. Dec. 612], cited in the decree.

It seems to me that the language of Lord Kenyon, in Marshall v. Rutton, 8 T. R. 545, is not at all inapplicable to a case like this. That was an action of assumpsit for necessary supplies, furnished to the defendant by the plaintiff. The defendant was a married woman, living apart from her husband, under a mutual agreement for separation. By this

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deed, a *complete separate maintenance, suitable to her rank and condition, was secured to the wife. The question was, whether she was liable on her contracts. And his Lordship, holding that she was not, observes: "A wife living apart from her husband, who has property secured to her separate use, must apply that property to her support as her occasions may call for it. And if those who know her condition, without requiring immediate payment, give her credit, they have no greater reason to complain of not being able to sue her, than others, who have nothing to confide in but the honor of those whom they trust."

It is ordered and decreed, that the appeals be dismissed, and the Circuit decree be affirmed.

DUNKIN, and WARDLAW, CC., concurred.

Decree affirmed.

5 Rich. Eq. 289

SAMUEL P. REED v. JAMES VIDAL.

(Charleston, Jan. Term, 1853.)

[Specific Performance ⇐79.]

Contract in writing, by which defendant agreed to repair plaintiff's steam saw mill, buildings, fences, etc., and plaintiff to sell to defendant, as soon as the repairs were finished, one undivided moiety of the premises on which the mill was situated: plaintiff and defendant then to form a partnership, to work the mill for one year, at the end of which time, if plaintiff chose to retire, defendant was to pay him for the premises a fixed sum; but if plaintiff did not choose to retire, the partnership was to continue for five years:—*held*, that this was not

a proper case for the exercise of the jurisdiction of the Court, to enforce the specific performance of contracts; and plaintiff's bill for that purpose dismissed.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 189; Dec. Dig. ⚡79.]

Before Dargan, Ch., at Charleston, June, 1852.

The bill, in this case, was for the specific performance of a contract. His Honor dismissed the bill, and the plaintiff appealed.

E. DeTreville, for appellant.
Campbell, contra.

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*The opinion of the Court was delivered by

DARGAN, Ch. This is a bill for the specific performance of a contract. The plaintiff was seized and possessed of a tract or lot of land, in or near the town of Beaufort, on which there was a steam saw mill, which was in a dilapidated condition. He entered into a written contract with the defendant, for the repair of this mill. The terms of the contract were, that the defendant should, at his own expense, and within six months, "put in two new boilers, repair the buildings, fences, mill-pond and dam, and rail-way as far as the street leading over the public causeway, build a new brick chimney and fire places to the said steam saw mill, and put all parts of the machinery and buildings of the said steam saw mill in perfect working order. In consideration of which," as soon as the said repairs were completed, the plaintiff agreed to sell, and convey to the defendant in fee, an undivided moiety of the premises on which the mill was situated. And it was further agreed between the parties, that they were to work the said mill at their joint expense, and for their joint benefit, under the partnership name of Reed & Vidal. This partnership was to continue for the space of one year; at the expiration of which time, if Reed was disposed to retire from the partnership, he had the privilege of doing so. In case he chose to retire, the defendant was to pay him, for his interest in the premises, the sum of two thousand dollars, in certain prescribed instalments. But if Reed was not disposed to retire, the partnership was to continue for five years. This agreement was executed on the 31st May, A. D. 1847.

The plaintiff, after various attempts to induce the defendant to commence his work in the repairs of the mill, and after several prolongations of the time, during which the defendant was to complete the execution of the work, filed his bill in this Court, for a specific performance of the contract.

The case was heard at June Term, 1852. The presiding Chancellor, (Dargan,) was of the opinion that the bill could not be sustained; that it was not a case in which this Court could, with propriety, interpose its

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jurisdiction, for the purpose *of giving relief in the manner sought by the bill; that the enforcement of a decree for a specific performance of a contract of this character would be attended with great difficulties and embarrassments, if it would not be entirely impracticable; and that it was a case peculiarly proper for a Court of Law, and a trial by jury. The plaintiff's bill was dismissed with costs.

This is an appeal from the Circuit decree, on various grounds, the substance of which is, that the Court should have retained the bill, and given the plaintiff the relief for which he asks.

This Court concurs in the Circuit decree. The appeal is dismissed, and the Circuit decree affirmed.

JOHNSTON, DUNKIN and WARDLAW, CC., concurred.

Decree affirmed.

5 Rich. Eq. 291

W. J. SMITH et al. v. GEORGE W. BROWN et al.

(Charleston. Jan. Term, 1853.)

[*Landlord and Tenant* ⚡157; *Trusts* ⚡274.]

Tenant of trustee not allowed compensation, from the corpus of the estate, for improvements put upon the premises.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 593; Dec. Dig. ⚡157; *Trusts*, Cent. Dig. § 390; Dec. Dig. ⚡274.]

[*Trusts* ⚡201.]

Trust property was sold, and bonds for the purchase money given to the Master, and assigned to the trustee: the purchaser made payments to the cestui que trust for life, without the consent of the trustee: the payments were allowed to the extent, only, that the cestui que trust would have been entitled to receive them from the trustee, had they been made to him, as they should have been.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 270; Dec. Dig. ⚡201.]

Before Dunkin, Ch., at Charleston, June, 1851.

Dunkin, Ch. This cause was heard on the report of the Master. In order to understand the exceptions, a brief statement will be necessary, which can be enlarged or corrected by reference to the pleadings, and the evidence which is reported.

The property called Gibbes' Wharf, in-

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cluding two slaves, *Tom and Pompey, attached to the Wharf, formerly belonged to two brothers, George Gibbes and James Gibbes. In 1835, George Gibbes conveyed his moiety to a trustee, for the benefit of the children of his brother, Paul C. Gibbes. The deed provides, that upon certain conditions, (which were complied with,) "the trustee should semi-annually pay over to Catharine

Gibbes," (the widow of Paul C. Gibbes, and the mother of his children,) "as long as she should continue a widow, and until all the children should die, or the youngest attain twenty-one years of age, the whole nett income of the property, to be applied by her to the support of herself and children, as she might deem expedient." On the 6th October, 1841, the complainant, William J. Smith, became the substituted trustee under this deed.

In January, 1843, William J. Smith, the trustee, and James Gibbes, (who owned the other moiety of the wharf,) united in a lease of the premises to the defendant, George W. Brown, for one year, at the rent of \$5,000 per annum—payable 1st July and 1st January—to each a moiety. The lease also included the use of the two slaves attached to the wharf. By the stipulations of the lease, the negroes were to be fed and clad, the taxes paid, and the premises repaired, and kept in repair, at the expense of the lessors; a lease, to the same effect, had been made between the same parties in the year 1842. Before the close of the year 1843, James Gibbes made a lease of his moiety to the defendant, George W. Brown, for five years, on the same terms; but the complainant refused to unite in this lease, and, at the expiration of the lease of 1843, he attempted to enter upon his moiety of the premises. This led to much litigation, to the particulars of which reference is made in the case of *Gibbes v. Smith*, 2 Rich. Eq. 131. The object of that suit was, to have the complainant removed from the trust, principally on the ground, that he declined to renew the lease for five years, (though requested by Mrs. Catharine Gibbes, the complainant in that proceeding,) and had refused to authorize her to receive the rent of the premises

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from the lessee, and *had brought an action against the defendant, G. W. Brown, for moneys which had been paid to her. The cause was heard in February, 1845, and the bill was dismissed—the Court remarking that, by the provisions of the trust deed, the management of the property was committed solely to the trustee, who was to receive the rents, and, after the necessary deductions, to pay the surplus to the complainant, for the purposes specified. That the trustee was directed to lease the premises, or such part as he thought proper, and direct such repairs and improvements as he might think necessary. That all this was left to his discretion, and not to that of the complainant, Mrs. Gibbes, who had only to receive from the trustee, semi-annually, the nett proceeds of the estate. On an appeal taken, this decree was affirmed in January, 1846.

It seems, that James Gibbes had died in November, 1844, intestate, leaving, as his heirs at law, his sister, Caroline L. Brown, wife of the defendant, and the children of Paul C. Gibbes, a deceased brother. Under certain proceedings in partition, the entire

premises hereinbefore mentioned were ordered to be sold by the Master, in April, 1846. They were accordingly sold, on the 23d April, 1846, and bid off by the defendant, George W. Brown, for the sum of fifty-eight thousand dollars. The Master's report of sales was confirmed by Chancellor Johnston, on the 3d July, 1846. The order further directed, *inter alia*, that one moiety of the proceeds of the sale should be paid or transferred "to William J. Smith, trustee, to be held and applied to the uses and trusts declared by the deed of George Gibbes to M. P. Walsh, recited in the pleadings." After certain other directions, not important in the present inquiry, the decretal order concludes as follows: "It is further ordered that, inasmuch as all parties are before the court, the Master take an account of the rents due to the said W. J. Smith, trustee, by the said George W. Brown, and of all just allowances against the same; and also, that he state the account between the trustee and Mrs. Catharine Gibbes, and report as to the proper investment to be made of the trust fund."

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*The bonds executed by the defendant, George W. Brown, to the Master, on the 23d April, 1846, were payable in one, two and three years, with interest from the date. On the 3d May, 1848, proceedings were instituted to foreclose the mortgage executed by the defendant, to secure the payment of these bonds. The report of the Master, filed 14th March, 1851, purports to be a statement of the amount due on these bonds, under a decretal order of reference. One of these bonds, conditioned for \$21,833, had been assigned to W. J. Smith, trustee, under Chancellor Johnston's order of 3d July, 1846; another, for \$8,733.34, had been assigned to W. J. Smith, as guardian of the minor children of Paul C. Gibbes, deceased; and a third, for \$2,183.31, to Richard M. Butler, who had married a daughter of Paul C. Gibbes, deceased.

No exception is taken as to the amounts reported by the Master to be due on the two latter bonds; but exceptions are filed on both sides, as to the statement of the bond assigned to W. J. Smith, trustee. Those of the complainant will be first considered. The bond is dated 23d April, 1846, and the first instalment ($\frac{1}{3}$) was due on the 23d April, 1847. On the latter day, the Master credits the defendant with the sum of \$3,093.57 as "the balance due G. W. Brown, for his account with the wharf to 1st March, 1846," and \$216.54, being the interest on that sum for one year—aggregate \$3,310.11. It will be remarked, that the allowance of this credit of \$3,093.57 is a diminution of the capital of the trust estate to that amount. It was contended, that it was an expenditure for permanent improvements made on the property. This Court has, on more than one occasion, withheld its sanction from this mode of improving a man out of his estate, without his

consent. Under the stipulations of the lease, the premises were to be kept in repair, taxes to be paid, etc., and, if done by the lessee, might be deducted from the rent, which was to be semi-annually paid to the trustee, who, by the deed of 1835, was to pay the "nett proceeds, after deducting all charges and expenses, to Mrs. Catharine Gibbes, for the sup-

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port of herself and the main*tenance and education of the children;" but it is an express stipulation of the lease, that the lessee, George W. Brown, "shall neither make, nor suffer to be made, any alterations or additions therein, without the consent of the trustee, for that purpose, in writing, first had and obtained." It was very properly said, that if these were valuable improvements, the rent should have been proportionately increased; but no authority was shown for these expenditures, and the Court can perceive no warrant for making this deduction from the bond of the defendant. The complainant's second exception is sustained. This also disposes of the defendant's first exception.

The first exception of the complainant may be considered with the second, third and fourth exceptions of the defendant. All the difficulty arising out of these exceptions is attributable to the determination of the defendant to usurp the authority of the trustee. Both by the condition of his bond, and the opinion of the Court in *Gibbes v. Smith*, he was informed to whom his payments were to be made; certainly, after January, 1846, the defendant was aware that the trustee, and he alone, was to judge of the nett proceeds of the income to be paid to Mrs. Gibbes. It was specially provided by the trust deed, that all the expenses and charges incurred in the management of the trust should be first deducted, and then, that the nett income should be semi-annually paid by him to Mrs. Gibbes, for the purposes specified. It was desirable, for obvious reasons, that she should know what income she had to expend, and also, that it should be paid to her in the mode prescribed by the deed. The Master reports, that the annual income payable to Mrs. Gibbes, after the sale, was \$1,223.07; but the defendant, instead of paying to the trustee, undertook to pay Mrs. Gibbes, from 23d April, 1846, to 23d April, 1848, the sum of \$3,742.44, nearly the income to which she was entitled in three years—thus leaving no income properly payable to her for the third year. In the trustee, this would have been an abuse of his trust. But the defendant not only claims credit for them, as if the payments were made to the

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trustee, but he claims interest *on the whole, from the time of payment, including interest on the excess. Prior to the decree of 1845-6, it might be said that the defendant acted under misapprehension, and that he should be subrogated to the rights of Mrs. Gibbes;

but, after that time, he was fully apprised of the course he should pursue, and, if he encounters difficulties, they are of his own seeking. He had no concern in the transactions between Mrs. Gibbes and the trustee; and the effect of his interference is only to render complicated a very simple transaction. His plain duty was, to pay the bond to the Master, or his assignee—and, in ascertaining the amount due, payments thus made should alone be allowed. These exceptions of the defendant are overruled, and the complainant's first exception sustained.

The remarks before made are illustrated by a consideration of the 6th, 7th and 8th exceptions of the defendant. It has been heretofore stated, that prior to the sale of the premises, in April, 1846, there was a litigation as to the rent due for the premises. In the decretal order of July, 1846, provision is made for taking an account of the rent due to the trustee by George W. Brown, after all just allowances; and also directing the Master to state the account between the trustee and Mrs. Gibbes. The exceptions to be now considered, relate to this account between the trustee and Mrs. Gibbes, as reported by the Master. There had been three successive trustees under the deed of 1835, to wit: M. P. Walsh, William Smith, sen., and W. J. Smith, the complainant; the last named having become trustee in October, 1841; no account was ordered in relation to the former trustees, nor were they parties to the proceedings. The only account to be taken was in relation to the present trustee. It will be remembered, that difficulties had arisen between him and Mrs. Gibbes in the latter part of 1843, both in reference to the renewal of the lease and the payment of rent by George W. Brown, the lessee, to her. The trustee, at the expiration of the lease, attempted to enter on his moiety of the premises, and also instituted a suit at law, against the defendant, for the rent due. No rent was received

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by the com*plainant from the trust estate; but he was subjected to expenses for the trust estate—such as State and City taxes for 1844, 1845 and 1846, professional advice, and other disbursements, amounting, between November, 1843, and July, 1846, when the account was ordered to be taken, to eight hundred and four dollars and fifty-two cents, (\$804.52,) according to the account reported by the Master, rejecting the disbursements of Wm. Smith, sen., which form no part of the case. This sum was a proper charge upon the income, and should be deducted from any rent found at that time to be due, and from any subsequently accrued income, if the rent then due was insufficient. The Master's statement of the account should be thus modified. But subsequent to the sale, and the order of July, 1846, the defendant had nothing to do with the after transactions between the trustee and Mrs. Gibbes. He had only to

pay the debt which he contracted with the Master for the purchase of the property, and upon the terms of the purchase. It is manifest, that, if he departed from this, and undertook to make arrangements with Mrs. Catharine Gibbes, he must settle with her for such advancements as he thought proper to make:—for instance, between April, 1847, and April, 1848, she was entitled to receive, at most, \$1,223.09—probably much less. The defendant paid to her, in that time, \$1,916.75—certainly, this could not be allowed as a payment on his bond, for it was about \$700 more than, in any view, Mrs. Gibbes was entitled to receive. But as between Mrs. Gibbes and the defendant, it was a voluntary payment on his part, she had, therefore, good reason to suppose that she was entitled to receive this amount, as the income due to her, and arrange her expenditures accordingly. How far shall she refund to the defendant? And must she not only refund, but with interest? The same remark is applicable to the following year, during which the defendant paid Mrs. Gibbes \$1,825.69 when her income certainly did not exceed \$1,223.07. The trustee would have no authority to make any such payment, thus annually encroaching upon the

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capital of *the estate. It seems, that, in 1849, Mrs. Gibbes was again married, and, by the terms of the deed of 1835, she was entitled thenceforth, to only a fixed income of seven hundred and eighty dollars. It appears to the Court, that the adjustment between the defendant and Mrs. Gibbes may require that it should be made upon different principles from those that would apply to a settlement between the defendant and the trustee, or between the trustee and Mrs. Gibbes. The defendant should be required to pay his bond, according to the stipulations therein contained, and the equitable adjustment between him and Mrs. Gibbes should be ascertained and fixed upon pleadings framed between them for that purpose. Let the Master correct his statement of the amount due on the bonds given for the purchase of the mortgaged premises, as herein indicated.

The remaining exceptions of the defendant are overruled.

The modification of the report hereinbefore directed is merely ministerial, and does not require a further reference. It is ordered and decreed that, unless the amount due on the bonds given for the mortgaged premises, together with the interest thereon, be paid on or before the first day of February next, the mortgaged premises be sold at such time, and upon such terms, as may be fixed by an order hereafter to be submitted for that purpose. It is further ordered and decreed, that the defendant, George W. Brown, pay to the complainant the sum of five hundred and nineteen dollars and thirty-seven cents, with interest from 23d January, 1851, as recom-

mended in schedule (C.) of the Master's report.

The defendant appealed, on the grounds:

1. That the credit of \$3,093 allowed the defendant by the report, should be allowed as a charge on the capital of the trust fund.

Because this sum was expended in necessary permanent improvements to the wharf, which improvements were contemplated by William Smith, sen., the trustee, when the

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wharf *was originally leased to defendant, and was acquiesced in by him and his successor, W. J. Smith, as shown by the testimony reported to the Court.

Because, the allowance of the credit is not, in fact, a diminution of the capital of the trust estate, in as much as the improvements, for which it is allowed, were necessary to make the wharf yield rent, and enhanced the value of the property beyond the amount of said credits, as shown by the testimony reported to the Court.

2. That the payments made by the defendant directly to the cestui que trust, Mrs. Gibbes, allowed by the report, and disallowed by the decree, should be sustained: because, the said payments, as shown by the report, do not trench upon the capital, nor interfere with any claims of the trustee against the income.

That Mrs. Gibbes had full power to receive her income as she pleased, or to assign it for valuable consideration; and Mr. Brown, by paying her income to her, was substituted to her rights by her express consent.

That an account having been ordered between the trustee and Mrs. Gibbes, Mr. Brown has a right to have that account taken.

Petigru, Lesesne, for appellant.
Memminger and Jervey, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. This Court is satisfied with the conclusion of the Chancellor to reject the claim of Mr. Brown for compensation, from the corpus of the estate, for improvements put upon the premises while in his possession. The claim of this defendant, for compensation for improvements, is weaker than similar claims, which have been rejected, in the cases of *Thurston v. Dickinson*, 2 Rich. Eq. 317 [46 Am. Dec. 56], and of *Corbett v. Laurens*, Ms. Charleston, Jan. 1852 [5 Rich. Eq. 301].

The remaining ground of appeal concerns the disallowance of the payments made by Brown to Mrs. Gibbes, the tenant for life, after his purchase of the wharf. In this re-

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spect, too, we *are content with the general conclusion of the Chancellor; but we think the defendant, Brown, is entitled to credit for such payments to Mrs. Gibbes, the cestui que trust for life, as did not exceed her interest

in the proceeds of sale, after deducting the expenditures and commissions of the trustee. Brown was contumacious in paying directly to the beneficiary, after the decree of this Court, affirming the right of the trustee to control the expenditure of the fund, and we are little disposed to encourage such contumacy; still, it is not just that the beneficiary should be twice paid, nor that the trustee should retain the fund for his own emolument. The case is to be treated as if Brown had paid the money to the trustee, and the trustee had paid it over to the beneficiary. Brown is entitled to be subrogated to the rights of the beneficiary, without disparagement of the rights of the trustee; and it is adjudged that the payments by Brown to Mrs. Gibbes shall be allowed, to the extent of her nett income, after all proper allowances to the trustee.

The extent of the trustee's expenditures is ascertained, and the amount of his commissions, if he claims them, is of easy calculation. So, too, the nett income of Mrs. Gibbes, which may be covered by Brown's payments, is simply a matter of figures, not requiring additional evidence. The whole correction of the Master's report, which we have directed by this opinion, is ministerial, and not requiring a new reference.

It is ordered and decreed, that the Master conform his report to the opinions hereinbefore expressed, and that, unless the defendant, Brown, pay the amount due on his bonds for the mortgaged premises, with the interest thereon, before the first Monday of March next, that Master Gray do sell, on the day last mentioned, the mortgaged premises for cash, or upon such credit, with interest from the day of sale, as those beneficially interested in the mortgage may direct. In all other particulars, the Circuit decree is affirmed, and the appeal is dismissed.

DUNKIN and DARGAN, CC., concurred.

JOHNSTON, Ch., absent at the hearing.
Decree modified.

5 Rich. Eq. *301

*ELIZABETH CORBETT v. M. H. LAURENS and Others.

(Charleston, Jan. Term, 1853.)

[*Life Estates* ⇨17.]

A tenant for life, who puts improvements on the land, is not, as a general rule, entitled to compensation from the remainder-men.

[Ed. Note.—Cited in *Smith v. Brown*, 5 Rich. Eq. 299; *Scaife v. Thomson*, 15 S. C. 368; *Buck, Heflebower & Neer v. Martin*, 21 S. C. 593, 53 Am. Rep. 702; *Sutton v. Sutton*, 26 S. C. 39, 1 S. E. 19; *Shumate v. Harbin*, 35 S. C. 529, 530, 15 S. E. 270; *Trimmier v. Darden*, 61 S. C. 233, 39 S. E. 373.

For other cases, see *Life Estates*, Cent. Dig. § 38; Dec. Dig. ⇨17.]

[*Wills* ⇨614.]

Testator devised lands to trustees, for the use of J. H. for life, with contingent remainder to her surviving issue; then declaring his "intent and purpose" that E. H. should hold the land devised to her "on similar and correspondent uses and trusts," in order "to effectuate his intent and purpose," he devised lands to the same trustees, "in trust for the use of E. H. for life; and on her decease, then in trust for the use of the lawful issue of E. H., to be equally divided among them, share and share alike; and if it so happen on the death of E. H., she leave no issue then alive, to take the said estate, then in trust for the use of J. H. and S. R., their heirs and assigns for ever?" —*Held*, that E. H. took an estate for life, with contingent remainder to her surviving issue.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1402; Dec. Dig. ⇨614.]

[*Wills* ⇨498, 531.]

Held, further, that all the descendants of E. H., grand-children as well as children, were embraced by the term issue, and took per capita.

[Ed. Note.—Cited in *Rembert v. Vetoe*, 89 S. C. 210, 71 S. E. 959.

For other cases, see *Wills*, Cent. Dig. §§ 1088, 1148; Dec. Dig. ⇨498, 531.]

[*Tenancy in Common* ⇨28.]

Where one tenant in common is in possession of the premises, the right of his co-tenant to an account of the rents and profits, is barred by the statute of limitations, except for the last four years before the filing of the bill.

[Ed. Note.—Cited in *Scaife v. Thomson*, 15 S. C. 343.

For other cases, see *Tenancy in Common*, Cent. Dig. § 82; Dec. Dig. ⇨28.]

Before Dunkin, Ch., at Charleston, June, 1851.

This case will be understood from the Circuit decree, and the decrees of the Court of Appeals. The Circuit decree is as follows:

Dunkin, Ch. It is proposed first to consider the claims of the complainant in relation to the plantation called Farmfield, situate on the eastern branch of Cooper river, in St. John's Berkley, and the tract of five hundred acres of land in St. Thomas' parish. In the codicil to the will of John Harleston, the great-grandfather of the complainant, executed 5th Sept., 1793, it is, among other things, provided as follows: "And as for the plantation called Farmfield, and the five hundred acre tract situated in St. Thomas' parish, I do hereby devise the same to my friends William, Edward and Nicholas Harleston, and their heirs and assigns, on the trusts and for the uses hereinafter set forth: that is to say, in trust to and for the use of my said daughter, Elizabeth Harleston, during her life: and on her decease, then in trust for the use of the lawful issue of my said daughter, Elizabeth, to be equally di-

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vided among them, *share and share alike; and if it should so happen that, on the death of my said daughter, she leave no issue then alive to take the said estate, then in trust for the use of my daughters, Jane Harleston and Sarah Read, their heirs and assigns for ever."

In May, 1795, Elizabeth Harleston intermarried with Thomas Corbett, and departed this life on 17th September, 1837. Her husband, Thomas Corbett, survived her, and died in July, 1850. There were nine children of the marriage. Of these, Thomas, the eldest, died 29th July, 1802, an infant of tender years; John Harleston, one of the defendants, was born 6th February, 1799; Richard, the father of the complainant, was born 17th September, 1801, and died 15th November, 1825; Elizabeth Harleston died 22d June, 1804, eleven months old; Margaret Harleston, one of the defendants, was born 7th June, 1805; Thomas C. Corbett was born 14th July, 1807, and died, unmarried and intestate, 26th June, 1846; Elizabeth Sarah died 12th September, 1810, aged eighteen months; Joseph was born 25th March, 1811, and died four days afterwards; Jane died 24th September, 1817, aged about eighteen months. Richard Corbett Laurens, one of the defendants, is the son of Margaret Harleston, and he and the complainant are grand-children of Elizabeth Corbett.

In the case of *Rutledge v. Rutledge*, Dud. Eq. 201, the Court have fixed the construction to be given to this clause of the testator's will, in reference to the rights of the issue of the marriage. It is true, the question did not arise on the will of John Harleston; but it is impossible to distinguish the language used from that on which the judicial interpretation was there declared. And this seems to have been the conviction of the counsel, as no attempt was made at the hearing to distinguish the case, or to question the inference to be deduced from that decision. Two points were adjudicated: First, that the children took vested interests, as they were successively born, subject to open and let in subsequent issue, in proportion to their numbers; and, second, that the

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grand-children are entitled to *take, under the description of issue, equally with the children, the immediate issue of the marriage.

According to these principles, at the death of Elizabeth Corbett, in September, 1837, Farmfield and the tract of land in St. Thomas' were distributable, in the first place, into eleven equal shares, of which the complainant was entitled, in her own right, to one share, and each of the defendants, John H. Corbett, Margaret H. Laurens, and Richard C. Laurens, to one share in their own rights, respectively, as issue of Elizabeth Corbett, deceased. Thomas C. Corbett (son of Thomas) was also entitled to one share: and of the remaining six shares, the heirs at law of the six pre-deceased children of Elizabeth Corbett, deceased, were entitled to one share for each child so deceased. Under the Act of 1797, Thomas Corbett, the father, was entitled to a proportion of the share of such of his children as had died without issue and

intestate: and he subsequently became entitled, equally with the complainant, and the defendants, Margaret H. Laurens and John H. Corbett, to the interest of his deceased son, Thomas C. Corbett. The several subdivisions can be more accurately ascertained by the proper officer of the Court.

In September, 1837, the complainant became entitled to one eleventh of the estate in her own right, and to two-thirds of whatever interest had vested in her father, Richard Corbett, at the time of his death, in November, 1825, and she, subsequently, to wit, on the 26th June, 1846, became entitled to one-fourth of the interest of her deceased uncle, Thomas C. Corbett. The bill prays an account of the rents and profits, from the time of the accrual of the right of possession. This account is resisted by John H. Corbett and Margaret H. Laurens, the defendants, and who are also the personal representatives, as well as sole legatees and devisees of their deceased father, Thomas Corbett. They rely, in the first place, on the statute of limitations. It appears from the evidence, that the complainant, at the time of her father's death, was only eight months old, having been born 10th March, 1825. She was about

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twelve *years old when her grandmother died, in September, 1837, and she did not become of age until 10th March, 1846. Her grandfather died in July, 1850, and this bill was preferred on the 27th November, 1850.

The statutes of limitations do not, in terms, apply to proceedings in Chancery; but this Court recognizes the provisions of the statutes, as it is sometimes said, in analogy to the statutes, and, at others, in obedience to the statutes. See *Smith v. Smith*, McM. Eq. 126. There are many cases, however, and classes of cases, in which Chancery refuses to recognize the plea, or permit it to be interposed, although, at law, it would afford an effectual bar to the action. But it is believed that the books afford no precedent for applying the bar of the statute to a proceeding in Equity, when the statute would be no bar at Law for the same cause of action. The Act of 1788 (5 Stat. 77) allows to persons under twenty-one years of age five years after attaining majority to prosecute their right or title to lands. And the Act of 1791, (Id. 170,) abolishing the action of ejectment, provides that the method of trying the title to lands or tenements in this State, shall be by action of trespass, in which the jury, by the same verdict, may find for the plaintiff not only the land, but award damages for the mesne profits, and judgment shall be entered upon such verdict, as well for the damages as for the recovery of the land. If this were merely an action of trespass to try title, the complainant would not be barred at Law until 10th March, 1851, and these proceedings were instituted some months before that time. In her action at Law, she would be

entitled to recover not only the land, but damages for the mesne profits, as they might be awarded by the jury. The statute would be no bar. But both the defendants and the testator were tenants in common with the complainant, and it would be difficult, if not impracticable, for the complainant to have adequate relief, except in this Court. In administering this relief, Equity is well satisfied to follow the Law, and to regard the rights of the complainant as unaffected by the statute of limitations.

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*Such would be the judgment of the Court, if, from the time of Elizabeth Corbett's death, in 1837, her husband, Thomas Corbett, deceased, should be regarded as a mere trespasser. But this view would be equally unjust to him and to the complainant. He was a tenant in common with her and in right of his pre-deceased children, was entitled to community of possession with the other parties interested. An account of the mesne profits is merely an incident to the recovery of the freehold. And it seems to be very well settled, that the statute of limitations is inapplicable between tenants in common. The possession of one is the possession of all. There are exceptions to this general rule. But it may be affirmed that a tenant in common can never avail himself of the statute of limitations, to bar the claim of his co-tenant, until his exclusive possession has been so long, and under such circumstances, as would warrant the presumption of an ouster, or, at least, until he has committed some distinct and overt act, which would constitute him a trespasser. See *Willison v. Watkins*, 3 Peters, 51 [7 L. Ed. 596], and the authorities there cited. The general principle was fully recognized in *Snowden v. Pope*, Rice, Eq. 174, where the plea of the statute was held to be no bar to the claim of a codistributee, and not only partition was ordered, but an account of the intermediate profits, while the property was in possession of the defendant.

The remaining objection of the defendants relates rather to the measure of accountability, or the principle on which the account should be taken, than to the obligation to render an account. It is said, that from the decease of his wife in 1837, until his own death in 1850, the testator acted under the impression that, according to the true construction of John Harleston's will, he was entitled to the enjoyment of the premises during his life, and that "no contrary opinion was ever intimated to him by complainant's mother, or by any other person, and that, inasmuch as he continued in peaceable possession of the plantation, and managed the same as his own, and received to his own use the crops thereof, without any claim

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*made, or notice on the part of the complainant, or her mother, it would be inequitable

to hold him, or his representatives, to any account for the rents of the said plantation." It is most probable that the testator lived and died under the impression that his rights were similar to those of Dr. Read, who had married the eldest daughter of Col. John Harleston. The original will had given an absolute estate to his three daughters. On the marriage of Mrs. Rutledge, he thought proper to modify his will, and to provide for their respective issue. In the event that Dr. Read or Mr. Edward Rutledge survived their respective wives, such survivor had also a life estate. But at the date of the codicil, and also at the death of the testator, his daughter, Elizabeth, was yet unmarried. By his will, she had an absolute estate in the plantation devised. The codicil declares that the plantation shall be held, not absolutely, but subject to uses and trusts similar to those directed in relation to his daughter Jane, to effectuate which intent and purpose the estates are devised to trustees, and the uses declared. Farmfield, &c., was to be held "for the use of his daughter Elizabeth Harleston, during her life, and, on her decease, then in trust for the use of the lawful issue of his said daughter, to be equally divided, &c.; but if it should so happen, that, on the death of his daughter, she leave no issue then alive, to take the said estate, then in trust for his daughters, Sarah and Jane," absolutely. The general purpose of the testator, as declared in the codicil, was to cut down the fee given to his daughters to a life estate, with remainder to their issue respectively. This is fully accomplished. Knowing and approving of the alliance of his two daughters, he thought proper to make a contingent provision for their respective husbands. Why he did not make the same provision in the event of the marriage of his daughter Elizabeth, the Court is not at liberty to inquire, or to speculate. The province of the Court is very properly confined to the construction of that which is written. The testator has made no such provision. Nor does it appear to the Court that there is any such inconsistency or ambiguity as would

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warrant a judicial *doubt as to the intention of the testator. It can only be said, that if the testator's daughter, Elizabeth, had been then married, he would have made the same provision for her husband as he did for Dr. Read and Mr. Rutledge. But, when the testator subsequently declares distinctly the uses and trusts under which Elizabeth's estate is to be held, he gives construction to the former terms used—"similar" and "correspondent"—and shows that they are to be "similar and correspondent," according to the existing state of things. Any other construction would be to make a will for the testator which he did not make, and may not have thought proper to make for himself. Perhaps the Court has dwelt longer

than was necessary on this point, as it was rather suggested than pressed in the argument at the hearing. Then, in what manner, and to what extent, is this erroneous impression of the defendants' testator to affect the rights of his co-tenants? And, in this inquiry, it is important to distinguish between the rights of the complainant, and those of her mother, who is one of the defendants. In *Green v. Biddle*, 8 Wheat. 69 [5 L. Ed. 547], it is stated to be the general rule of the English Chancery, to allow an account of rents and profits, in all cases, from the title accrued, provided it did not exceed six years, unless under special circumstances. This principle has been repeatedly recognized in South-Carolina. One of the exceptions is thus stated by the Chancellor, in *Rowland v. Best*, 2 McC. Eq. 320: "It is not an uncommon case for a party, who lies by and permits another to occupy and enjoy property as his own, under an apparent good title, which he might, and ought to have brought into discussion much earlier, to be restricted, in his demand for an account of rents and profits, to the filing of the bill, or four years before." So far as the complainant is concerned, it is difficult to conceive in what the principle of this exception will avail the defendants. She was left without a father, in early infancy. Her mother was comparatively a stranger to the family; and to her paternal grandfather she would naturally look, both for information in regard to her rights, and for active efforts, if such were

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necessary, *in maintaining them. According to the testimony, she had, at her grandmother's death, in 1837, derived no estate from her father. While still a minor, to wit: in June, 1842, her uncle applied to him in her behalf. The correspondence between them was submitted to the Court. From the evidence of both the witnesses, it is very apparent that the complainant was then entirely ignorant of her rights, and probably of the instrument from which they were derived. It is not less certain, that no light was shed upon the subject, in the communication with her grandfather. Knowing, as he well knew, the existence of John Harleston's will, whatever construction he may have given it, how can it be maintained that he was permitted by the complainant to occupy, as his own, property, the title to which she might, and ought to have brought into discussion much earlier. But laches is never imputed to an infant. And so it was recently held by the Court, in a very hard case against a bona fide purchaser without notice, who had been in undisturbed possession for fifteen years. In *Woodward v. Clarke*, 4 Strob. Eq. 167, it was ruled in the Circuit Court, on the authority of *Lahiffe v. Smart* [1 Bailey, 192] that the minority of one of the co-tenants protected the others from the bar of the statute, and partition was ordered. It was

also decreed that, under the circumstances, the account for rents and profits should be restricted to the time of filing the bill. On appeal from this decree, so much of it was affirmed as confined the account of the adults to the time of filing the bill; the Court declaring, that "The disability of a complainant could afford them no advantage in the claim for rents and profits;" but "the account of the minor was extended to the period when her right accrued," and the Circuit decree was ordered to be so modified. The Court is of opinion that the complainant is entitled to an account of the rents and profits from the decease of her grandmother, Elizabeth Corbett, in September, 1837, or rather from the end of that year.

The defendant, Mary Corbett, is entitled to one-third of the interest of her deceased husband, Richard Corbett. She has interposed no claim at any time, and now submits

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her rights to *the judgment of the Court. It seems, therefore, only necessary to declare that, in making the partition of Farmfield and the five hundred acre tract, one-third of the interest of Richard Corbett, deceased, should be set off to her.

Thomas C. Corbett, the uncle of the complainant, resided with his father until the death of the former, in June, 1846. It is to be presumed that he was satisfied in relation to his interest in the rents and profits from the time of his mother's death. The complainant's account of rents and profits, as derived from her uncle's interest in the freehold, must be confined to the period of his decease, and thenceforward.

The subject next to be considered is the complainant's right in the two lots of land on Harleston Green, fronting southwardly on Montague-street, running in depth to Bull-street, and joining other lands formerly belonging to John Harleston, on the corner. Under the marriage settlement set forth in the pleadings, the complainant, on the death of her grandfather, Thomas Corbett, in July, 1850, became entitled, as the representative of her deceased father, to one-third of the said premises as tenant in common with the defendants, John Harleston Corbett and Margaret Harleston Laurens. By the same deed, fifty-three slaves were settled to the same uses. The bill claims partition and account. The rights of the complainant, under the marriage settlement, are not controverted by the defendants. But in relation to the two lots of land, running from Montague to Bull-street, on Harleston Green, the defendants say that their late father erected thereon "a valuable three story dwelling house, and other out-buildings, at his own expense, and from his own means, and occupied the same as his own property for the last twenty years;" and they "submit that the estate of their father shall be allowed the value of the improvements made by him in any par-

tition to be had." They insist that "a portion of the real estate, in its unimproved state, shall be assigned in severalty to the complainant, leaving to those claiming under Thomas Corbett that portion upon which his improvements stand."

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*If Thomas Corbett had been tenant in common of the premises, it has been settled that he would not be entitled to compensation from his co-tenants, in partition of the premises. It was so ruled in *Thurston v. Dickinson*, 2 Rich. Eq. 317 [46 Am. Dec. 56], which has been followed in several other cases. Nor, if he had supposed himself exclusive owner of the premises, would he be entitled to compensation for the enhanced value which his improvements had given to them, except so far as to diminish his account for the rents and profits to that extent. The subject was fully considered in *Green v. Biddle*, already cited. It was there ruled that the value of the improvements can never be set up as a substantial demand, but only as a set off against the rents and profits; that beyond this a bona fide occupant, who supposes himself the rightful proprietor, cannot sustain a claim for the value of his improvements. It was further held, that the bona fides of his possession ceases so soon as he has notice of the adverse title. These conclusions are founded upon the principle that the recovery of a man's land should not be clogged by conditions and restrictions, which might materially diminish the value of the right; still the application of the rule has sometimes operated great hardship both upon the tenant in common and upon the bona fide possessor, or purchaser. But if a person knowingly and with his eyes open, erect buildings upon the property of a stranger, the loss of the buildings would entitle him neither to compensation, nor sympathy. If they were erected on the property of his child, they would be regarded as a gratuity. But, when the parent has a life estate in unimproved city lands, to which his children are entitled to a remainder in fee, he consults his own enlightened self-interest scarcely less than the future benefit of his offspring, by the erection of such valuable improvements as add to his income, or contribute to his comfort and convenience. The testator, with his family, enjoyed the use of his improvements for more than twenty years. There is no ground to suppose that he misapprehended his rights, or those of his children, under the marriage settlement.

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Nor is there any evidence that *he contemplated compensation from his children for the improved value which his outlay had imparted to the premises. The silence of the testator's will in reference to any such claim, is not without influence. He marks the distinction between "the settled estate" of which the premises on Bull-street constituted a part, and "his private estate." The latter

he devised exclusively to his son and daughter, and, as a reason for "not mentioning" the complainant in his will, states that "she will inherit her share of the settled estate, and will receive from her mother's family an equivalent equal to what his children would get from his private estate." Did the testator mean that his private estate consisted in part of valuable improvements which he had erected on the settled estate? Taking the whole will together, it would seem sufficiently clear that the testator proposed to give to the defendants the whole of his private estate, as distinguished from the settled estate, "of which he was then possessed, or might thereafter possess," and that he recognized the right of his grand-daughter (the complainant) to her share of the settled estate, as it then stood, as a part of her inheritance. But, whatever may have been the views of the testator, the Court is of the opinion that such were the rights of the complainant upon established principles of this Court. An account must be taken of the rent of the premises, and of the hire of such of the slaves as were not engaged in agricultural purposes from the death of the testator in July, 1850, and of such as were engaged in agricultural employments from the expiration of the year, according to the provisions of the Act of Assembly.

It is not understood that any difference of opinion exists as to the rights of the complainant under the will of her great grandmother, Elizabeth Corbett, deceased. In the moiety of the tract of four hundred and three acres, adjoining the Bossis tract, her interest is precisely the same as it had been declared in the Farmfield tract, except that her account of rents and profits must commence at the close of the year in which her grandfather, Thomas Corbett, departed this life.

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*The bequest of the personalty is to Elizabeth Corbett and Thomas Corbett, "to be held, possessed, &c., by them, jointly, during their joint lives, and, upon the death of either of them, by the survivor, during his or her life, and upon the death of such survivor, then to the future, as well as the present issue of the said Eliza and Thomas, equally to be divided among them if more than one."

The testatrix died about January, 1805. Two of the children of Eliza and Thomas Corbett, to wit, Thomas, who died 29th July, 1802, and Elizabeth Harleston, who died 22d June, 1804, do not fall within the description of the testatrix's will, and consequently, as was determined in *Rutledge* and *Rutledge*, took no interest in this bequest. With this modification, the rule declared in relation to the devise of Farmfield, under the will of John Harleston, is applicable to this bequest. A reference must be had to fix the several dates accurately, and report the rights of the parties according to the principles herein stated.

It is ordered and decreed, that a writ of partition issue to divide the plantation called Farmfield, and the tract of land in St. Thomas' parish, among the parties, in the proportions to be reported by the Master, on the principles hereinbefore declared, and also to divide the premises extending from Bull to Montague-street, and the negroes specified in the marriage settlement, with their issue, into three equal parts; one part thereof to be assigned to the complainant, and one part to each of the defendants, John Harleston Corbett and Margaret Harleston Laurens, to be held by them respectively, in severalty; also, to divide the moiety of the four hundred and three acre tract, adjoining the Richmond and Farmfield plantations, and the personalty derived under the will of Elizabeth Harleston, deceased, among the parties interested, according to the report of the Master, to be made on the principles herein declared. And if, in the judgment of the Commissioners, partition cannot be advantageously made of any part of the premises above described, then that they make a

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special return in regard to the *same, according to the directions of the Act of Assembly in such case made and provided.

It is further ordered and decreed, that it be referred to one of the Masters of this Court, to state an account of the rents and profits of the real estate, also of the hire and use of the slaves, upon the principles of this decree, and that he have leave to report any special matter.

The defendants, John H. Corbett and Margaret H. Laurens, appealed on the grounds:

1. Because the statute of limitations is a bar to the account claimed of rents and profits by the complainant, for more than four years from the filing of the bill.

2. Because, under the circumstances of this case, no account for rents and profits should be allowed before the filing of this bill, or at least before the death of Thomas Corbett, sen.

3. Because the lots embraced in the settlement of Thomas Corbett and wife, are capable of just partition by metes and bounds; that the larger portion thereof are unimproved, and of more value than the lot which has been improved, and that in making partition among the remaindermen, a portion of the unimproved lots should be assigned to the complainant as her share, and the lot with the improvements made by the testator, should be assigned to his son and daughter as devisees, at their rateable value, as unimproved lots of land.

4. Because the complainant is not entitled to any account of the rent of the dwelling house.

5. Because, under the said codicil, Elizabeth Corbett took either an estate in fee conditional, or an estate for life, with a contingent remainder to her issue surviving her;

that in the first case, Thomas Corbett would have been entitled to hold the estate for life as tenant by the curtesy; and in the latter, none of the issue could take who died in the life time of Elizabeth Corbett.

The defendant, Mary Corbett, also appealed, on the ground, that she was entitled to rents and profits from the time her title accrued.

Memminger, Flagg, for John H. Corbett

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and Margaret H. *Laurens, cited Steedman v. Weeks, 2 Strob. Eq. 115; 1 Story, Eq. § 655, et seq.; 1 Madd. Ch. 73; Townshend v. Townshend, 1 Cox, 28; 1 Bro. Ch. R. 550; Willman v. Holmes, 4 Rich. Eq. 475; Burleson v. Bowman, 1 Rich. Eq. 111; Jesson v. Wright, 2 Bligh, 1; Doe v. Burnall, 6 T. R. 30; 2 Jarm. on Wills, 277, 280; Doe v. Applin, 6 T. R. 82; Doe v. Cooper, 1 East, 227; Tate v. Clark, 1 Beav. 100; 1 Bl. Com. 126; 1 Harg. L. Tr. 161; 2 Jarm. on Wills, 246.

Macheth, for Mary Corbett, cited Dormer v. Fortescue, 3 Atk. 124; 2 Atk. 282; Townsend v. Ash, 3 Atk. 336; Doe v. Elvey, 4 East, 314.

Petigru, for appellees, cited Backhouse v. Wells, 1 Eq. Abr. 184, pl. 27; Fearne, 152, (9th ed.); 2 Story, Eq. § 487; Horry v. Glover, 2 Hill, Ch. 515; Snowden v. Evans, Rice, Eq. 174; Myers v. Anderson, 1 Strob. Eq. 344; Wheeler v. Horne, Willes, 208.

The appeal was heard in January, 1852, and the following opinion of the Court was delivered by

WARDLAW, Ch. Two of the defendants, the devisees and surviving children of Thomas Corbett, in their appeal, claim compensation for the valuable buildings erected by him, on the lot on Harleston Green, during his life estate therein. The reasoning of the Circuit decree is very strong, that if the testator had any equitable right to such compensation, he has not assigned it by his will to these defendants; but, waiving this objection, we are concluded by the course of adjudication in this State, from admitting the claim of a tenant for life to be reimbursed for his improvements of the estate.

It is unjust, that one shall be enriched at the expense and to the wrong of another; and Courts of Equity elsewhere, pursuing this maxim, have allowed, to some extent, the benefit of his improvements, to a tenant in common, or other joint owner, who has improved the joint estate, under the honest conviction of exclusive ownership in himself, or under other circumstances equally strong in natural equity. Such relief is extended

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only *where the refusal of it would operate as a fraud, or unconscionable hardship, upon the improving co-tenant. He is not

wronged in any just sense, if detriment to himself be occasioned by his own folly and wilfulness. If he be cognizant of the rights of his co-tenants, he may either contract with them concerning proposed improvements, or by easy process of partition, he may obtain his share in severalty; and if he neither so contracts nor severs, before expending his money in improvements, he must either reckon that his proportion of the estate will justify the outlay upon the whole, or intend a gratuity to the other owners. To reimburse the improving tenant in common, to the extent of the cost of the improvements to himself, would enable one of prodigality and capricious taste to deprive his fellows in the tenure of all shares in the common estate, by subjecting them to debts for structures and innovations that were valueless and distasteful. It is scarcely less objectionable to allow to an improving tenant in common, by general rule, reimbursement to the extent of the market value imparted by his improvements to the estate; for the commercial value does not constitute the whole value of an estate. Some changes might increase the price an estate would bring at auction, which would greatly disparage it in the estimation of some of the joint owners: such as the removal of a monumental ruin for the erection of a shop. One who does not wish to sell his undivided share of an estate, can hardly be compelled, consistently with equity, to pay for improvements, so called, that are offensive to his taste, or to his ancestral and patriotic pride, or disproportionate to his means. Without further pursuing this train of remark, it is enough to say, that our cases have settled the question against the right of an improving tenant in common, to the exclusive benefit of his improvements. *Hancock v. Day*, McM. Eq. 69 [36 Am. Dec. 293; *Id.*, McM. Eq.] 298; *Thompson v. Bostick*, *Id.* 75; *Holt & Kerr v. Robertson*, *Id.* 475; *Dellert v. Whitner*, Chev. Eq. 213; *Thurston v. Dickinson*, 2 Rich. Eq. 317 [46 Am. Dec. 56].

The equity of a tenant for life against remaindermen for the benefit of his improve-

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ments, is inferior to that of a tenant in common in like case. The tenant for life is exclusively entitled to the enjoyment of the estate for an indefinite term of time, as measured by the calendar, always long in his anticipation; and as to him the interference is more natural that he intends his improvements for his personal use. He is not interested in the inheritance, and has little pretension to anticipate the interests or the wishes of his successors. He is an implied trustee for the remaindermen, and by general rule in Equity, trustees are not entitled to the profits of their management of the trust estate. His estate is not unfrequently given, rather for the preservation of the rights of the remaindermen, than for his own enjoyment.

Where a bounty to him is clearly intended, it is commonly no more than the enjoyment of the estate, in the existing condition, at the time of the gift, or in a progressive condition contemplated by the donor at the time of the gift. Courts of Equity in England, which admit this equity as to improvements more liberally than we do between tenants in common, have not recognized the claim of a tenant for life to compensation for improvements, except in the case where he has gone on to finish improvements permanently beneficial to the estate, which were begun by the donor. *Hibbert v. Cook*, 1 Sim. & Stu. 552. The doctrine, as limited, seems to be approved in *Ex parte Palmer*, 2 Hill, Eq. 217. There, an allowance was made to an executor for improvements put by him on an unimproved lot in the city of Charleston, which by subsequent marriage with the widow of testator, he acquired for life; but the general rule against such allowance to a tenant for life is expressly stated. This, as a general rule, is not unconscientious; and in cases which may seem to be proper exceptions to its operation, as in a gift for life of wild lands, in such terms as clearly import an intended bounty to the tenant for life, which cannot be enjoyed in the existing condition of the subject, the tenant may obtain, by timely application to this Court, either a sale of the whole estate, so that he may enjoy the income, or authority to make improvements permanently beneficial; and he suffers from his own wilfulness, if he proceed upon his own notions of improvement,

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without asking aid or advice. The Court may sanction what it would have previously authorized, but it encourages no experiments upon its power of retroactive relief.

The inference of gratuity, rather than charge, is made against the heady improver, who disdains to consult in advance his successors in interest, or the Court which may provide for their rights and their wishes. In the present case, the improvements were made by a father on land to which his children were entitled after his life, and as he in his life time made no claim for a debt on account thereof, it is fitly presumed that he intended his improvements as an advancement.

Under the Act of 1791, the Commissioners to whom the writ of partition is directed, have authority to make specific division of the premises, or to assign the whole to one or more of the parties in interest, as well as to recommend a sale. In a proper case, this Court might instruct the Commissioners to assign to the parties, respectively, such parts of the estate as would best accommodate them, and be of most value to them, with reference to their several positions to the property before partition. *Storey v. Johnson*, 1 You. and Col. 538, 2 Y. and C. 586. But in the present case, we decline to inter-

here with the discretion of the Commissioners by instructions in advance, as we do not see that the surviving children of Thomas Corbett have any superior claims to his improvements, to the daughter of his deceased son.

The defendants' fifth ground of appeal raises the question, whether under the codicil to the will of John Harleston, Mrs. Elizabeth Corbett took an estate in fee conditional in Farmfield and the tract in St. Thomas' parish, with the incident of an estate for life by the curtesy in her surviving husband. On this question, this Court has not yet attained a satisfactory conclusion; and this part of the case is reserved for future judgment.

If this question be resolved in favor of the defendants, the parties to take the lands, and the shares in which they will take, may be different from those declared in the Circuit decree. In that event, too, the claims for

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rents and profits by the plaintiff *and by the defendant, Mary Corbett, would extend to the time only since Thomas Corbett's death; and of course, there would be no room for the application of the statute of limitations.

It is difficult to see, in the facts of this case, anything which should limit the demand of Mary Corbett for rents and profits, from the accrual of her right, any more than that of the plaintiff, unless it be by the statute of limitations. If by our ultimate determination, the claim for rents and profits by the plaintiff and Mary Corbett, shall reach beyond the death of Thomas Corbett, the term of the bar of the statute of limitations will become an important inquiry. We are at present inclined to the conclusion, that, as a general rule, the claim for rents and profits is a personal demand, a debt not by specialty, and is barred by the term which would bar the suits for an analogous claim at law, account, assumpsit, and debt on simple contract. But it is doubtful whether this rule applies to the cases of tenants in common. At common law, if one tenant in common take the whole profits, his co-tenants have no remedy against him. *Litt. Sec. 323, and Co. Litt. 26.* By 27th section of 4 and 5 Anne, c. 16, an action of account is given to a tenant in common against his co-tenant, who has received more than his just share or proportion of the profits; but this remedy extends only to the actual receipt of rents and profits, and not to the case where the tenant in common is in the occupation and enjoyment of the premises. *Wheeler v. Horne, Willes, 208.* It is clear that the statute of limitations does not run as to the title to the lands themselves, in favor of the tenant in common in possession, without actual ouster, against his co-tenants; and we reserve our opinion, whether the incidental claim for profits is governed by the same principle. We decide nothing as to points which may be superseded by our final judgment on the question, whether

Thomas Corbett had an estate for life by the curtesy.

It is ordered and decreed, that the Circuit decree be affirmed, and the appeal be dismissed, so far as the partition of the lots on Harleston Green is concerned. In other respects, the questions made by the appeal are reserved for judgment.

DUNKIN and DARGAN, CC., concurred.

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*At this Term, January, 1853, the opinion of the Court upon the questions reserved was delivered by

WARDLAW, Ch. This case was heard at the last sitting of this Court, and an opinion was then pronounced, affirming the Circuit decree, and dismissing the appeal, so far as the partition of the lots on Harleston Green was involved, and reserving our judgment on the other questions made by the appeal. The points reserved depend upon the construction of the codicil to the will of John Harleston, devising the plantation, Farmfield, and a tract of land in the parish of St. Thomas, in trust for his daughter Elizabeth.

When the codicil was executed, the immediate family of the testator consisted of a wife and three daughters—Sarah, the wife of William Read, Jane, affianced, with his approbation, to Edward Rutledge, and Elizabeth, under no contract or engagement of marriage. By his will, the testator had devised to his daughters, in fee simple absolute, the same lands which are settled upon the daughters, respectively, by the codicil.

Besides other provisions, not affecting this litigation, this codicil contains the following devises: "And it is further my will and pleasure, and I do hereby direct, that the tract of land called Richmond," &c., "devised to my daughter Jane Harleston, by my said will, shall be held by my friends William, Edward and Nicholas Harleston: and I do hereby devise the said land to them, and to their heirs and assigns, in trust to and for the use and benefit of my said daughter, Jane and of the said Edward Rutledge, in the event of the said marriage taking place, during their joint lives: and on the death of either of them, then in trust for the survivor, during his or her life: and on the death of both, then in trust for any lawful issue which the said Jane may leave alive, to be equally divided among them, if more than one, share and share alike, in fee simple: saving and reserving to my wife, Elizabeth, her life estate, residence, and right to plant with her negroes, as given by my will, in the house and plantations of Richmond and Farmfield: but if it

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should so happen, that on the death of *both the said Jane and Edward, there should be no lawful issue of the said Jane then alive, to take the said estate, agreeably to this will, then in trust, that the said tracts of land be

equally divided between my daughters, Sarah Read and Elizabeth Harleston, their heirs and assigns forever. It is further my will, and I do hereby direct, that the plantation called Rice Hope, which I have devised to my daughter Sarah Read, and the plantation called Farmfield, with the five hundred acre tract in St. Thomas' parish, which I have devised to my daughter Elizabeth Harleston, shall be held on trust, and to uses similar to and correspondent with those I have directed in the preceeding clause, respecting the Richmond place I have devised to my daughter Jane. To effectuate which intent and purpose, I do hereby devise the said tract of land, called Rice Hope, and the said plantation, called Farmfield, and the five hundred acre tract in St. Thomas' parish, to my friends William, Edward and Nicholas Harleston, and their heirs and assigns, in trust to and for the following uses and purposes: that is to say, as for the plantation Rice Hope, in trust to and for the use of my daughter Sarah, and her husband, Dr. William Read, during their joint lives: and on the death of either of them, then in trust for the use of the survivor, during his or her life: and on his or her decease, then in trust for the use of any lawful issue of the said Sarah, to be equally divided among them, if more than one, in fee simple: but if it should so happen, that on the death of the survivor of the said Sarah and William Read, there should be no lawful issue of the said Sarah alive, to take the said estate, agreeably to this will, then in trust, that the said tract of land be equally divided between my daughters, Jane Harleston and Elizabeth Harleston, their heirs and assigns for ever. And as for the plantation called Farmfield, and the five hundred acre tract situated in St. Thomas' parish, I do hereby devise the same to my friends William, Edward and Nicholas Harleston, and their heirs and assigns, on the trusts and for the uses hereinafter set forth: that is to say, in trust to and for the use of my said daughter, Elizabeth

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Harleston, during her life: *and on her decease, then in trust for the use of the lawful issue of my said daughter Elizabeth, to be equally divided among them, share and share alike: and if it should so happen, that on the death of my said daughter, she leave no issue then alive to take the said estate, then in trust for the use of my daughters, Jane Harleston and Sarah Read, their heirs and assigns forever."

Elizabeth Harleston, the devisee of the lands which are the subject of this suit, after the death of her father, became the wife of Thomas Corbett and the mother of nine children. She died September 17, 1837, and her issue then surviving were three children, John H., Margaret H. and Thomas, and two grandchildren, Richard C. Laurens, son of defendant, Margaret H., and Elizabeth Corbett,

the plaintiff. Of the six children of the said Elizabeth Harleston, who pre-deceased her, namely, Thomas, Richard, Elizabeth, Elizabeth Sarah, Joseph and John, all died infants, intestate and unmarried, except Richard, who attained full age, and died leaving one child, the plaintiff, and a widow, the defendant, Mary Corbett. Of the issue that survived Elizabeth Harleston, Thomas, second son of that name, died in 1846, unmarried and intestate, leaving his father, his brother, John H., his sister, Margaret H., and his niece, the plaintiff, equal distributees of his estate. Thomas Corbett, the father, continued in possession of the lands devised to his wife until his death, in July, 1850. This bill was filed Nov. 27, 1850, amongst other things, for partition of the lands devised to Elizabeth Harleston, and an account of the rents and profits. The plaintiff attained full age, March 10, 1846, more than four years before the death of her grandfather. The extent of the plaintiff's title to relief in this matter depends upon the construction of the codicil above recited, as to her share in the lands, and also upon the operation of the statute of limitations, as to her share of the rents and profits.

First, as to the plaintiff's share in the lands. It is adjudged in the Circuit decree, upon the authority of *Rutledge v. Rutledge*, Dud. Eq. 201, that the children of Elizabeth

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Harleston, *as they were successively born, took vested interests, opening to let in subsequent issue, and of course diminishing in proportion as the issue increased: and that all descendants took equally with children, under the description of issue. The defendants insist, by their fifth ground of appeal, that the said Elizabeth Harleston either took an estate in fee conditional, with the incident of an estate for life in her surviving husband, by the curtesy: or an estate for life, with contingent remainder to her surviving issue, in exclusion of her issue that died in her life time.

It is a general rule, in the interpretation of a written instrument, that the construction be made from all its parts, so as to give, if reasonable, a consistency to the whole instrument, and avoid discordance in its parts. One part helps to expound another; and, in ascertaining the meaning of any clause, we should consider the whole context. In this codicil, the testator explicitly declares his purpose, that the lands respectively devised to his daughters, Sarah and Elizabeth, "shall be held on trusts and to uses similar to and correspondent with those" created in the preceeding clause, respecting the devise of Richmond to Jane. The meaning of this declaration of purpose, by itself, seems plain, that the three daughters should have the same interest, enjoy their several estates, with such change, only, as the variety in their condition required. Elizabeth was not

married, like Sarah, nor affianced, with the approbation of the testator, like Jane, and she might never marry, with or without such approbation. No contingent estate, by survivorship, in Elizabeth's future husband, should be implied, under such circumstances; especially when the testator, in undertaking to repeat the declaration of his purposes, omits provision, in her case, for such surviving husband. The same motive which induced the testator to omit provision for the future and unknown husband of Elizabeth, the uncertainty of his suitability, would operate on testator to prevent accretion to the husband's interests by the death of issue in the life time of the wife. We may imagine mo-

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tives in a testator for a more strict settlement upon the issue of an unascertained husband of his daughter, but we should not naturally expect that he would give to such issue estates that might enure to increased advantage of such husband, beyond the contingent rights of husbands, known and approved. Yet such would be the result, in this case, of holding that the issue, as they came into being, took vested interests, liable to be transmitted, if they died intestate, to the father and other distributees.

By the careful provision of the testator for cross remainders among his daughters, in case any of them died without surviving issue, we may see his general intent to produce equality among his daughters and their surviving issue. But the language of the testator, in the limitations over, deserves to be carefully considered. In every instance, the gift over is in case the particular legatee leave no issue alive, at her death, to take the estate. I agree to the doctrine of *Whitworth v. Stuckey*, 1 Rich. Eq. 404, that the terms employed in the gift over, if defining issue within the rules as to perpetuity, do not necessarily import restriction into the direct gift to issue, so far as real estate is embraced. I may say for myself, without committing my brethren, or intending to impair the authority of the cases upon Bell's will, and those following the same decision, that I am not satisfied with the reasoning that, even in relation to personalty, if the limitation over, on the failure of issue, be good, the issue necessarily take as purchasers. Chancellor Johnston, however, in the case of *Hay v. Hay* [3 Rich. Eq. 384], has given satisfactory reasons for some difference of force in the reflex operation of the terms in the gift over, when applied to the different subjects of realty and personalty. Still, I apprehend the true doctrine to be, that the construction of any particular clause is to be made from the whole instrument, and that the limitation over is to be treated as other portions of the context. If there be a confluence in expression of meaning, or pertinent reference in the terms of gift over to the terms of direct gift to the issue, the language of the gift over

may properly satisfy us of the intention of the donor in using the phrase issue in the

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*gift to issue. The terms of the gift over, as other portions of the context, are referential and expository in relation to any particular clause, and not absolutely controlling. In the present case, the description of issue in the gift over aids us in the construction, as to the issue entitled to take by direct gift. The estate is to go to others, if the tenant for life, at her death, "leave no issue then alive, to take the said estate." This strongly indicates the purpose of the testator, that the issue to take the estate was the issue alive at the death of his daughter, Elizabeth. This purpose is expressed with more pleonasm in relation to the other two daughters, the words "agreeably to this will" being added to the description of issue to take the estate; but the meaning is the same.

Much of the difficulty of this case arises from the prolixity of conveyancing which was usual at the date of this codicil. The testator, having created certain trusts as to the lands devised to his daughter Jane, and expressed his purpose that his other two daughters should hold their lands on similar and correspondent trusts and uses, undertakes "to effectuate his intent and purpose" by repeating and specifying the trusts as to the devises to his daughters Sarah and Elizabeth. It is beyond dispute, that under the devise to Jane she took an estate for life, with contingent remainder to her surviving issue, a contingent estate, on his survivorship, to Edward Rutledge for life, being interposed; and Sarah and Elizabeth were intended to take similar and correspondent estates. But the testator, or his scrivener, in the gifts to the issue of the latter two daughters, omitted the qualifying words, which the daughter may "leave alive at her death," to be supplied by the context.

We are of opinion that Elizabeth Harleston, under the codicil to the will of her father, took an estate for life, with contingent remainder to her surviving issue, in exclusion of pre-deceased issue.

It is clear, upon the authorities cited in *Rutledge v. Rutledge*, without need of reference to other cases, that all the descendants of Elizabeth Harleston, whether in the first

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or a *more remote degree, take the remainder in the estates limited after her life, per capita.

It is proper to remark, concerning the case of *Rutledge v. Rutledge*, as affecting the construction of the codicil under consideration, that that case was upon a marriage settlement, and that under marriage settlements, the reasonable and the settled construction is to vest estates in the issue, as purchasers, at the earliest point of time. Besides, there was no such distinct reference, in the context of the instrument there construed, to surviving

the mother, qualifying the sense in which the term issue was used, as we find in the present case.

The result of our construction is, that the plaintiff is entitled to one-fifth of the lands devised to her grandmother, Elizabeth Harleston, as issue surviving at the death of said Elizabeth, and to one-fourth of another fifth, as distributee of her uncle Thomas. Mary Corbett, the defendant, has no lot or part in the matter. This conclusion supersedes the necessity of considering the difficult question, whether tenancy by the curtesy is an incident of a fee conditional.

The further question reserved, is as to the operation of the statute of limitations upon the plaintiff's demand for rents and profits. It is the settled law of this State, that one tenant in common, in exclusive occupation of the estate and pernaney of the profits, is liable to account to his co-tenants, for their shares of the rents and profits. By the common law, co-tenants have no remedy against a tenant in common, who takes the whole profits. The statute of 4 and 5 Anne, c. 16, § 27, gave an action of account to a tenant in common, against his co-tenant, who had received more than his share of the rents; but the Court of Law restricted the remedy of the statute to the actual receipt of rents, and denied relief, in the case of exclusive occupation of the common estate, where there was no actual receipt of rents. Wheeler v. Horne, Willes, 208. This Court, however, afforded relief to co-tenants, where one of the tenants in common was in the exclusive occupation of more than his share of the premises, without receipt of rents in money, or

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*its equivalent. It seems to be just, that while we afford relief to tenants in common, beyond the operation of the statute of Anne, we should hold the additional beneficiaries to the same bar as those within the express terms of the statute. Our Act of limitations bars an account not presented by suit at Law within four years, and account for rents and profits is within the scope of its general terms. In the well considered case of Wagstaff v. Smith, 4 Ired. Eq. 1, the claim for rents and profits, made by bill in Equity, of a tenant in common, against his co-tenant, in possession of the premises, was held to be restricted by the statute of limitations applicable to account: and we are content to follow such respectable authority. We are of opinion that the statute of limitations bars the plaintiff's right to an account of the rents and profits, except for the last four years before the filing of her bill.

It is ordered and decreed, that a writ of partition be issued, to divide the plantation, Farmfield, and the tract of land in St. Thomas' parish, among the parties, according to the principles of this decree.

It is also ordered, that one of the Masters

of this Court take an account of the rents and profits of said lands, according to the opinions herein expressed.

It is further ordered and decreed, that the Circuit decree be modified, as herein indicated, and, in all other particulars, be affirmed.

JOHNSTON, DUNKIN, and DARGAN, CC., concurred.

Decree modified.

5 Rich. Eq. *327

*ADELAIDE GIBBES, Ex'x, v. GIBBES L. ELLIOTT and JULIET G. ELLIOTT.

(Charleston. Jan. Term, 1853.)

[Equity ⇨419.]

A motion made before the Circuit Court for Charleston, after the Court had been in session several weeks, to set aside an order pro confesso, refused—the defendant, making the motion, having in no particular complied with the 35th rule of Court.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 972-985; Dec. Dig. ⇨419.]

[Equity ⇨336.]

A party against whom a bill has been taken pro confesso, not being entitled to introduce evidence in defence, as if he had pleaded or answered to the bill, is not entitled to require the production of title deeds.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 677; Dec. Dig. ⇨336.]

[Equity ⇨419.]

Upon a motion to set aside an order pro confesso, it may be imposed as a condition, that the testimony of certain witnesses taken before the Master, without notice, should be read—the defendant to have the right to produce them and treat them as plaintiff's witnesses.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 972-985; Dec. Dig. ⇨419.]

[Wills ⇨561.]

Testatrix devised to G. E. "all that lot lying and being at the corner of St. Philip and George-streets, being on St. Philip-street 151½ feet, and on George-street 57 feet; also, that lot being and lying next to the aforesaid lot, fronting on George-street 57 feet, and 151½ in depth;" the rest and residue of her estate, real and personal, she devised and bequeathed to her four children, G. E. being one; testatrix owned but one lot at the corner of St. Philip and George-streets, which fronted 151½ feet on the former, and was in depth 171 feet on the latter:—*Held*, that the devise to G. E. did not carry the whole lot, but only two-thirds thereof, next to St. Philip-street, to be cut off in two lots, each fronting 57 feet on George-street; and that the remaining third part passed under the residuary clause.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1221; Dec. Dig. ⇨561.]

[Equity ⇨17.]

The Court of Equity has no authority, in general, to try questions of title to lands, where the parties claim by distinct titles; but where the whole dispute is upon the construction of a will, or other written instrument, under which both parties claim, the Court has jurisdiction to determine the rights of the parties.

[Ed. Note.—Cited in *Albergotte v. Chaplin*, 10 Rich. Eq. 433; *Reams v. Spann*, 28 S. C. 533, 6 S. E. 325; *Hunt v. Gower*, 80 S. C. 83, 61 S. E. 218, 128 Am. St. Rep. 862; *Jenkins v. Jenkins*, 83 S. C. 544, 65 S. E. 736.

For other cases, see Equity, Cent. Dig. § 39; Dec. Dig. ⇨17.]

Before Johnston, Ch., at Charleston, February, 1852.

This case will be understood from the full statement contained in the opinion delivered in the Court of Appeals.

Hunt, for appellant.

Flagg, Memminger, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. This appeal of the defendant, Gibbs L. Elliott, controverts decisions of the Chancellor at two separate stages of the case, and the consideration of it may be conveniently divided in reference to these stages. The bill was filed September 23, 1851, and on the next day, B. F. Hunt

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& Son, *Solicitors of the Court, endorsed upon the subpoena that they appeared for the defendant. On November 19, 1851, the bill was ordered to be taken pro confesso. On 14 and 20 February, 1852, the testimony of certain witnesses was taken by the Master, at the instance of the plaintiff, without notice to the defendant or his solicitors. On March 2, 1852, during the sitting of the Court, which began on the first Monday of February, Mr. Hunt, in behalf of defendant, moved to set aside the order pro confesso, and for leave to file an answer; and also moved, that plaintiff be compelled to produce the title deeds of the lot at the corner of George and St. Philip-streets. These motions being opposed by the counsel of the plaintiff, were refused by the Chancellor. Thereupon, Mr. Hunt served the Chancellor with grounds of appeal, and a statement of facts prefixed, which perhaps in substance, but in form altogether different, are repeated in the printed brief. On March 4, 1852, the Chancellor made the following report on these grounds, which, in violation of the rule of Court, is omitted from the brief:

"The annexed notice of appeal has been served on me; and the statement of facts which it contains is so inaccurate, as to render a report, on my part, necessary. Mr. Hunt made a motion, on the 2d of March, 1852, (the Court having been in session from early in February,) to set aside an order pro confesso, and for leave to file an answer in this cause. The motion was not reduced to writing.

"It was objected to by Mr. Memminger, unless it were made a condition, that the testimony of some witnesses which had been taken, should be allowed to stand; at the same time consenting, that Mr. Hunt's client might produce the witnesses and examine them further, or cross-examine them on his part.

"Mr. Hunt resisted the condition, and insisted on his motion as matter of right. The Court decided, that he had no such right under the rule of Court; that the condition

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was reasonable, *and if Mr. Hunt would take

his motion on that condition, he was at liberty to do so. He declined this offer.

"There was not a word said by the Court by way of requiring the condition to appear as granted upon his motion.

"He then made a verbal motion, that the plaintiff be required to deposit such title deeds as were in her possession. Mr. Memminger resisted it on the grounds:

"That he had received no notice of the motion. It appeared, and was admitted, (though at first, Mr. Hunt asserted notice,) that no notice had been given:

"That Mr. H.'s client had not appeared to the suit:

"That defendant was in contempt for non-appearance, and for not answering, and was not entitled to move, or be heard in the cause:

"That he was not entitled to offer evidence, (under the rule of Court,) having neither plea nor answer to support by it.

"The Court waived the question of non-appearance, intimating an opinion, however, that his appearance, though not regular, was good. It also waived the question of contempt; but it ruled, that, under the rule of Court, the defendant was not entitled to his motion. That, under the rule, he was only entitled to be heard upon such objections as he could have urged, if he had demurred to the bill; and was not entitled to introduce evidence in defence, without laying a foundation for it by plea or answer; and that the only possible use he could have for the deeds, was to make them the basis of evidence; and that, if the deeds were material to his interests, he should show the fact by affidavit.

"Further than this, I do not recognize the correctness of the statement of the facts, made in the grounds of appeal."

It is stated, and not disputed, that the draft of an answer, not signed nor sworn to, was left with the Register, before the sitting of the Court; but it was not an answer at the time of the application to file it, and became an answer by the jurat of the defendant on the 8th of March, six days after the application.

The reasoning of the Chancellor's report

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is entirely satisfactory to this Court, but from respect to the earnestness with which the appeal on this point has been pressed, some observations may be added. The rule of Court 35, expressly requires, that the motion to set aside an order pro confesso and file an answer, should be made on the first day of the sitting of the Court ensuing the order, after written notice, of ten days before the sitting, of the proposed motion, and that the defendant at the time of the motion shall have filed, that is, have deposited with the Register for filing, or shall then produce, a full and explicit answer or plea. The mover in the present instance, was

faulty in all these particulars. He had not given the prescribed notice of his motion; he did not make his motion on the first day of the sitting, and he produced no answer with a jurat at the time of his motion. To speak of his right to file an answer under such circumstances, is idle talk. It may be, that upon affidavit, that he was prevented from coming within the terms of the rule by accident, mistake or surprise, the Court might have placed him in the same position as if he had made the motion on the first day of the sitting, after notice; but no such affidavit was made. If he had given the required notice, and made his motion on the first day of the term, still by the rule referred to, he must "submit to any further conditions the Court may impose." An appellate tribunal should overrule an exercise of judicial discretion by a Judge, in the first instance, only in case of gross abuse of discretion. In this case, we think the discretion was judiciously exercised; if indeed, the Chancellor had any discretion to overrule the resistance to an irregular motion. The condition insisted upon by the counsel of the plaintiff to the motion proposed, that the plaintiff should not be at the expense of producing again at the trial, witnesses examined before the Master, even if irregularly examined, although the defendant might produce them, and treat them as plaintiff's witnesses, was altogether reasonable. The Court, in admitting the reasonableness of this condition, determined nothing as to the competency or effect of this testimony, which was then unheard. It turned out, that at the hearing, the Chancellor placed no

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*reliance whatever upon this testimony, most of it being incompetent, and all of it insufficient. At the hearing, the counsel of the plaintiff repeated the offer to allow the defendant, although he was only entitled by the rule of Court, to take advantage of any matter which would have been good cause of demurrer, to offer any evidence whatsoever; but he offered no evidence. The defendant suffered no detriment from not filing the answer, for we, perceive, upon perusing it, that it contains nothing in bar of the suit, and is merely argumentative. If authority be needed for the ruling of the Chancellor, it may be found in *Foot v. Van Ranst*, 1 Hill Eq. 185, where the analogous question as to the time of filing exceptions under the 26th rule, is explicitly determined.

It is worthy of remark in this case, that while the appellant complains of departure from the regular procedure of the Court, he directly infringes the 53d rule of the Court in the mode of stating his complaint in this appeal, inasmuch as his brief does not contain the whole decree appealed from, nor the report of the Chancellor on the grounds of appeal. It is also curious, that, while he vehemently resists the introduction of testimony, irregular in the single par-

ticular that notice of the examination of the witnesses was not given to him, he treats as matter of right his motion to set aside the order pro confesso, although notice of that motion to the adverse party, expressly required, was not given.

The case was heard on the merits, on the 5 and 8 of March, 1852; and at the hearing, the defendant was permitted to offer any evidence in his possession, and to argue fully the whole case. The matter decided, involved in this appeal, is upon the construction of the following clauses of the will of the testatrix: "Item. I give absolutely to my son, Dr. G. L. Elliott, to him and his assigns forever, all that lot of land, with the dwelling house, buildings, and the appurtenances thereof, lying and being at the corner of St. Philip and George-streets, being on St. Philip-street 151½ feet, and on George-street 57 feet; also, that lot of land

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being and lying next to the aforesaid *lot, fronting on George-street 57 feet, and 151½ in depth." "Item. I give, devise and bequeath all and singular the rest and residue of my whole estate, real and personal, &c., to my four children, Adelaide Gibbes, Barnard S. Elliott, Juliet G. Elliott, and Gibbes L. Elliott, their heirs, executors and administrators and assigns, absolutely and forever, equally, and share and share alike." Barnard S. Elliott died after the death of testatrix, intestate, and without wife or issue, leaving his brothers and sisters, the parties to this suit, the distributees of his estate. In the will of testatrix there is minute specification of the property devised and bequeathed; but much of her estate, including fifty-seven slaves, is left to pass under the residuary clause of her will. Upon a survey of the lot owned by testatrix, at the corner of St. Philip and George-streets, made by R. Q. Pinckney, and supported by his testimony in this case, it appears that the whole lot is divisible into three parcels of 57 feet each, fronting on George-street. It is conceded, and the title deeds of the lot, if produced on the defendant's motion, could have proved no more, that before the division prescribed in the will, the lots were described as fronting on St. Philip-street. But it is unquestionable, that the testatrix, in her will, might establish and designate any division of the lot new or old, among the objects of her bounty, according to her caprice. It further appears by Mr. Pinckney's survey, that a front of 57 feet on George-street, running in depth 151½ feet on St. Philip-street, on the corner of George and St. Philip-streets, will not include by 16 feet the whole of the buildings appurtenant to that parcel; but that two lots of 57 feet each, fronting on George-street, will include all the buildings, and leave another uncovered lot of 57 feet front on George-street. There might be some difficulty in settling the extent of the

several devises to the defendant, if these devises were to two persons: but when we find that two parcels, including all the buildings and appurtenances, are given to one person, the defendant, and that an aliquot parcel is left out of the devise, we are relieved from the necessity of determining

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between the devises of the separate *parcels. It is manifest, however, from this separation of parcels in the devise to the defendant, that the testatrix had made, or contemplated, a division of this lot, differing from the original state of the subject when conveyed to her.

It is argued, that the devise to the defendant must carry the whole lot, inasmuch as the terms of it, otherwise large enough, are restricted only in reference to contents; course and distance being the feeblest means of location. It is obvious, however, that if testatrix intended to give the whole of this property to defendant, there was no need of any division into parcels, and that her purpose would be simply and naturally expressed in a single clause describing the whole. In determining the location of a subject granted or devised, course and distance have usually subordinate influence in the judgment, but they may be absolutely controlling. As if a grantor convey 100 acres and no more, as a specific portion of a larger lot. In the present instance, the testatrix, by her will, divides the lot into parcels fronting on George-street, and gives portions to the defendant by exact and limited measurement in feet. The devise to the defendant of the second parcel, as "fronting on George-street 57 feet and 151½ feet in depth," demonstrates the division by testatrix into parcels fronting on George-street, and thus fixes the location, if it were otherwise doubtful, of the first parcel devised. Suppose the devise of this second parcel had been to a different person than the defendant, the devisee of the first parcel, it could not be pretended that the defendant, under the construction of the first devise to him, could skip over the second parcel and claim the third; and yet the construction of the will must be the same, whether the devises were to the same person or to distinct persons. It is equally clear, that the devise of the second lot, so exactly described by measurement, does not carry the third; especially, when we consider that the residuary clause of the will covered so large a portion of the estate.

It is further urged, that this Court has no jurisdiction to determine where is the freehold of the third part of this tract, in-

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asmuch *as the defendant claims the whole, and acknowledges no tenancy in common with the other parties to the suit. Magna Charta, and the Constitution of the State,

are pressed upon us. It is true, that this Court has no authority, in general, to try questions of title to lands, where the parties claim by distinct titles; but in this case, all the parties claim from the testatrix, acknowledging her title, and the whole dispute is as to the construction of her will. It has never been disputed, that this Court has jurisdiction to determine rights of parties in lands, dependent on the construction of wills or other written instruments, and where there was no fact to be settled by a jury of the vicinage. If the case were in the Court of Law, it would be adjudged, as to doctrine, by the Judge, and not by the jury. But it is not perceived, that any action could be maintained, in the Court of Law, to try titles between tenants in common. This Court by its organization, has not the breakwater against unpopularity afforded by a jury, and counsel with much impunity from public opinion inveigh against usurpation and exceeding of jurisdiction by Chancellors; but we must endeavor, so long as the polity of the State continues the existing judicial establishment, to administer the jurisdiction confided to us, without bias from obloquy.

It is ordered and decreed, that the decree be affirmed, and the appeal be dismissed.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

Decree affirmed.

5 Rich. Eq. *335

*ALEXANDER H. ABRAHAMS v. JAMES P. COLE and Others.

(Charleston. Jan. Term, 1853.)

[Injunction ⇨44.]

Where, pending suit against him, a debtor removed with his property (slaves) beyond the limits of the State, and after recovery of judgment, and after plaintiff's execution had lost its active energy, the slaves were brought back into the State:—*Held*, that plaintiff could sustain a bill to prevent the removal of the slaves until he could revive his execution.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 92; Dec. Dig. ⇨44.]

[Fraudulent Conveyances ⇨226.]

When a post-nuptial marriage settlement is void, as to creditors, for want of registration, a creditor, seeking satisfaction out of the property, may proceed as if no such deed existed.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 658; Dec. Dig. ⇨226.]

Before Johnston, Ch., at Charleston, March, 1852.

Joseph E. Cole, then a resident of Beaufort District, executed, March 2, 1832, a post-nuptial marriage settlement, by which he conveyed to Thomas Talbird, the elder, his distributive share of his father's estate, (afterwards ascertained to consist of negroes.)

in trust, "for his wife and her children, should there be any, to be equally divided at his death"—reserving to himself "the right to the income, or to the possession, the one or the other, during his natural life." This deed was recorded, May 7, 1832, in the Register's office for Beaufort, but was never recorded in the Secretary of State's office. In November, 1836, the plaintiff filed a bill in the Court of Equity for Beaufort, against Joseph E. Cole, for dissolution of a copartnership then existing between them, and for account; and in May, 1841, obtained a decree against him for \$3,000, besides interest and costs. Execution upon the decree was lodged, May 28, 1841. Pending the proceedings upon plaintiff's bill—to wit, in 1836 or 1837—Joseph E. Cole removed, with the negroes embraced in the settlement of 1832, to Alabama, where he died, June 10, 1841. The negroes were not returned by his administrator, as part of his estate, but were removed, shortly after his death, to Texas, by James P. Cole, who acted as the agent of the trustee, who resided in Beaufort. The estate of Joseph E. Cole was declared to be insolvent, and the plaintiff received from the administrator in Alabama about \$1,300, his ratable share of the assets.

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*In 1843, the trustee, Thomas Talbird, the elder, died, and his son and executor, Thomas Talbird, the younger, assumed to act as trustee. At the death of Joseph E. Cole, the cestui que trusts, under the settlement, were his two infant children—his wife having predeceased him. Their residence was in Beaufort. In September, 1848, the negroes were sent by James P. Cole to South-Carolina, and they were hired out in Charleston by Edmund R. and Joseph B. Cheesborough, the agents of the trustee, Thomas Talbird, the younger.

In January, 1851, the plaintiff, having discovered that the negroes were in Charleston, induced his friend, Jacob Cohen, to apply for letters of administration on the estate of Joseph E. Cole, and, as his execution had lost its active energy, he filed this bill against James P. Cole, Thomas Talbird, the younger, and Edmund R. and Joseph B. Cheesborough, for account; for an injunction to restrain defendants from removing or selling the negroes; and for general relief. The bill was afterwards amended, by making the two infant children of Joseph E. Cole, and Jacob Cohen, who, in the mean time, had become his administrator, parties.

Johnston, Ch. It is unnecessary to make a statement of this case. The whole case is set forth in the pleadings and evidence in writing. I shall proceed directly to the delivery of the judgment of the Court.

There is strong ground to infer, from the testimony of William Barnwell, that the deed was executed by Joseph E. Cole while

he was deeply indebted. But there is no necessity to inquire into the existence of that fact, or, if it existed, how far it tended to vitiate the deed, as against the plaintiff, Abrahams. It is sufficient that the deed is a marriage settlement, according to the case of *Sibely v. Tutt*, (McM. Eq. 320,) and as such void, as against creditors, for the want of a schedule, and particularly for the want of registration, as required by the statute of 1823. (6 Stat. 213, 482.)

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*It is said, however, that the plaintiff is barred of the remedy he seeks, because he did not proceed, within the statutory period, to set the deed aside.

It may admit of doubt whether he is barred, even if he were now seeking a decree to cancel this instrument. The statute of limitations is a bar only in the forums of this State. It cannot run, unless the party has an opportunity for an effectual proceeding in our own Courts. It may be doubted whether the absence of James P. Cole, who was in custody of the slaves in foreign parts, did not preclude an effectual proceeding. The presence of Talbird, the trustee, in the State, was not of itself sufficient to sustain a bill to set aside the deed. It would have been necessary for the plaintiff to bring before the Court both parties to the deed—both the grantor and the grantee. But the grantor was dead, and, until lately, had no personal representative within the jurisdiction. Could the statute run until Cohen took out letters? The statute does not run when the suit is to bear against an individual who is dead, until there is a representative to be sued; and I suppose, that when the suit must necessarily embrace a deceased person, as one of several defendants, the statute is equally inoperative, until a representative of that individual exists.

But if a suit for the purpose of cancelling the deed would be barred, does it necessarily follow, if the plaintiff has another remedy, that that remedy is also barred? The contrary would seem to be reasonable, and not without authority. *Cholmondeley v. Clinton*, 2 Meriv. 201.

The statute of 1823 makes the conveyance absolutely void, as against creditors. But, says Chancellor Harper, in *Fripp v. Talbird*, (1 Hill, Eq. 143,) "when it is said that a deed, good between the parties, is void as to creditors, there is, perhaps, a want of exact precision in the language. They may treat it as void. They are not compelled to institute any legal proceedings to avoid it, but may seize the property as if there were no deed. But, until they do seize the property, the deed remains perfectly good."

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*It is clear, that no length of possession of the negroes, out of the State, would have any effect as against the plaintiff's *fi. fa.* Whenever they were brought within its limits, the

lien of the execution attached upon them, as was long ago decided in one of our reported law cases.

If the plaintiff's execution had been leviable, as well as binding, when he discovered the negroes, which had returned in September, 1848, he might have levied on them. But when he found out that the negroes were here, his execution had lost its active energy. His bill was filed to prevent their being eloiigned, (in substance, to preserve the property,) until he could renew his *fi. fa.*

It is proper to remark, that in one of our cases, something is said apparently contradictory to Chancellor Harper's assertion of a creditor's right to avoid a trust deed by levying on the property. I cannot think, however, that though a creditor be obliged to forego a direct levy, and be obliged to come here to have the benefit of a lien and of a levy, that, therefore, we are to divest him of all the advantages he would have had from his execution, if he had levied it. Our interference with his legal right should not prejudice him, but we should allow him the benefit of all the rights he would have had, had we not interfered. Our interposition is to protect the property of *cestui que trusts*, but not to frustrate the just rights, or frustrate the remedies, of creditors.

So much upon the merits of the case. As to James P. Cole, he has not been properly made a party. He is not within the jurisdiction, nor is he interested in or chargeable with the custody of the negroes since they came here. He has no agent here, nor has he had any agency in the suit. It is therefore ordered, that the bill be dismissed, as to him.

It is decreed, that the slaves (except Maria, to whom the plaintiff has made out no case) be delivered up, to be sold, in satisfaction of the plaintiff's debt, referred to in the bill, and of the costs in this case.

If the plaintiff desires an account of hire,

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let him go before *one of the Masters: I suppose he will be entitled to the balance of hire unexpended by the trustee. But I reserve the point, and leave it to be made before the Master, and so come up upon exceptions to the Master's report.

The defendants appealed on the following grounds:

1. Because his Honor ought to have decreed upon the case made by the pleadings and evidence, that the defendants had acquired a right by possession to the negroes named in the bill; and that they were no longer subject to the debts of Joseph E. Cole.

2. Because, although there was no administration on the estate of Joseph E. Cole, in this State, until after the filing of the complainant's bill, yet such administration was not necessary to give to the defendants' possession of the said negroes an adverse character; but necessary only to enable the complainant to show that his decree had not been satisfied, and to revive it; and it was there-

fore his duty to cause administration to be taken out.

3. Because the trustee, Thomas Talbird, sen., during his life, and his executor after his death, as well as James P. Cole, the administrator in Alabama, had each, by his possession of the negroes, made himself liable as executor *de son tort*, of Joseph E. Cole, and might have been sued, in that character, in this State, notwithstanding the property was out of the State.

4. Because the right of the complainant to revive his decree, and, under his execution, to levy on the property of Joseph E. Cole, is not denied; but it is submitted that the negroes in dispute, having been carried out of the State by Joseph E. Cole, before the complainant obtained his decree, were never subject to the lien of the execution; and when brought back, eight years after the death of the said Joseph E. Cole, the infant defendants had, by the possession of their trustees, even though it might have commenced in fraud, acquired a statutory title, as against all the world.

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*5. Because it is not pretended by the complainant that he was not apprised of the execution of the deed by Joseph E. Cole, at the time, or shortly after its execution; or that he was not informed of his removal with his property to Alabama, and of his death, at the time it happened, or that he was ignorant that the trustee, who held possession of the negroes for the defendants, and the defendants themselves, were living in the town of Beaufort, in this State, at the death of the said Joseph E. Cole, and so always continued to live, without interruption.

Wherefore, it is humbly submitted, that complainant ought to have filed his bill, to subject the specific property of Joseph E. Cole to the payment of the decree, within four years after the death of the said Joseph E. Cole.

6. Because, if the complainant has the right to subject the negroes in dispute to the payment of his decree, he certainly has no right to any account of their hire and wages from the trustee; it is therefore submitted that the decree is erroneous, in directing such account to be taken.

Treville, for appellants.
Campbell, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. There is no mistaking the ground upon which the decree is founded. The bill is framed with the sole object of subjecting the negroes, which were brought into this State in 1848, to the lien of the plaintiff's execution against Joseph E. Cole. The plaintiff had obtained his judgment against his debtor, and had lodged his execution; but, pending the suit, the property had been removed to Alabama, and there was nothing within the jurisdiction out of which the money could be made. When the property was

brought back, in 1848, for the first time the lien of the execution attached upon it, if it was Joseph E. Cole's property; but, as the execution had lost its active energy, and the

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property was liable to be eloiigned, *it was necessary for the plaintiff to come here, to prevent its removal, until he could renew his execution according to the statute of 1827.

This is the whole case upon which the decree is founded; and it would be a very simple one, if the debtor had never alienated the property. Independently of that circumstance, there could be no doubt the Court would be bound to lend its aid for the preservation of the property, to answer to the execution.

The property, however, had been alienated; but the alienation was ineffectual, inasmuch as it was made by way of post-nuptial settlement, and the instrument had not been duly registered. It was void against the creditor, for want of registration. This point being decided, the plaintiff was entitled to his decree, as if no such settlement had been made.

It was not necessary to inquire whether the plaintiff was barred of his remedy, to set the conveyance aside: because, in fact, he needed no such remedy. Nor did the bill seek to set the instrument aside. All that is said in the decree upon that subject, and upon the subject of the parties necessary to such a proceeding, and the operation of the statute, as affecting that remedy, is merely speculative; and intended to meet arguments made at the hearing; the counsel having supposed that, in addition to the remedy which his bill specifically prays, he might have been entitled, under the general prayer, to have the deed set aside and cancelled.

We are satisfied that the decree is right, in aiding the plaintiff to the lien of his execution; which is the only point decided: and it is ordered that the decree be affirmed, and the appeal dismissed.

DUNKIN, DARGAN and WARDLAW, CC.,
concurred.

Decree affirmed.

5 Rich. Eq. *342

*THE CHARLESTON INSURANCE AND
TRUST COMPANY v. EDWARD
SEBRING and Others.

(Charleston. Jan. Term, 1853.)

[Corporations \hookrightarrow 320.]

Bill filed by a stockholder against the President and Directors of a banking corporation, to compel them to re-transfer to the Bank certain shares in the stock of the Bank, which the Bank itself had owned, and which the defendants had sold and purchased themselves, at less, it was alleged, than the market value:—*Held*, that the

corporation should have been made a party to the bill.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1429; Dec. Dig. \hookrightarrow 320.]

[Corporations \hookrightarrow 1.]

[Cited in *Ex parte Trustees of Greenville Academies*, 7 Rich. Eq. 481, to the point that a corporation is a single artificial person and has but one will, expressed by resolution of the majority.]

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1, 3–6; Dec. Dig. \hookrightarrow 1.]

Before Dunkin, Ch., at Charleston, June, 1851.

Dunkin, Ch. The State Bank is an institution with a capital of one million of dollars, divided into ten thousand shares, of one hundred dollars each. The complainants are stockholders of this institution, to the extent of two hundred and ninety-four shares. The allegations of the bill are, that the business of the State Bank is transacted by a President and Directors—twelve Directors being annually chosen by the stockholders, and the President being selected by the Directors, from their own body; that, after the annual election in July, 1850, the Board consisted of Edward Sebring, President, and James H. Ladson, H. A. DeSaussure, George M. Coffin, John E. Cay, H. S. Hayden, E. W. Bancroft, Geo. Gibbon, M. P. Matheson, S. P. Ripley, Robt. Mure, and Thomas Trout; that the State Bank had been, some time previously, the owners of two thousand three hundred shares of their own stock—that, from various causes, the stock of the State Bank had depreciated from the par value, but that, in July, 1850, it had become a desirable investment and the market value was above par; that, at a meeting of the Board, held in July, 1850, the President and Directors of the said State Bank, or such of them as were present at the meeting, and who were willing to unite in the same, by a resolution among themselves, did agree, that they would, in certain proportions, determined by and among themselves, become the purchasers of the two thousand three hundred of the shares of the stock held by the Bank,

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and that *it should be taken at \$100 per share, or the par value of the same; that "the President and all the Directors assented to this sale to themselves, as individuals, with the exception, so far as complainants are informed, of James H. Ladson, George M. Coffin, and H. A. DeSaussure, who, as complainants are informed, were absent, or declined to participate in the same"—that the agreement has been carried into effect by a transfer of the stock. The complainants insist that the President and Directors had no right to purchase for themselves, privately, the property of which they were possessed as trustees for the stockholders, and at less than the market value of the stock. The prayer of the bill is, that the de-

fendants may answer as to the alleged agreement, &c., and which of them purchased, and what number of shares each received, &c., and "that the purchases so made shall be cancelled, and the President and Directors so purchasing be decreed to deliver back to the State Bank the shares so purchased by them, and account for the dividends which they have received; and, in case the shares cannot be transferred back to the State Bank, that the said President and Directors may be decreed to account to the complainants, for their interest or proportion in the shares so purchased, and be decreed to pay to the complainants such damages as they have sustained by reason of the premises," and for general relief. Subpœna is also prayed against all the individuals hereinbefore named—but no process is prayed against the State Bank, nor is that institution, in any way, a party to the proceedings.

The bill was filed on the 3d February, 1851. James H. Ladson, George M. Coffin, and H. A. DeSaussure have demurred to the bill. It is not suggested that they were present at the meeting in July; but, on the contrary, it is set forth that they neither assented to the sale nor participated in it, and no relief is sought against either of them. A discovery is only sought from those who were parties to the agreement, or participated in the result of the sale. The demurrer must therefore be sustained.

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*The defendants, Robert Mure and E. W. Bancroft, were absent when they were elected, in July, 1850—had no knowledge, or concern, in relation to the transactions about which complaint is made and did not return to Charleston until some time after they had been consummated. As to these defendants, the bill must stand dismissed.

The other defendants have answered fully. The principal answer, of Edward Sebring and others, submits that, as the prayer is, that "the defendants should be decreed to deliver back to the State Bank the shares purchased, and account for the dividends received," that institution should be made a party to the proceedings, and they insist on the want of such party, in the same manner as if they had demurred for that cause. This presents a preliminary inquiry for adjudication. The bill assumes that the defendants were agents of the State Bank, for the sale of the two thousand three hundred shares which belonged to the institution, and that the transfer or sale, which they had made, was a breach of their duty, and should be set aside and cancelled, and the stock be retransferred to the State Bank. The complainants proceed on the well established principle, that a sale of this character is voidable, at the instance of the principal, or cestui que trust. On the other hand, it cannot be doubted that it is at the option of the principal to acquiesce in the sale, as advan-

tageous to himself, or to set it aside. Nor is it less clear, that the principal, or cestui que trust, in this case, is the incorporated institution called the "State Bank."

The prayer of the bill is, (and could only be,) that the defendants may retransfer to the State Bank; but this necessarily implies a rescission of the contract, and that, consequently, the State Bank should refund to the defendants the par value of the stock, at which it was purchased. The inquiry is not, whether this would be an advantageous arrangement for the institution; but can the Court make such decree, or prosecute such inquiry, in a proceeding to which the State Bank is no party? It is true, the difficulty

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lies deeper. The State Bank *is composed of the stockholders in that institution. They appoint their agents for conducting the business of the Bank, and remove them at pleasure. This is done by a majority of the stockholders, who have also the right to do any act, within the limits of the charter, which they may conceive beneficial to the institution. A minority may not concur, or may be dissatisfied, but, in the absence of fraud, collusion, or other abuse, on the part of the stockholders, the will of the majority must be regarded as the act of the institution itself. See *Foss v. Harbottle*, 2 Hare. 493; *Mozley v. Alston*, 1 Phil. 700, and *Lord v. Copper Mining Company*, 2 Phil. 740.

The complainants are merely shareholders in the incorporation, and it is unimportant, in discussing their rights, whether they hold one share or three hundred shares. Nor is it important whether the subject matter of complaint was stock improperly sold, and purchased by the President, or a banking house, which had belonged to himself, and which he had sold to the institution. Generally, none but the bank could impeach the transaction, and although an individual stockholder may, perhaps, present a case which would entitle him to a hearing, the incorporated institution, as such, must be a party to the proceedings. In anticipation of the possible judgment of the Court upon this objection of the defendants, a motion was submitted by the complainants, that, in that event, they should have leave to amend the pleadings, by making the State Bank a party thereto. As the objection was not taken at the threshold, and this is, necessarily, very much a matter of discretion, the Court is unwilling to deprive the complainants of any advantage which such amendment may be supposed to afford them.

As to the defendants, James H. Ladson, George M. Coffin, and H. A. DeSaussure, and also, as to the defendants, Robert Mure and E. W. Bancroft, it is ordered and decreed that the bill be dismissed.

It is further ordered, that the complainants have leave to amend their pleadings, by making the State Bank a party thereto, in such manner as they may be advised.

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*The complainants appealed on the grounds:

1. Because the case made in the bill, and supported by the testimony, entitled the complainants to relief.

2. Because it was not necessary, for the purposes of this suit that the State Bank should be made a party.

3. Because, if the State Bank, in this case, is a necessary party, the rights of individual stockholders of the Bank are to be determined, not by the established laws of the land, but the power of a majority: and while such a rule may be recognized in relation to the ordinary matters of the Bank, it cannot be applied to a case where the Directors acted in opposition to the established principles which govern all who act in a fiduciary capacity, and which had no proper connection with their duties as officers of the State Bank, but was, in fact, an admitted violation of the same.

4. Because the Chancellor erred in dismissing the bill, as to the five defendants, Messrs. DeSaussure, Ladson, Coffin, Mure and Bancroft.

5. Because the decree is unsupported by the evidence and the law applicable to the case.

Magrath, McCready, for appellants.

DeSaussure, Petigru, Memminger, contra.

The opinion of the Court was delivered by

DARGAN, Ch. It is necessary to add but little to what has been said in the Circuit decree.

A corporation is an artificial person, the creature of the law, and manifesting its existence only by the exercise, after a prescribed form, of certain franchises and functions given to it by law. Or, as defined by Chief Justice Marshall, in the case of *Dartmouth College v. Woodward*, 4 Wheat. 636 [4 L. Ed. 629], it "is an artificial being, invisible, intangible, and existing only in contemplation of law." In the *Providence Bank v. Billings*, 4 Peters, 514 [7 L. Ed. 939], it is said by the same eminent Judge, that, "the great object of an incorporation is to bestow the charac-

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ter and *properties of individuality on a collective and changing body of men."

A corporation aggregate is but one person, having the same unity in its corporate character and existence as a natural person. However numerous they may be, the will and individuality of the corporators are lost or merged in the will and individuality of the whole. A corporation can have but one will, and that will can only be manifested by the potential and uncontrollable voice of the majority. It has, and can have, from the nature of things, no other mode of action.

As long, therefore, as a corporation confines itself, in the management of its affairs, within the limits of its chartered powers, and

commits no fraud upon the rights of the individual corporators, (facts which are not alleged in this case,) it is idle, and it is inconsistent, to talk of the rights of individual members of the corporation, as distinct from, or opposed to those of the corporation itself. In case that the corporation should commit a fraud upon the rights of individual members, the Court of Equity would take cognizance of the transaction, and would afford its protection and relief, as in any other case of fraud; and upon the principles applicable to frauds generally.

The Directors of an incorporated company are not technically trustees: they are the agents of the company, and, so far as the doctrines which prevail in this Court, in reference to trusts, are applicable to the relations of principal and agent, the same would be enforced against the Directors, in favor of the Corporation. I am at a loss to perceive any difference as to the duties and liabilities of the agents of a natural person, and the agents of that artificial or political body, known as a corporation.

The Directors are the agents, not of the natural persons, or individual members composing it, but of the corporation: that is to say, of all the corporators, in their associated and corporate character. If the agents commit default—if they embezzle, become indebted, or liable for mismanagement, or neglect—no action would lie in this, or any other

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Court, in behalf of individual corporators, for their supposed aliquot part of the amount embezzled, or of the damages resulting from the default. But such defaulting agents would be responsible to their principal alone, which is the corporation. And the action must be in the name of the corporation.

When, in this case, the Directors of the State Bank, having in charge the shares of stock belonging to the company, with authority to sell, sold the said shares to themselves, at less than their marketable value, I do not hesitate to say that they did a very improper act. It was a breach of trust. I do not wish to be understood to say that it was a wilfully corrupt breach of trust. Yet it was a devastavit, for which this Court would make them liable. The same principles would be enforced against them, as would be enforced against trustees, under like circumstances. They would be compelled to re-assign the stock, or to account for the profits which they had realized in the transaction, at the option of the aggrieved party.

But who is the aggrieved party? Who is the principal? These questions are already answered. A principal, who is a natural person, might not choose to contend in law for his extreme rights, against a defaulting agent. Just so of a corporation. The conduct of the defaulter might be looked upon with a lenient eye, on account of past fidelity and services; or he may have made restitution,

or a compromise; or the amount to be recovered by action might not be thought worth the cost and trouble of the pursuit. Certainly, a corporation has the power of exercising its discretion in such matters—and the exercise of its discretion would be conclusive upon the individual corporators. Can it be doubted that the corporation would have the right to confirm to the Directors the illegal sale of the stock, which they made to themselves.

For a small constituent of this banking corporation to bring their suit against the agents of the corporation, without making the latter a party, for their supposed share of the loss which resulted from the illegal sale of stock shares, is not warranted by principle or authority. The Circuit decree, with-

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out adjudg*ing the case upon its merits, orders the corporation, as the State Bank of South-Carolina, to be made a party. This Court is satisfied with the decree. The appeal is dismissed, and the Circuit decree is affirmed.

DUNKIN and WARDLAW, CC., concurred.

JOHNSTON, Ch., absent at the hearing.
Appeal dismissed.

5 Rich. Eq. 349

WILLIAM FOX and Wife, et al. v. MORTON FORD, et al.

(Charleston. Jan. Term, 1853.)

[*Equity* ⇐378.]

Where, in cases of dower, injunction to stay waste, or of partition, the title to the land is involved, the approved practice of the Court is, not to determine upon the title, but to leave, or send, that matter to a jury, by directing an action at law, or ordering an issue.

[Ed. Note.—Cited in *Du Pont v. Du Bos*, 23 S. C. 399, 11 S. E. 1073.]

For other cases, see *Equity*, Cent. Dig. § 799; Dec. Dig. ⇐378.]

Before Dargan, Ch., at Colleton, February, 1852.

Bill to set aside a deed of gift of two slaves and a tract of land, and for partition. His Honor sustained the prayer of the bill, and Christian Rumph, one of the defendants, appealed.

Carn, for appellant.
Tracy, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. The principal object of this bill was to set aside for fraud, a deed of gift of a tract of land and two slaves, from Mary Ford, deceased, to her son, (one of the defend-

ants.) Morton Ford. The deed bears date November 4, 1848, and was recorded in the office

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of the Register of Mesne Conveyances, *for Colleton district, on the 17th of February, 1849. Mary Ford died during the month of February, 1849. Her son, Morton Ford, remained in possession until 4th November, 1850, when the land was sold as his property by the sheriff of Colleton district, under executions against him, and purchased by the defendant, Christian Rumph, who holds the conveyance from the sheriff. The complainants are two of the heirs at law of Mary Ford, deceased, and they pray that the deed from Mary Ford may be set aside; that the two slaves may be held part of her estate, and that a writ of partition may issue to divide the land. The bill is taken pro confesso against Morton Ford. But the other defendant, C. Rumph, denies all knowledge of the fraud, if any existed, or any notice of complainants' claim, and insists on his exclusive right to the land under the purchase from the sheriff.

By the decree of the Circuit Court, the deed was set aside, the defendant, Morton Ford, ordered, to account for the slaves and their hire; and a writ of partition of the land was directed to issue. From this decree, the defendant, Christian Rumph, alone has appealed.

In considering the case of this defendant, the Court deems it unnecessary to review the evidence, or to express any opinion upon the inference deduced from it. The defendant is in possession of a tract of land, to which he claims to hold an exclusive title as his freehold. No fiduciary relation exists, or is charged to exist, between the complainants and himself. As no bill will lie for the possession of lands, so where the Court has jurisdiction of the subject matter, as in cases of dower, of injunction to stay waste, or of partition, and the title to the land is involved, it is the approved practice of this Court not to determine upon the title, but to leave or send that matter to a jury, by directing an action at law, or ordering an issue. 1 Story, Eq. § 72. The subject is fully discussed by Sir William Grant, in *Jones v. Jones*, 3 Meriv. 161.

It is ordered and decreed, that an issue at law, in the nature of an action to try title, be

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made up between the complainants *and the defendant, Christian Rumph, in which the complainants shall be the plaintiffs, and the defendant, C. Rumph, shall admit ouster; that the issue be tried in the Court of Common Pleas for Colleton district, and that the presiding Judge be respectfully requested to certify the verdict to the Court of Chancery for said district, at the sittings next thereafter; and it is finally ordered and decreed, that so much of the Circuit decree as affects

the claim of the defendant, Christian Rumph, be set aside.

DARGAN and WARDLAW, CC., concurred.

JOHNSTON, Ch., absent at the hearing.
Issue ordered.

5 Rich. Eq. 351

AUSTIN PASLAY and Others v. ROBERT MARTIN.

(Charleston. Jan. Term, 1853.)

[Equity ⚡378; Jury ⚡13.]

On a bill for the specific delivery of slaves, the Court is not bound to refer the question of title, where it is disputed, to the Law Court: It can determine the question of title itself.

[Ed. Note.—Cited in *Leaphart v. Leaphart*, 1 S. C. 208.]

For other cases, see Equity, Cent. Dig. § 799; Dec. Dig. ⚡378; Jury, Cent. Dig. § 42; Dec. Dig. ⚡13.]

Before Johnston, Ch., at Charleston, February, 1852.

This cause came up for a hearing on the bill, answer and report of Master Tupper, with the testimony, as taken by him.

The following is a statement of the facts:

On December 2, 1837, Daniel Cook conveyed, by bill of sale, five negro slaves, to wit: Randall, Joe, Jerry, Ellen and Elsey, to Jesse R. Gary, in consideration of the sum of \$4,237. At the same time an agreement in writing was made between Cook and Gary, by which the negroes were hired to Cook at the rate of fifty dollars per month.

Gary afterwards, to wit, in February, 1838,

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conveyed the *negroes to Austin Paslay, for the sum of \$4,200. For the said amount, Austin Paslay gave his note. On this note there were two credits, one on May 10, 1838, for \$1,200, and one on August 22, 1839, for \$332.34. Subsequently the note passed into the possession of Paslay, and was exhibited by him in evidence.

On February 7, 1838, Austin Paslay, in consideration of five dollars, and his love and affection for his sister, Hannah H. Cook, and her children, sold and delivered the said negroes to Elizabeth Bird, her executors, administrators and assigns, to have and to hold the said negroes upon the following trusts, to wit: "to and for the use of Hannah H. Cook, the wife of Daniel Cook, of Charleston, and the heirs of her body now living; not to be liable for the present or future debts of the said Daniel Cook, or any other person, during the minority of the said children of Daniel and Hannah H. Cook; and further in trust, to permit and allow the said Hannah H. Cook and her children to enjoy the use and services of the said slaves, subject, however, to the aforesaid trusts during the

minority of each and every of the said children."

In an ex parte case in the Court of Equity for Charleston district, wherein the said Hannah H. Cook and her children were petitioners, the original deed of trust was filed on September 8, 1843, as an exhibit; and it still remained there, according to the certificate of the Register. Neither of the aforesaid bills of sale were recorded in the Secretary of State's office, and the trust deed was not recorded there till September, 1851.

The negroes were received by Mrs. Cook and her children, according to the limitations of the trust deed, and were hired out for their benefit. The man Randall was generally used as a cook at the Victoria Hotel, of which Cook was the keeper, and where Cook, and his wife and children, lived together.

Daniel Cook died before Hannah, his wife; and the negro, Randall, continued to be employed at the hotel. Mrs. Cook died some time in 1850, and the negroes continued to pay their wages to the complainants.

On September 20, 1851, Robert Martin, the

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defendant, caused *the negroes to be levied on, and lodged in the jail of Charleston district, claiming the property in them by virtue of a bill of sale, executed by Daniel Cook, on the 27th of October, 1848, to John C. Simons, for \$1,000. This bill of sale was recorded in the office of the Secretary of State at Charleston, October 27, 1848, and by the said Simons assigned to the defendant, September 17, 1851. The defendant admitted that he paid less than the market value, and alleged that he was induced to make the purchase with a view to secure an old debt due him by Daniel Cook, in his life time.

Two days after the defendant levied on the negroes, to wit: on September 23, 1851, the complainants filed their bill, having in the meantime, as admitted by the defendant's answer, demanded the negroes, praying a specific delivery of the negroes, and an account of hire and expenses.

On January 15, 1852, on motion of the complainants' solicitor, and with the consent of the defendant, Chancellor Wardlaw granted an order for the sale of these negroes, of which the following is the last clause: "This order to be without prejudice to the rights of the parties, and upon the express understanding that all further litigation shall proceed, and be determined, as if the matter in litigation (precisely) were the negroes in specie, and not money."

Johnston, Ch. The defendant urges that the Court has lost jurisdiction of the cause, by reason of the order of sale. The rule is too well settled, to be now denied, that where the Court has original jurisdiction, no subsequent change in the nature of the property will take it away. The vexations of a tedious suit may alienate the affections of the master

from his slave; humanity to the slave, who has been unjustly imprisoned, may free the master to consent to his sale, in order to relieve the slave.

The defendant insists, that the title to the negroes should be tried at law. Where this Court has jurisdiction in cases of this nature, it has plenary jurisdiction, and can decide every question, including that of title. In no case for the specific delivery of slaves

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*that I know of, has the Court considered itself under the necessity of throwing the trial of title upon the Court of Law; nor is there a precedent for such a proceeding in the analogous cases of practice.

Issues are ordered on matters of fact, at the discretion of the Chancellor, and to relieve his mind; no party, in general, has a right to demand them. In this case, I have no doubts, which would induce me to refer the facts to a jury.

It is therefore ordered, that the Master do pay over to the heirs of the body of Hannah H. Cook, living at the time of the deed from Austin Paslay to Elizabeth Bird, trustee, the funds arising from the sale of the said negroes, under the order of Chancellor Wardlaw, dated 15th January, 1852, share and share alike, in the following manner, to wit:

1. To James Robert Cook, one-fifth;
2. To Mrs. Eliza Wood, one-fifth;
3. To the children of Nubilla Blewer, late Cook, share and share alike, one-fifth;
4. To Dorothy Frances Nopie, one-fifth;
5. To Elizabeth A. Avery, late Cook, one-fifth.

The complainant, Hannah H. Cook, was born after the 7th of February, 1838, and is not entitled under the deed.

And is further ordered, that the defendant do account upon reference before the said Master, for the hire of the said slaves, Randall, Jerry and Joe, from the time that he had them levied on and confined in the jail of this district to the date of this decree, and for their board and expenses while in jail, which have been paid by Master Tupper, and which should be made good to him by defendant. And it is further ordered, that the said defendant do pay the costs.

The defendant appealed, on the grounds:

1. Because the defendant was entitled to a trial at law to settle the question of title to the negroes in dispute, and the Chancellor should have so decreed.

2. Because, the Court having refused a

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trial at law, and decided the issue raised by the pleadings upon that point, the defendant was then entitled to an order of reference to take testimony as to the title, and should not have been forced to trial upon the complainants' testimony alone, taken by the Master before hearing upon bill and answer.

3. Because the evidence was insufficient to set aside the defendant's title, and establish the complainants', and there is error in the decree, ordering the defendant to account for wages after the Master took possession of the negroes by order of Court, and on motion of complainants.

Campbell, for appellant.

William Whaley, contra.

The judgment of the Court was announced by

DUNKIN, Ch. This appeal was submitted on the brief. So far as the Court can judge from the statement of facts appearing in the Chancellor's decree, and the brief furnished to the Court, his judgment is well sustained by the reasons which he has presented. The decree is therefore affirmed, and the appeal dismissed.

DARGAN and WARDLAW, CC., concurred.

JOHNSTON, Ch., absent at the hearing.
Decree affirmed.

5 Rich. Eq. *356

*SARAH P. DANNER v. WILLIAM H. TRESCOT.

(Charleston. Jan. Term, 1853.)

[Trusts. \S 140.]

Conveyance of land to "H. F. and his heirs; to the use of the said H. F. and his heirs; in trust for the use of S. P., during the term of her natural life; and after her death, then in trust to and for the right heirs of her, the said S. P., their heirs and assigns for ever." *Held*, that S. P., the cestui que trust, took an estate absolute and in fee.

[Ed. Note.—Cited in *Poston v. Midland Timber Co.*, 76 S. C. 39, 56 S. E. 546; *Clark v. Neves*, 76 S. C. 488, 57 S. E. 614, 12 L. R. A. (N. S.) 298; *Williams v. Gause*, 83 S. C. 266, 65 S. E. 241.

For other cases, see *Trusts*, Cent. Dig. \S 186; Dec. Dig. \S 140.]

Before Dargan, Ch., at Charleston, June, 1852.

The Circuit decree is as follows:

Dargan, Ch. This is a bill for the specific performance of an executory contract, for the sale of a house and lot in the town of Beaufort. By a written contract, dated the 29th of April, A. D. 1851, the plaintiff undertook to convey to the defendant the property in question, and to make him good titles; and the latter agreed to pay to the plaintiff the sum of six thousand dollars, in different instalments, not necessary here to be particularly brought to notice. The plaintiff avers her readiness to comply with the conditions on her part, and the defendant having refused to perform, this bill was filed.

The defendant, in his answer, alleges, as the ground of his defence against the prayer of the bill, that the plaintiff is unable to

execute to him good and sufficient titles in fee simple, which, according to the true construction of the agreement, she was bound to execute. The plaintiff derived title from her late husband, N. J. Danner, who, by a deed bearing date the 29th day of April, 1847, conveyed the lot to Henry Fuller in fee, in trust, however, for uses that are therein declared, in the following language: "to have and to hold, all and singular, the premises before mentioned, unto the said Doctor Henry Fuller and his heirs; to the use of the said Dr. Henry Fuller and his heirs: in trust, nevertheless, for the sole, separate and only use of the said Sarah P. Danner, during the term of her natural life; so that the same shall in no manner be liable to my debts, contracts or engagements; and after her death, should the said Sarah P. Danner

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survive me, the said N. J. Danner, *and only in that event, then in trust to and for the right heirs of her, the said Sarah P. Danner, their heirs and assigns forever. But should I, the said N. J. Danner, survive her, the said Sarah P. Danner, then in trust, to hold the aforesaid premises to the only use and behoof of me, the said N. J. Danner, my heirs and assigns, forever."

The plaintiff has survived her husband, N. J. Danner, and in order to determine whether she is entitled to have a decree against the defendant for a specific performance of the contract, it will be necessary to see whether she is now vested with a fee simple estate in the premises which she has undertaken to convey.

The contingent estate in fee, reserved to the husband in the event of his survivorship, is gone, the condition on which it was to take effect not having happened. It can now never happen, and is not in the way. So that the deed, as to the question before the Court, must be construed upon the words giving to Mrs. Danner an estate for life, "and after her death," "to and for the right heirs of her, the said Sarah P. Danner, *their heirs and assigns forever.*" And the discussion will more particularly turn upon the effect of the last words of the preceding sentence, which I have placed in italics. What effect have these words that are superadded to the previous words of limitation? Strike them out, and the defendant himself would admit that the estate of the husband, limited upon his survivorship, having failed, Mrs. Danner would now take the fee under the rule in Shelley's case. But the defendant insists, that, by the force and effect of the superadded words of limitation, "the right heirs" of Mrs. Danner will be entitled to take at her death, as purchasers; or, in other words, that Mrs. Danner is only entitled to a life estate, with remainder in fee to her own right heirs.

The reason of this construction rests upon the ground that the donor, by indicating an

intention to create a new stock of inheritance, the "propositus" of which should be, not Mrs. Danner, but her "right heirs," has

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shown that he did not use *the word "heirs" in its general and technical sense; but to describe a class of persons who should be entitled to take at the death of Mrs. Danner. I assent to the doctrine, when the subject matter of the gift is personal estate. I assent to it, however, with this qualification: that the superadded words of limitation must be after a gift to the heirs of the body, or the issue, and not after a limitation to one and his heirs generally. I am aware of no case, English or American, where even in reference to personal property, this idea of cutting down what would otherwise be a fee, by superadded words of limitation, indicating an intent to create a new stock, has ever been applied in a case where the gift to the first taker was to him and his heirs general.

With this qualification, I think the doctrine well sustained when applicable to personal property. It received an early recognition in *Dott v. Willson*, 1 Bay, 457. It was affirmed with great solemnity in *Lemacks v. Glover*, 1 Rich. Eq. 141, by the Court of Errors. *Myers v. Anderson*, 1 Strob. Eq. 344 [47 Am. Dec. 537], was decided upon its authority. All these were cases of personal estate.

The first trace of the doctrine, that I have been able to find in the English reports, is that of *Peacock v. Spooner* and others, decided by Sir Joseph Jekyll, 4 Geo. 2, and cited by Lord Hardwicke, in *Hodgeson v. Bussey*, 2 Atk. 89. Upon the authority of *Peacock v. Spooner*, and "the general run of the cases," as he expressed it, (none of which latter, however, were cited,) Lord Hardwicke decided the case of *Hodgeson v. Bussey*. In each of these cases, the property limited was a term for years, which, in questions of this nature, stands upon precisely the same footing as chattels personal. See note, 2 Atk. 89. The latter case, (*Hodgeson v. Bussey*), arose under a deed of post-nuptial settlement, by which the husband conveyed to trustees a term for 59 years, in trust, to permit Grace Bussey, his wife, to receive the rents and profits for her sole and separate use, during the term, if she should so long live, and after her decease, to permit Ed-

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ward Bussey (who was the settler) *to enjoy the rents and profits during the remainder of the term, if he should so long live, and after his decease, in trust for the heirs of the body of Grace, by Edward Bussey begotten, their heirs, executors and assigns. This case is relied on in the argument for the defendant, as being in perfect analogy to that before the Court. But it has several very important contradistinctive features. First, the subject matter is personal, and

not real property. Second, the limitation is not to the heirs general, as in the case of Mrs. Danner, but to the heirs of the body of Grace Bussey. And, third, the limitation is to even a more limited class than to the heirs of the body of Grace: for it is to the heirs of her body begotten by Edward Bussey.

As our Courts have gone to the English decisions for the authority and principles upon which *Dott v. Willson*, *Lemacks v. Glover*, and similar cases have been decided, it would be the extreme of absurdity and inconsistency not to consider the English decisions as authoritative, when a similar question arises as to real estate.

Jarman (2 Jarman, Wills, 271.) lays down the doctrine broadly, "that where the super-added words amount to a mere repetition of the preceding words of limitation, they are, of course, inoperative to vary the construction." The text is supported by a uniform and unbroken series of decisions, down to the case of *Nash v. Nash*, 3 B. and Ad. 339, which is directly in point.

The cases go further than this. In *Goodright v. Pulyn*, *Ld. Raym.* 1437, S. C. 2 Strange, 729, the devise was to the first taker for life, and after his death, to the heirs male of his body and their heirs forever:—and if he should happen to die without such male heirs, then over. It was held to be an estate tail in the first taker. See *Buxton v. Uxbridge*, 10 Metcalf, 87. So that it seems to be well settled, that a limitation to the heirs general of the heirs of the body is ineffectual to turn the words "heirs of the body" into words of purchase.

It is said in argument, that the case of *Doe v. Ironmonger*, 3 East, 533, is contrary to this proposition. It is not so consid-

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ered by any English writer. It is true, that it is quoted by Chancellor Harper, in *Lemacks v. Glover*, in support of the principle therein decided, which, as we have seen, related to personal estate. That learned Chancellor misconceived the issue decided in *Doe v. Ironmonger*, in applying it to the point involved in *Lemacks v. Glover*. And this is shown by a reference to the report of the former case, which I have now before me. The devise, (which was of lands, &c.,) was to Sarah Hallen, &c., "and after her death, for the use of the heirs of her body, lawfully begotten or to be begotten, their heirs and assigns forever, without any respect to be had or made in regard to seniority of age or priority of birth." It is true that the form of the devise was similar to that of the bequest in *Lemacks v. Glover*. But the questions were not the same. It was not decided that the heirs of Sarah Hallen's body took as purchasers, because the testator intended to create a new stock of inheritance in them. Hear Lord Ellenborough, who decided the cause. He said, "all Sarah Hal-

len's children were intended to take together, without regard to seniority of age or priority of birth; that must mean, that they should take as joint tenants." This was all that was decided; and the above extract embraces, according to the report, every word that fell from his Lordship's lips. The decision was, that the heirs of the body of Sarah Hallen took as purchasers, not because the testator intended to create in them a new stock of inheritance, but because he intended to give them an estate in joint tenancy, which was inconsistent with the devolution of the estate upon them, as tenants in tail.

The only other case quoted by the counsel for the defendant, in support of his construction of the deed, which I feel it incumbent upon me to notice, is that of *McLure v. Young*, 3 Rich. Eq. 559, decided by the Court of Errors. Though there was a division of the Court in that case, and I myself was among those who dissented, I acknowledge the authoritative force of the decision, in cases to which it may be regarded as a precedent. The testator, Jonathan Davenport, gave all his

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real estate to his daughter Catharine, for and during the term of her natural life; and at her death, he gave the same absolutely and forever to her lineal descendants. The decision of the Court was made to rest upon the ground that the testator, upon the death of his daughter Catharine, intended to adopt the provisions of the Act of 1791, as the rule for the distribution of his estate. It was the same (the Court ruled) as if he had said, on the death of Catharine, the estate shall go, absolutely and for ever, to such persons among her lineal descendants, as under the statute of distributions, would be entitled to take; which, in the case that happened, was her only child, the defendant. Thus, according to the reasoning upon which the decision was founded, the testator had designated, on the death of Catharine, a person or class of persons, who must then, if ever, be in esse, and who, at that time, were to take an absolute estate. It was the same (reasoned the Court) as if Davenport had said in his will, I give the estate to Catharine, and on her death I give it to her child or children, to be equally divided among them, with the right of representation to the issue of deceased children, &c., the division to take place among them on the death of Catharine. It is obvious that this case is strikingly different from that before the Court, in all its main features, as well as in the reasoning by which it was decided. Certainly, the child of Catharine became a new stock, not taking his estate derivatively from his mother, but directly as a purchaser under the will. But that is equally the case in all limitations of estates, where the issue or heirs of the body take as purchasers, after a life estate in the ancestor. But that is not what is meant by the reasoning applicable to a

case like that now before the Court. It is in a case where there being no other circumstances to show that the testator intended to use the words "heirs of the body," in another than the technical sense, the argument applies, that because the testator has given the estate to the heirs of the body of the first taker, and, not content with this, has again limited it to their heirs, &c., he therefore intended to create a new stock. And if he did intend to create a new stock, such

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new stock *would of course take as purchasers. It is clear that the construction of Davenport's will depended upon no such arguments as this.

The Chancellor who delivered the opinion of the Court, (quoting from the appeal decree in *Myers v. Anderson*,) says, "all the authorities agree, that if the limitation be to the heirs of the body or issue, and to their heirs, this constitutes them purchasers, as it shows an intention to give them an estate not inheritable from the first taker, but an original estate, inheritable from themselves as a new stock." This proposition is much too broadly laid down. It is true, when applied to cases involving personal estate, as in *Myers v. Anderson*. But it is not correct when applied to real estate, where, as I have shown, the authorities are all the other way. It is not for me to say why the distinction has been drawn. But I take the law as I find it.

Archer's case, 1 Co. 66, cannot be considered an authority or an example against this construction. There, lands were devised to one for life, and after his death, "to his next heir male, and the heirs male of the body of such next heir male."

It was held by all the Judges, that the first taker had a life estate, with a contingent remainder to "the next heir male." The testator was considered as having indicated an intention to use the words "next heir male," as a description of the person who was to take after the termination of the life estate—the superadded words of limitation converting the expression "next heir male," into words of purchase; "an effect, however," says Mr. Jarman, 2 vol. 235, "which (as will be shown at large in the sequel) does not in general belong to such superadded expressions of this nature," and the whole course of the English decisions is in conformity with Mr. Jarman's text.

But to make the most of the general proposition above quoted, found in *Myers v. Anderson*, it is simply this, that "if the limitation be to the heirs of the body, or to the issue, and to their heirs, this constitutes them purchasers," &c. But where is the authority for saying that such will be the re-

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result, if the *limitation be to the heirs general of the first taker, and their heirs?"

Before dismissing *McLure v. Young*, I have

one further remark to make. I do this with the view of showing the utter want of analogy between that case and this. In the former, the gift was to Catharine Davenport for life, and after her death to her "lineal descendants, absolutely and forever," a phrase construed by the Court to be equivalent to heirs of the body, and evidently importing issue; while, in the case before the Court, the estate is given to the plaintiff for life, and after her death, to her right heirs, and their heirs and assigns. There is a vast difference, I think.

I am of the opinion that on the death of the husband, and the survivorship of the wife, the trustee stands seized for the use of the plaintiff, absolutely and in fee. The estate is conveyed "to Dr. Henry Fuller and his heirs, in trust for the use of the said Dr. Henry Fuller and his heirs, in trust, nevertheless," for the uses and purposes which the deed proceeds to declare. This is a trust which is not executed by the statute of uses. 1 Cruise, Dig. 304; Lewin on Trusts, 102. It will therefore be necessary, in executing a conveyance, that Dr. Henry Fuller should join.

The judgment of the Court is, that there is no valid objection to the plaintiff's title, so far as the same is derived from the deed of N. J. Danner.

It is the further judgment of the Court, that if the plaintiff can show, in other respects, a good and sufficient title to the premises, she is entitled to have a specific performance of the contract set out in her bill of complaint.

It is further ordered and decreed, that it be referred to one of the Masters, to report upon the title.

It is further ordered and decreed, that Dr. Henry Fuller, if the plaintiff's title should be found good and sufficient, do join in a conveyance thereof to the defendant.

It is further ordered and decreed, that each party pay his and her own costs.

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*The defendant appealed, on the grounds:

1. Because "right heirs" may be "designatio personarum," or words of purchase as well as "heirs of the body," in grants or deeds, as well of real as of personal estate.

2. Because "right heirs," in this deed, should be taken as words of purchase, from the concurrence of these provisions: first, an express life estate to Mrs. Danner; next, a contingent remainder to her "right heirs;" and third, the addition of words, showing an intention to make the "right heirs" a new stock of inheritance, or purchasers.

McCrary, for appellant, cited Archer's case, 1 Co. 66; King v. Melling, 1 Vent. 214; Lisle v. Gray, Jones 114, 2 Lev. 223; Doe v. Laming, 2 Bur. 1109; Luddington v. Kyme, 1 Ld. Raym. 203; Lowe v. Davies, 2 Id. 1561; Dubber v. Trollope, Amb. 453; Harg. Tr. 489; Jones v. Morgan, 1 Bro. Ch. R. 208; Dott v.

Cunnington, 1 Bay, 453; 3 T. R. 146; Campbell v. Wiggins, Rice Eq. 10.

Petigru, contra, cited 2 Fearne, 31, 32.

PER CURIAM. This Court concurs in the conclusion of the Chancellor. And it is ordered that his decree be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.
Decree affirmed.

5 Rich. Eq. *365

*FRANCES COX v. PETER COX.

(Charleston. Jan. Term, 1853.)

[*Frauds, Statute of* Ⓒ119.]

Defendant agreed, by parol, with H. C., his brother, who was infirm, and whose land was about to be sold at sheriff's sale, to purchase the land for the accommodation of his brother, and to secure a home to his helpless family, and, when it suited him to refund the money, he should have the benefit of what was done: defendant announced the agreement at the sale, bid off the land for a nominal price, and paid the bid: H. C. remained in possession until his death, and then the defendant took a sheriff's deed for the land, and brought an action at law to dispossess the plaintiff, the widow and heir of H. C.:—*Held*, that defendant's conduct was fraudulent, and that he could not avail himself of the statute of frauds to defeat the plaintiff's claim to have the sheriff's deed cancelled. (a)

[Ed. Note.—Cited in *Coney v. Timmons*, 16 S. C. 385.

For other cases, see *Frauds, Statute of*, Cent. Dig. § 270; Dec. Dig. Ⓒ119.]

Before Dunkin, Ch., at Horry, February, 1852.

Dunkin, Ch. This was an application for an injunction to stay proceedings at law, in an action of trespass to try title.

The facts, which for the purposes of this motion, are supposed to exist, are substantially these:

Herman Cox, deceased, the husband of the complainant, and the brother of the defendant, was, in his life time, seized and possessed of two tracts of land, one called Cox's Ferry, with about twelve hundred acres attached to it, and the other called Savannah Bluff. Being embarrassed in his pecuniary affairs, both these tracts of land were advertised for sale by the sheriff of Horry district, for October sales, 1842. It is charged, that the defendant attended the sale with his brother, Herman Cox, deceased, and announced to the bystanders, that "he was desirous of purchasing the plantation, called Cox's Ferry, for the benefit and accommodation of the said Herman, and a home for him and his family, which was then helpless, and he, the said Herman, infirm; and that he desired

no benefit to himself in said purchase, but that as soon as the said Herman refunded him the purchase money, he should have the said plantation absolutely, all of which he had promised the said Herman: who assented thereto." That Herman, and all others,

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believed "the declaration to be made in good faith, and the land was knocked off to the defendant at fifty dollars, being less than one-tenth the value thereof. These allegations are very well sustained; and the affiant, Benjamin E. Sessions, moreover states, that in January, 1844, the defendant told him that he had bought the land called Cox's Ferry, as well as another tract called Savannah Bluff, on sale day in October previous, for Herman's benefit. The latter tract was knocked off to him for ninety-three dollars, and Herman had agreed to sell this tract to the affiant for four hundred dollars. The defendant told Sessions that he recognized this transaction, and at first gave him a bond to make titles, but there was some dispute with the person in possession, and the defendant made a quit claim to Herman, who sued for the land, and then sold it to Sessions for four hundred dollars, the money being paid to Herman, or to his agent. At the time of the sale, in October, 1842, Herman Cox and his family were residing on the Cox's Ferry tract, where he continued to reside until his decease, some five years afterwards. (1847.) In the meantime, as it is alleged, the defendant had taken no title from the sheriff of the Cox's Ferry tract.

The statement of the Rev. James L. Belin is important, not only from his excellent character, but from the position which he occupied towards the parties, and the distinctness of his narrative.

Herman Cox being in infirm health, as well as involved in pecuniary difficulties, Mr. Belin, early in 1844, undertook to act as his attorney in fact, in discharging his debts. Herman Cox gave him a memorandum of his liabilities, and among others, requested him to refund his brother, Peter Cox, (the defendant,) the money which he had paid to the sheriff of Horry district for his plantation at Cox's Ferry, which had been purchased by Peter at sheriff's sale, for his accommodation, for some fifty-odd dollars. A few days afterwards, Mr. Belin met the defendant, and had a free and full conversation with him on the subject; on which occasion, the defendant

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confirmed what his brother Herman had stated, and told Mr. Belin, that he would make Herman Cox titles to the land as soon as the money he had paid the sheriff was refunded; and closed his remarks by saying, that "what he had done was for the accommodation of his brother."

Mr. Belin told him the amount should be refunded to him. Many of Herman Cox's

(a) Vide *Kinard v. Hiers*, 3 Rich. Eq. 423 [55 Am. Dec. 643].

creditors were pressing him, and Mr. Belin inquired of the defendant, whether he was disposed to wait until they could refund at a more convenient time; and he agreed to do so. Mr. Belin says, that, when he was in funds for that purpose, he offered to pay the defendant what his brother was indebted to him. Perhaps this was after his brother's death, for Mr. Belin says, the defendant refused, and claimed his brother's whole estate, refusing to let his sister-in-law (the complainant) have any share of it. It seems that Herman Cox died intestate, and his heirs at law were his widow, (the complainant,) and his brother, (the defendant.)

Josiah G. Waller, was present at the sheriff sales in October, 1842, when Herman Cox's lands, to wit, Savannah Bluff and the Cox's Ferry tracts were sold; he heard the conversation between Herman Cox and the defendant. The defendant "was to bid off the lands of Herman Cox, and when Herman paid him, he was to have the title." He is certain this was well understood by the bystanders at the sale, as he thinks no other bid than that of the defendant was made. He says that Herman was much attached to the Cox's Ferry tract, valued it highly, and would not have taken \$1,000 for it. After the death of the complainant's husband, in 1847, she still continued in possession of the Cox's Ferry tract.

Some time in 1850, the defendant, it is alleged, attempted to take possession of a portion of the land, and did actually take possession, by cutting turpentine boxes and tending them, and that in March, 1851, he instituted an action of trespass to try title against the complainant, relying on a deed which he had obtained from the sheriff. The prayer of this bill is, that this deed may be set aside; that

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the suit at law may be enjoined, *and that a writ of partition may issue to divide the land between the complainant and the defendant, as the heirs at law of Herman Cox, deceased.

The defendant has interposed the plea of the statute of frauds, and on this ground, resists the motion for injunction. The case has been discussed, as if Peter Cox, the defendant, was the original owner of the land, which, in October, 1842, he agreed to sell to his brother, Herman Cox, for fifty dollars, and that this is merely an attempt to enforce the performance of that parol agreement. But the land belonged, it is conceded, to the complainant's intestate. The foundation of her bill is, that the defendant procured the title (if any he has) by fraud, and she seeks to set aside the conveyance thus fraudulently obtained. In October, 1842, Herman Cox was in possession of the premises, holding the same in fee. He valued them at \$1,000, and they had a marketable value for the payment of his debts, or other purposes, of \$500. He was in danger of being summarily

dispossessed by a sheriff's sale. Although the witnesses differ as to the words, the substance of the agreement with the defendant was, that, "for the accommodation of his infirm brother, and to secure a home to his helpless family," he would bid off the land, and pay the bid, by which the lien would be discharged; and that, when it suited his brother to refund the money, he should have the benefit of what had been done. This being declared to the bystanders, good feeling to Herman Cox and family, prevented competition, and the defendant became the nominal purchaser, at fifty dollars. It is charged, and it is assumed to be true, that this was a fraudulent contrivance on the part of the defendant to obtain his brother's land for one-tenth of its value. That he continued the deceit and misrepresentation by his conduct, in taking no title, and by his repeated assurances to others during his brother's life time; and that his fraud was consummated by his subsequently obtaining the sheriff's title, and attempting to dispossess his brother's widow and heir. The complainant occupies the position of her husband. The ground of his claim to relief would be, that the legal title to his

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land *had been obtained by his brother by fraud, and he would seek that the deed, thus fraudulently obtained, should be cancelled. This Court has often repeated, that the statute of frauds should never be perverted into an instrument of fraud. Thus, in case of an agreement, such as the statute plainly declares void if not reduced to writing; yet, if this was omitted by fraud, the defendant would not be permitted to avail himself of the statute. In *Whitchurch v. Bevis*, 2 Bro. C. C. 565, Lord Thurlow says, "if you interpose the medium of fraud, by which the agreement is prevented from being put in writing, I agree the statute is inapplicable." See *Keith v. Purvis*, 4 Dess. 114.

The necessity of a prompt decision upon this motion is urgent, as the Court of Common Pleas for Horry district is at hand.

The Court has not been able to give to the subject the mature deliberation to which it is entitled, and will doubtless hereafter receive.

For the same reason, the Court has not fully considered another aspect of the case. Assuming it to be a proceeding to carry into effect a parol agreement, the transactions in regard to Savannah Bluff may demand a fuller development.

It is ordered, that an injunction issue according to the prayer of the bill, until the hearing of the cause, and the further order of the Court thereon.

The defendant appealed on the ground:

Because it is submitted, that upon the case as made by complainant's bill, his Honor, the Chancellor, should have sustained the defendant's plea of the statute of frauds.

Munro, for appellant.
Harilee, contra.

PER CURIAM. This Court concur in the decree of the Chancellor, and the appeal is dismissed.

DUNKIN, DARGAN and WARDELOW, CC., concurring.

JOHNSTON, Ch., absent at the hearing.
Appeal dismissed.

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*CHARLES R. THOMPSON v. JOSEPH H. DULLES.

(Charleston. Jan. Term, 1853.)

[Trusts ⇨273½.]

Six co-heirs make an informal division of their ancestor's estate, and a plantation falls to the exclusive share of C.: no conveyances are made, and W., one of the co-heirs, dies intestate, leaving an infant child his sole heir: the infant is a trustee for C. and bound to convey to him under statute, 7 Ann. c. 19.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 387; Dec. Dig. ⇨273½.]

[Infants ⇨27.]

It is not every interest that puts an infant trustee beyond the operation of the statute of Ann.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 35; Dec. Dig. ⇨27.]

[Infants ⇨27.]

A conveyance made by an infant trustee, under a decree of the Court, is good, until the decree is reversed, and the conveyance avoided.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 35; Dec. Dig. ⇨27.]

[Specific Performance ⇨95.]

A good marketable title is all that is required of the vendor—plaintiff in a suit for specific performance: it is not enough for the defendant to shew that the title may, possibly be defeated.

[Ed. Note.—Cited in De Saussure v. Bollman, 7 S. C. 340; Maccaw v. Crawley, 59 S. C. 350, 37 S. E. 934.

For other cases, see Specific Performance, Cent. Dig. § 262; Dec. Dig. ⇨95.]

[Specific Performance ⇨105.]

Early in 1847, defendant agreed to purchase plaintiff's plantation, and to pay for the same \$1,000 in March, 1848; \$2,000 in March, 1849; and \$3,000 in March, 1850, without interest,—the plaintiff and defendant each to plant part for the year 1847, and full possession to be given to defendant on January 1, 1848. Plaintiff had a good equitable title, but his legal title was defective. Defendant took possession according to the agreement. In April, 1847, he discovered the defects in plaintiff's title, and from that time till December, 1848, repeatedly importuned him to cure the defects, and execute a conveyance. On December 11, 1848, he informed plaintiff, that he had been advised good titles could not be made, and on December 23, gave him notice, that, unless good titles were tendered by January 1, 1849, he should consider the negotiation for the sale at an end. On January 1, 1849, he, accordingly, abandoned the premises—having paid no part of the purchase money. There were considerable difficulties in the way of the plaintiff in getting in the legal title. In 1848, he took some steps towards get-

ting it in. In August, 1849, he filed his bill for specific performance; and in July, 1851, when the Master submitted his report, he had perfected his title:—*Held*, that, although there had been delay on the plaintiff's part, it did not amount to such laches as deprived him of his right to a decree for specific performance.

[Ed. Note.—Cited in Lesesne v. Witte, 5 S. C. 462.]

For other cases, see Specific Performance, Cent. Dig. §§ 325-341; Dec. Dig. ⇨105.]

[Specific Performance ⇨105.]

Principles on which the Court proceeds in granting or refusing relief, in suits for specific performance, where the party seeking relief is wanting in diligence.

[Ed. Note.—Cited in Cureton v. Gilmore, 3 S. C. 51.]

For other cases, see Specific Performance, Cent. Dig. §§ 325-341; Dec. Dig. ⇨105.]

[Specific Performance ⇨93.]

Where no time is fixed in the contract, or time is not essential, it will not, however, be permitted to the party who is to make the conveyance, to trifle with the interests of the opposite party by unnecessary delay; it is in the power of the latter to fix some reasonable time,—not capriciously or with intent to surprise, but a reasonable time according to the circumstances of the case,—within which he will expect the title to be made at the peril of rescinding the agreement.

[Ed. Note.—Cited in Prothro v. Smith, 6 Rich. Eq. 332; Sams v. Frupp, 10 Rich. Eq. 456; McMillan v. McMillan, 77 S. C. 513, 58 S. E. 431.]

For other cases, see Specific Performance, Cent. Dig. § 246; Dec. Dig. ⇨93.]

[Specific Performance ⇨92.]

Notice on December 23, that unless good titles were tendered by January 1, the purchaser would consider the contract at an end, *held*, under the circumstances of the case, not to be reasonable.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 233-244; Dec. Dig. ⇨92.]

[Specific Performance ⇨92.]

The embarrassing state of the title has always been recognized, as affording a reasonable excuse for delay.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 233-244; Dec. Dig. ⇨92.]

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*Before Johnston, Ch., at Charleston, February, 1852.

Johnston, Ch. The bill, in this case, relates to a body of land, situate in the Parish of St. Mathew, sold by the plaintiff, Thompson, to the defendant, Dulles.

The defendant was let into possession; but afterwards, abandoned the premises, and refused to complete the contract, on the ground of insufficiency of title, or delay on the part of the plaintiff to make him a good conveyance. The vendor brings this suit, (which was instituted the 29th of August, 1847,) to compel him to execute the contract of purchase.

Pending the suit, the titles were referred to Mr. Tupper, one of the Masters, who has reported; and exceptions are taken by the defendant to his report.

I shall, first, consider the report and ex-

ceptions, for the purpose of ascertaining the true state of the title.

The land consists of two tracts, viz:

1. A tract of 1,447 acres, called Lower Falls; and

2. A small adjoining tract, of 100 acres.

1. With respect to the tract of 1,447 acres, or Lower Falls.

This body of land originally belonged to William Sabb. His estate consisted of Lower Falls, and another contiguous tract, called Providence.

He died intestate in 18—, leaving a wife, Ann; a brother Thomas, and two sisters, Ann Stewart, (wife of James Stewart,) and Elizabeth Thompson, (wife of William R. Thompson.)

Under a summons in partition, issued from the Court of Common Pleas, the 10th of March, 1806, Commissioners were appointed, who divided the real estate of William Sabb, by allotting Providence to his widow, Ann Sabb, and Lower Falls to his brother, Thomas, and his sisters, Mrs. Stewart and Mrs. Thompson, in common. This partition was confirmed by the Court, the 18th March, 1808.

Thomas Sabb died in 1811, intestate and without issue; and his distributive share of Lower Falls became vested in, and distributable between, his widow, Sarah Frances,

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and his two *sisters, Mrs. Stewart and Mrs. Thompson, (then a widow, her husband, William R. Thompson, having died in 1807.)

Sarah Frances, the widow of Thomas Sabb, married a second husband, James F. Erving. There is evidence, which, coupled with lapse of time and acquiescence, shows, in a manner sufficiently satisfactory, that she was compensated for her interest in Lower Falls by other real estate.(a)

Mrs. Stewart died in 1813, leaving her husband, James Stewart, and one child, Ann, to inherit her original share of Lower Falls, and her portion acquired as distributee of Thomas Sabb, and also her portion of what had been acquired from Thomas Sabb's widow, Sarah Frances, as already stated.

James Stewart, the husband, on the 30th of May, 1818, conveyed all his interest in Lower Falls to Mrs. Thompson.

Ann, the child of Mrs. Stewart, married William L. Lewis, and died December 11, 1831, leaving her husband and three children: Ellen, (widow of William H. Colcock,) Ann and James, her sole distributees. On the 10th of April, 1849, these three children and their father, William L. Lewis, conveyed to the plaintiff, Charles R. Thompson, all their interests in Lower Falls.

What has been stated, shows that the plaintiff, by the deed of April 10, 1849, has the legal title to two-thirds of Mrs. Stewart's original third of Lower Falls, as well as of

her share, acquired through her brother, Thomas Sabb, and his widow; and that the rest of the tract vested in Mrs. Thompson, his mother. It remains to be inquired, whether he has title to that residue.

Mrs. Thompson's husband, William R. Thompson, died, as we have stated, in 1807; she died intestate, in November, 1838, leaving six children, of whom the plaintiff, Charles R. Thompson, is one. This gave him one-sixth of his mother's interest in Lower Falls. He and the other five children made an informal division of her and her late husband's estate, in 1839, in which Lower Falls fell to his exclusive share. No

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conveyances were *made. But he had an equitable right to conveyances. The other five children of Mrs. Thompson were:

1. Caroline, wife of Dr. John B. Lewis. She and her husband conveyed her interests to the plaintiff, the 13th of July, 1843.

2. Charlotte, who first married Derril Hart, and upon his death, Robert H. Goodwyn. She and her second husband conveyed her interests to the plaintiff, the 25th of December, 1848, and she renounced her inheritance the 9th of January, 1849.

3. John Linton Thompson. He died before his mother, leaving two daughters: Margaret, who married Dr. Artemas T. Darby, and Anna, who married William H. Sinkler. These two daughters, with their husbands, conveyed their interests to the plaintiff, the 25th of December, 1848; the daughters relinquishing their inheritance, the 1st and 2d of January, 1849.

4. Mary Eugenia. She married A. B. Darbey, whom she survived; and after his death, she conveyed her rights in Lower Falls to the plaintiff, 25th December, 1848. The remaining child of Mrs. Thompson was,

5. William Sabb Thompson. He died intestate in 1841, leaving one child, his sole distributee, by the name of Emma Thompson. She is still an infant. Proceedings were instituted by the plaintiff, the — of February, 1851, against this infant, upon the ground that her father was a trustee to release his interests in the land allotted to plaintiff in the division of 1839, and that the trust descended upon her, and that, therefore, she was bound to convey, under the Statute 7 Ann, c. 19, (P. L. 97; 2 Stat. 546,) enacted, "to enable infants, who are seized or possessed of estates in fee, in trust, or by way of mortgage, to make conveyances of such estates." A decree passed in the case, the 13th of February, 1851; in conformity to which, Emma Thompson, the infant, on the 28th of May, 1851, conveyed to the plaintiff the undivided sixth of her father in Lower Falls, which had descended to her.

It has been objected, that this conveyance

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is not binding on *the infant, and does not

(a) Sugd. on Vend. Chap. 10, p. 88, note 1, (Hammond's edition.)

constitute a title which a purchaser is bound to accept.

I am of opinion, that the conveyance is good, so long as the decree, under which it was made, remains of force;—unless it can be shown that the decree is a nullity.

It has been argued, that the statute of Ann empowers the Court to direct a conveyance, by an infant, only where the infant is a naked trustee; not where the infant, although a trustee, has an interest; and that the infant in this case had an interest, and, therefore, the decree, directing a conveyance by the infant, is null and inoperative.

It is not every interest that puts an infant trustee beyond the operation of the statute of Ann.

In *Ex parte Marshall*, referred to in a note to ——— *v. Handcock*, 17 Ves. 383, the Master reported, that the infant was not only trustee as heir of the mortgagee, but had an interest in the mortgage money, as one of the mortgagee's four residuary legatees; and was, therefore, not a mere trustee, within the meaning of the statute. But the Master of the Rolls was of a different opinion, and by an order, made the 15th of June, 1797, directed the infant to convey the estate.

The same note states, that the same point had been decided by Lord Thurlow, the 15th of March, 1783, in a case where the heir of the mortgagee, who had died intestate, would be entitled, as one of his next of kin, to a share of the mortgage money, when paid to the administrator.

The reason why an infant trustee, possessed of such an interest, is still within the statute, appears to be, (as explained by Lord Eldon, in ——— *v. Handcock*, 17 Ves. 384, that the mortgage money being part of the personal estate, may be paid to the personal representative of the mortgagee, who may compel the payment, and give a valid discharge for the debt; and, if well paid to the representative, the consequence is, that the infant, (though also a co-executor, as in ——— *v. Handcock*.) may be considered as a dry trustee, without interest.

But in ——— *v. Handcock*, 17 Ves. 384,

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Lord Eldon goes still *further. He holds, not only that where the interest of the infant can be extinguished by payment to another, he is thereby reduced to a naked trustee, and may be compelled to convey under the statute; but that though he possess an interest that cannot be thus extinguished and is, therefore, not a dry trustee, and within the statute; yet a conveyance, made by him, is not void, but voidable, and voidable only during infancy. That it passes the legal estate until avoided; and if made in a case where he would be bound to convey, when of age, a Court of Equity would prevent him from avoiding it at law, if he at-

tempted to do so. "In every way, therefore," says his Lordship, "the title is good."

In the case before me, the infant stands precisely in that situation. She would be bound to convey at majority. The Court would not, therefore, allow her to avoid the conveyance she has made.

But this is not all. The question with me is not, whether I ought now to direct a conveyance by this infant trustee, under the statute. The Court has already decreed a conveyance, and it has been made. That decree is in force; and until it is reversed, it must be taken to have been rightly made, and in a proper case.

Suppose the Court to have erred in compelling the conveyance; neither the decree nor the conveyance is void. They are both good, until avoided; and though there were a possibility that the infant may hereafter avoid them, I am to regard them, as, now efficacious.

There is not another deed, in the whole chain of title, that may not, by possibility, be set aside, as well as this, by some future proceeding. But that is not enough to invalidate them in a contract of sale. Mathematical certainty is not attainable, and is not required, in such cases. Moral probability, sufficient to make a good marketable title, is all that is required. It is not sufficient for the defendant, in this case, to show, that the title tendered to him may, possibly, be defeated. He must show, that there is reason to apprehend it will be defeated.

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But, so *far from that being the case, there is reason to believe it can never be defeated, or set aside.

My conclusion is, that the plaintiff had, when he sold, a good equitable title, and has now, a good legal title, to Lower Falls.

2. Then, as to the 100 acres adjacent. This tract also belonged, originally, to William Sabb, and was parcel of Providence, which was assigned to his widow, Ann Sabb, in the partition of 1808.

She afterwards married Donald Rowe; and on the 8th of August, 1809, joined him in a conveyance of Providence to Edward Richardson.

Edward Richardson, on the 3d of January, 1816, conveyed to his mother, Rachel Richardson.

Rachel Richardson devised her estate, by will executed 8th September, 1820, to her daughter, Mary R. McCord.

Mary R. McCord died intestate, leaving two daughters:

1. Rachel Susan Bee, (by a former marriage) who married John R. Cheves; and

2. Mary E. McCord, who married Christopher F. Hampton.

August 19th, 1843, Cheves and wife conveyed all the interest of the wife, in Providence, to Hampton and wife; constituting

them tenant in entirety of Mrs. Cheves' moiety.

Mrs. Hampton died intestate, leaving her husband, Christopher F. Hampton, and an infant daughter, Ann Hampton, her sole distributees.

By her death, her husband became entitled, as survivor, to the moiety of Mrs. Cheves, which had been conveyed to himself and wife, as tenant in entirety; and to one-third of his wife's original moiety, as her widower. The child Ann, became entitled to the remaining two-thirds of the latter moiety.

July 15, 1850, Christopher F. Hampton released to the plaintiff all his right to the 100 acres, which the plaintiff had sold to the defendant.

June 13, 1851, the infant, Ann Hampton, released all her interest to the plaintiff, in

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the same 100 acres. This release was *executed under an order of this Court, obtained on the application of the plaintiff; in which she was held to be a trustee, and bound to convey. The trust arose from the fact, that Edward Richardson had undertaken to convey, and did convey to the plaintiff, this 100 acres by deed, dated the 29th of June, 1820. He afterwards died intestate, and his estate became divisible between Mrs. Cheves and Mrs. Hampton, who were his nieces.

The view I took in relation to the conveyance of the infant, Emma Thompson, is applicable to that of Ann Hampton; and shows that, in my opinion, it is a good conveyance.

The title of the plaintiff to this 100 acres is, therefore, sufficient.

If there is any impediment to the enforcement of the contract of sale, it does not consist in a present insufficiency in the title, but must arise from some other cause.

In order to discover whether there be any other impediment, let us now look into the treaty of sale, and the conduct of the parties.

The defendant, Dulles, resided in Philadelphia, but owned a plantation adjoining these two tracts of Charles R. Thompson. After some preliminaries between the parties, Mr. Dulles, (being at the time, at his South-Carolina estate,) addressed Mr. Thompson the following note:

St. Matthews, Dec. 4, 1846.

Dear Sir,—I have considered the matter of your river plantation, and have concluded to offer you \$5,000, payable in three equal yearly instalments of \$1,666.66 each, without interest; leaving to your use, for the year 1847, the premises in use now, and the lands at present under cultivation, and to my use the fields and lands which have not been planted this present year. A deed, clear of incumbrances, to be made at the first payment, and the premises mortgaged for the balance.

If this proposition is accepted, please inform me at once; and if not, please return me this letter. It is the utmost I can offer

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*now: and, if not accepted, I shall make such arrangements as to render the addition not important to me in future.

Yours respectfully,

Joseph H. Dulles.

I expect to return on Monday morning.

Mr. Thompson declined this offer, and Mr. Dulles proceeded to Philadelphia. After reaching that city, he received a letter from Mr. Thompson, to which he replied as follows:

Philadelphia, Jan. 21, 1847.

Dear Sir:—I have received your favor of the 10th instant: and, although your price is far beyond my views, I have concluded to come up to your price, with some variation of the terms.

You propose three yearly payments of \$2,000, without interest. To this I cannot accede.

But, on the basis of your retaining, for this year, the use of the premises and the fields cultivated by you last year, and my using the remainder of the lands, the whole to be given up to me on, or before, the first of January, 1848, with good title, clear of incumbrance, together with the buildings and fixtures, (including the tract, I think you said, one hundred acres, bought by you, adjoining your tract,) I will purchase the property on the following terms:

\$1,000 payable first of January, 1848.

1,000 " 1st March, 1849.

2,000 " 1st March, 1850.

2,000 " 1st March, 1851.

\$6,000 without interest; the payments to be secured by mortgage of the premises, with the privilege of anticipating the payments, with allowance of interest.

I will add, that my object in making this offer is to arrange my planting the present year; and I fear it is even now too late.

Should I make the clearings now designed,

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I would not buy, *at any price: for I do not desire to increase my property in Carolina.

My plan is to sell woodlands to those who want it, to cover any purchase I may make. If I clear what I want, this year, it will preclude any such operation. Please give me your decision.

Very truly, yours, Joseph H. Dulles.

This letter was shown to Thompson by William R. Rast, then in the employment of Dulles, as the overseer of his South-Carolina plantation: and he says Thompson declined the terms proposed.

But shortly after, another letter was written by Mr. Dulles to Mr. Thompson, from Philadelphia, and also confided to Rast, who carried it to Mr. Thompson. It does not appear that he delivered it, but showed it to Thompson, as he had the letter of 21st January. It was retained by Rast, but has been lost.

Rast, in his testimony, says, "Subsequent to this," (i. e., to the letter of the 21st January, 1847.) "Dulles wrote again, making a different offer for the same place. I saw Mr. Thompson; showed him Dulles' letter, and Thompson accepted the conditions laid down in the letter. The terms of the contract were \$1,000 in March, 1848, \$2,000 in March, 1849, and \$3,000 in March, 1850, without interest." He refers to a representation of the terms of Dulles' letter contained in a letter subsequently written by himself to Thompson, which he affirms to be correct, and in that letter he adds to the foregoing terms: "You," (Thompson,) "to plant the upper part, and Mr. Dulles the lower part of the plantation, and you to give full possession the first of January, 1848. The letter was to be binding till Mr. Dulles came on;—then he would arrange business with you himself."

He testifies further, that upon this verbal acceptance of these terms by Mr. Thompson, he apprised his employer of the fact, by letter, and, as his agent, took possession of the

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lower part of *Lower Falls, and cultivated it in common with the rest of his plantation. This possession was taken in or about March, 1847.

Mr. Dulles, he says, did not reply to his letter, but came out about the beginning of April, and approved the contract that had been made. He also came out again towards the end of that year, (1847,) rode over the place with him, (Rast,) saw the crop gathered in bulk, and received from him a full statement of what had been done. There was no discrimination in the crops, between what was made on Mr. Dulles' original plantation, and that made on the part of Lower Falls worked by his hands.

During Mr. Dulles' visit of April, he addressed the following note to Thompson:

St. Matthews, April 7, 1847.

Charles R. Thompson, Esq.,

My Dear Sir:—On looking over the papers, they appear to me so defective, and the right so much depending on possession, that it will, as I think, be requisite to take out a new grant, conforming with the re-survey of 1841; and to strengthen this by obtaining a renunciation on the part of Mr. and Mrs. Hampton, [then alive,] if the legal title, under Mrs. Rachel Richardson, is in them, as I suppose it to be. The deed from Colonel Richardson is only an obligation against his estate to make a good title; but conveys nothing, as I conclude from the papers executed by him.

It will be requisite, also, to have the deed of partition by your own family recorded, as I understand that instrument vests the title in you, so far as concerns the heirs of your mother. I presume it is in proper form.

The deed of James Stewart wants confirmation, by the proving and recording that

instrument, and a renunciation on the part of the heirs of Mrs. Stewart.

And the interest of Thomas Sabb wants evidence, to show when and how it passed to your mother.

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*The evidence of possession, and the persons by whom it can be proved, can be given in a memorandum.

I apprehend, these things cannot be done before my going North, which must be next week, if possible. I return all the papers.

Yours respectfully, Joseph H. Dulles.

In December, 1847, we find Mr. Dulles again in St. Matthews, and addressing Mr. Thompson the following note:

St. Matthews, Dec. 4, 1847.

My Dear Sir:—Since I left with you the papers, with a note of what I supposed requisite, I have not heard from you. My expectation is to return to Philadelphia in ten or twelve days; and, if they are prepared, so as to make a conveyance which shall be deemed good, I am ready to complete the contract. Not being familiar with such matters, I would rest on the opinion of an attorney of experience in titles.

I am so busy, hunting an overseer and arranging for an early return, that I have not had time to call, and would not postpone this communication any longer.

Yours very respectfully,

Joseph H. Dulles.

Then follows this letter, after his return to Philadelphia—the whole of the premises being then in his possession:—

Philadelphia, Jan. 11, 1848.

My Dear Sir:—As there is an unavoidable uncertainty about the time of my visiting Carolina, this Spring, I take the liberty of suggesting the propriety of having the land papers prepared at once, and if, when they are completed, they are handed to Mr. Hutson, of Orangeburgh, who has attended to my law business, he will examine them and advise me, so that I shall be prepared to act.

I am so entirely unacquainted with such

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matters, that I do *not presume to act on my own judgment; and, in any case of the purchase of real estate, refer the question of title to a legal adviser.

I suppose (of course) that a clear and good title can be made, and suggested some things last April; but I do not profess to judge whether they are requisite, or would be sufficient.

I may desire to exchange, or sell, a part of the tract, or perhaps all my lands; and it is essential to me, (so far off,) to have the title complete in itself, so that any third party would be satisfied with it; and I have gone to a great deal of trouble to make every thing clear and exactly defined, as to my own lands.

My stay at the South may be short; and it would be well to have this matter attended

to early, so that there may be no delay: and I am also anxious to have it fixed absolutely, as, until this is done, I cannot but act under disadvantageous restraint in the use of the property.

With my best regards, &c.,

Joseph H. Dulles.

Charles R. Thompson, Esq., Fort Motte.

He writes Mr. Thompson again in April, as follows:

Philadelphia, April 13, 1848.

Dear Sir:—I wrote to you on the 11th of January last, stating that there was an unavoidable uncertainty about the time of my going to Carolina, and requesting that you would have the land papers prepared immediately, and, by submitting them to Mr. Hutson, of Orangeburgh, as proposed, I could perform my part of the contract, whether present or absent.

My mortgage was prepared a year ago, according to the terms of agreement, and I have been waiting to hand it over to you, as soon as the titles were ready.

I am ready now, as I have been, to make the first payment when the titles were prepared, and I only wait your action.

Mr. Hutson wrote to me that he would in-

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form me, as soon as *he examined your conveyances. If he has had the papers, and neglected to do so, I regret it.

The plan I proposed was the only one to prevent delay: and I now write to say, that I fear it will not be in my power to go to Carolina this Spring, various and important changes in my family prevent it, at present. But this will be no difficulty in the way of a settlement, as all can be done that the case requires, on notice that the title is ready.

Yours, very respectfully,

Joseph H. Dulles.

In December, Mr. Dulles is in South-Carolina, and writes Mr. Thompson as follows:

St. Matthews, Dec. 11, 1848.

My Dear Sir:—Being advised by my attorney, after an examination of your papers, that a clear title cannot be made, to convey the lands at the Lower Falls place, I must, of course, relinquish the purchase.

This has been a great disappointment, and a serious inconvenience to me. Taking it, however, as one of the cases of unintentional error to which business transactions are liable, I am disposed to make the best of it, and am willing to pay what, under the circumstances, may be deemed a fair price for the use of such parts of the land as have been planted.

This, we may adjust ourselves, or leave to be settled by disinterested persons: so that there may be nothing to interrupt the friendship which has so long existed.

I expect to remain in the parish twelve or fifteen days, and then be subject to an immediate return to the North. I hope that, within that time, this matter may be settled

to our mutual satisfaction. I shall be pleased to receive any proposition from you, and give it my immediate attention.

Yours, very respectfully,

Joseph H. Dulles.

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*He writes him again:

St. Matthews, Dec. 23, 1848.

Dear Sir:—Under the circumstances in which I am placed, I deem it my duty to advise you, that if good titles to the Lower Falls Plantation, which you proposed selling me, are not tendered to me by the first day of January next, I shall consider the negotiations for the purchase of the same at an end. Urgent business requires my return home, at least by that time.

Yours, very respectfully,

Joseph H. Dulles.

On the 1st of January, 1849, Mr. Dulles closed the correspondence, by a delivery of the keys to Mr. Thompson's overseer, and by the following note to himself:

January 1, 1849.

Dear Sir:—Having received no communication from you, since the notice which I gave you on the 23d of December, I now surrender the proposed purchase of lands on the Santee, and return you the keys of the houses, which have not been used. I am assured, that the property is, in every way, in better condition than when it was left by your negroes, excepting the ordinary decay of the buildings.

Yours, very respectfully,

Joseph H. Dulles.

These are the facts upon which the bill was brought: and it was filed, as has been stated, the 29th of August, 1849.

One of the questions presented in the case is, whether a contract of sale has been made out; and, if so, what are its terms?

The bill, after stating the two offers contained in Mr. Dulles' letters of the 4th of December, 1846, and 21st January, 1847, which were declined, proceeds: "But the said Joseph H. Dulles, at the same time, authorized his agent, William R. Rast, to see your Orator, and to conclude the contract with

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him. That, *about the first day of February, 1847, the said William R. Rast saw your Orator, and agreed with him for the purchase, on the same terms, as to the taking of possession of part immediately, and the residue in January, 1848, as mentioned in Mr. Dulles' letters." "And the said William R. Rast, by the authority of the said Joseph H. Dulles, agreed that the said Joseph H. Dulles should pay your Orator, for the said plantation, the sum of \$6,000, in manner following: that is to say, \$1,000 in March, 1848; \$2,000 in March, 1849; and the residue of \$3,000 in March, 1850;" and avers delivery of possession, under that contract, which is stated to have been by parol.

The defendant admits his offers in the two

letters referred to, and that they were declined. He also admits, that he gave authority to Rast to agree with the plaintiff for the purchase of the plantation; but his authority was special, to wit: to vary the times of payment proposed in his letter of 21st January, 1847, so as to make payment of \$1,000 1st March, 1848; \$2,000 1st March, 1849; and \$3,000 1st March, 1850; but to retain and insist upon all the other terms of that letter.

He insists that the possession taken by him was in pursuance of these terms, and pleads the statute of frauds to the contract set up by the plaintiff, so far as it departs from them.

The material departure suggested, is the omission, (in the plaintiff's statement of the contract,) of the stipulations in the defendant's letter, that "a good title, clear of incumbrance," was to accompany the full delivery of possession, in January, 1848; and that the purchaser was to have "the privilege of anticipating the times of payment, with allowance of interest."

It is further insisted, that the object of speedily obtaining the actual execution of a clear conveyance was stated by the defendant in his said letter, and was of the essence of the contract, and is omitted in the plaintiff's statement of it. Upon this latter point, I am very clear, that although the disclosure of his purposes by the purchaser so bears upon the execution of the contract of sale, that it will not be allowed to be executed to the disappointment of the purposes so

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disclosed—in other words, *will not be executed against good faith—yet the disclosure referred to forms no part of the contract, properly so called, and need not be stated as parcel of it.

The other departure from the contract, admitted by the defendant, might be more material, if the establishment of the contract depended altogether upon the defendant's admissions.

Where the existence of some contract, (not reduced to writing,) is evidenced by acts done in partial execution of it, as in this instance, the case is so far taken out of the statute of frauds, that the contract actually made, and, of course, its particular terms, may be established by parol. In this case, the act of taking possession under a contract is proved. This is sufficient to displace the plea of the statute: and that being out of the way, we are to receive parol evidence of the authority of Rast, the agent, and of the contract which he made.(b)

I take it for granted, from his testimony, that he (Rast) made the contract, although

that does not appear to be his apprehension of the matter. He proves the contents of the last letter which he showed to Thompson, without stating that it contained any express reservation of the terms of the previous letter, as defendant supposes. That letter, thus exhibited by him, was the basis of Thompson's acceptance: and Rast's only authority being to obtain that acceptance, the contract was closed by Rast by taking possession.

It is objected, that, although the part execution be adjudged to take the contract of the parties out of the statute, and to let in parol evidence of the contract actually made, yet, as the defendant has denied the contract alleged in the bill, the single testimony of Rast is not sufficient, in this Court, to establish it, in opposition to the defendant's denial. This objection is neither exactly accurate, nor does it do justice to the defendant, himself. It is not true that his answer

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is contradicted by Rast: *because the defendant does not, in fact, deny the contract as alleged. To the allegation that Rast, as agent of the defendant, made a contract, in certain terms, the defendant answers that he gave Rast specific authority. This is not, in my opinion, such a direct denial of the contract alleged, as renders it necessary to prove it by two witnesses.

So far, I am with the plaintiff in this case: but the principal difficulties of the case are yet to be considered.

The plaintiff, at the time he made the agreement to sell, had not the legal title. But he had the equitable title: and the general principle is, that where the vendor has the equitable title in him, the getting in the legal title is a matter of conveyancing.

The plaintiff had the ability, at some time, sooner or later, to make a good legal title. Was there anything requiring him to make it out sooner than he has done?

I have said that the contract proved, did not provide for the making of titles at a specified time: and, in such cases, time is not generally essential.

Where a specific time is fixed by contract, it may generally be insisted on: and, when insisted on, the contract will not be enforced, unless there be a substantial compliance with its terms.(c) But parties who may insist upon the terms, may also waive them: and he who, either expressly or by his conduct, makes such a waiver, has no right afterwards to take advantage of the other party, by holding him literally to the terms which he has waived.(d)

On the other hand, where no time is fixed in the contract, the party who is to make the conveyance will not be permitted, on that account, to trifle with the interests of the opposite party by unnecessary delay: and

(b) 1 Mad. Ch. 377; 1 Fomb. 180, note (d); Sug. Vend. 83, 84; Atkins, on Titles, 66; 1 Ves. 221, 297; 1 Serg. & R. 80; 2 Johns. R. 587; Gunter v. Halsey, Amb. 586; 3 Atk. 3; 15 Mass. 85; 3 Burr. 1919; Kirby, 400; 1 Des. 350; 2 Des. 590; 4 Des. 77; 3 Ves. 39, note; 12 Ves. 26.

(c) 1 Johns. Ch. 374, et seq.

(d) 2 Story Eq. § 776.

it is in the power of that party to fix some reasonable time—not capriciously or unreasonably, or for the purpose of surprising him, and thus getting clear of the bargain, but a reasonable time, according to the cir-

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cumstances *of the case—within which he will expect the title to be made, at the peril of rescinding the agreement.(c)

These principles are clear. There is no mystery about the doctrine. Good faith is to govern in all cases.

There was, in the contract in this case, not only a want of stipulation as to the time when titles were to be made, but possession was to precede the title, and was taken accordingly.

Now, out of this possession arises another difficulty. It is contended by the plaintiff, that so long as this possession was retained, it was a continual waiver of all objections to the title, or of the defendant's right to complain of the delay in making it out.

But where the contract authorizes possession to be taken before a title is made, the fact of possession cannot, by itself, be used against the purchaser, for that would be contrary to the very terms of the contract.(f) Nor is his taking possession with the vendor's concurrence, a waiver of any right to call for a good title: and the vendor's subsequent delivery of abstracts, or negotiations on the subject, render this clear. Nor will ordinary acts of ownership, after possession, vary the rights, as arising from possession: for what can be the purpose of taking possession, but to act as owner?

A purchaser, who goes in under a contract for a good title, cannot be compelled, from the mere fact that he is in possession, to accept a bad or defective one. Nor is his possession any justification to the vendor in unreasonably delaying the title: nor will it, of itself, deprive him of the right to complain of such delay.

The reasonable doctrine to be deduced from all the authorities is, that this point, like every other, must depend upon good faith and fair dealing.(g) A party in possession will not be allowed to retain the possession, and, at the same time, insist on an entire rescission of the contract: and, so long

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as he retains the *possession, it is, unless under peculiar circumstances, so far, a waiver of all anterior objections, whether of defects in the title, or delay in completing it, that if title is made to him, while yet in possession, he must accept it. Why does he remain on the land, unless he is waiting for the title?

In this case, it does not appear, that at

the time of the agreement of purchase, Mr. Duiles had been informed of the state of the plaintiff's title, and it is fair to presume that he took possession in ignorance of it.

The contract he made was executory in every particular, except as to the possession. But in April, 1847, it appears from his letter, he was apprised of the state of the title. When he received this information, he might, perhaps, at once, have put an end to the agreement, by abandoning his occupancy of the land then in his possession, though, as his crop was pitched, the sacrifice would have been unreasonable. But he remained on it (constantly calling for the title, however,) for the year 1847. And in 1848, he took possession of the entire premises, and held it until the end of that year also.

During all this time, he was urgent for the title, and ready to perform his part of the agreement. There was neither neglect nor default on his part. If there was unreasonable delay on the vendor's part, he had a right to complain of it, and his waiver of that right extended only so as to make the contract obligatory on him, if the complaint was removed before he abandoned it.(h)

And here, I think, is the main difficulty in the way of the plaintiff. It appears to me, he was too indifferent to the interests and claims of the defendant, as a purchaser, and, by his delay, kept him in suspense for an unreasonable time, not only as to his ultimate right to the property purchased, but also as to the plans and arrangements which the defendant had, at the outset, informed him he must make, in consequence of the purchase.

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*An eminent elementary writer (i) says, that "the exercise of this whole branch of Equity jurisprudence, respecting the rescission and specific performance of contracts, is not a matter of right in either party: but it is a matter of discretion in the Court. Not, indeed, of arbitrary or capricious discretion, dependent upon the mere pleasure of the Judge, but of that sound and reasonable discretion, which governs itself, as far as it may, by general rules and principles: but, at the same time, which withholds or grants relief according to the circumstances of each particular case, where these rules and principles will not furnish any exact measure of justice between the parties."

In another place, he says, that though time is not, generally, deemed in Equity to be of the essence of contracts of sale, unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract, yet, "Courts of Equity have regard to time, so far as it

(c) 2 Story Eq. § 777.

(f) 2 Sug. 65, chap. 8, § 1, pl. 26, 27, 28, 29, and see chap. 4, § 4.

(g) 2 Sug. 21, chap. 8, § 1, pl. 27.

(h) 2 Sug. chap. 8, § 1, pl. 44; and Knatchbull v. Grueber, 1 Mad. R. 91.

(i) 2 Story Eq. § 742.

respects the good faith and diligence of the parties." (j) He observes further, that "if circumstances of a reasonable nature have disabled a party from a strict compliance, or if he comes recente facto to ask a specific performance, the suit is treated with indulgence, and generally with favor, by the Court." "But, then," says he, "in such cases it should be clear," "that compensation for the delay can be fully and beneficially given," and "that he who seeks a specific performance is" not only "in a condition to perform his own part of the contract," but, "that he has shown himself ready, desirous, prompt and eager to perform the contract." (k)

Ch. Justice Marshall says, in *Brashier v. Gratz*, 6 Wheat. 584, [5 L. Ed. 322], "If a bill be brought by a party who is himself in fault, the court will consider all the circumstances of the case, and decree according to those circumstances."

Chancellor Kent, in *Benedict v. Lynch*, (1 Johns. Ch. 377), cites with approbation the

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doctrine laid down by Lord Hardwicke, (4 Vesey, 450), where the enforcement of contracts is put upon the footing, that "the non-performance has not arisen by default of the party seeking to have a specific performance;" and adds, "so it was held in the case of *Hayes v. Caryll*, as early as 1702, 5 Vin. 538, pl. 18, that where one person has trifled, or shown a backwardness in performing his part of the agreement, Equity will not decree a specific performance in his favor—especially if circumstances are altered."

In *Fordyce v. Ford*, (4 Bro. 494), Lord Alvanley said, "the rule, now, is, that if either party has been guilty of gross negligence, the Court will not lend him its aid, to complete the contract." Though, in that case, his Lordship decreed a specific performance, he added, that he hoped it would not be understood, that a man entering into a contract should think himself entitled to take his own time to perform it. (l)

I am aware that most of these observations were made in cases where a specific time was stipulated, in the contract, for the performance of the acts which the parties seeking a specific execution had omitted. But, in principle, there is no distinction between negligence to come up to a time stipulated, and negligence to perform duties which are incumbent, although no time is fixed in the contract. The principle is sound and just, and demanded alike by morals and by policy, that he who has neglected to perform a duty which he might have performed, and ought to have performed, has no claim upon the Court to compel the other party to perform his engagements. Whenever such negligent

party comes into this Court, he must be told that he has neglected to do Equity, and has therefore deprived himself of the Equity he claims. "An Equity arising out of one's own neglect," exclaims Lord Loughborough, in *Lloyd v. Gillett*, (4 Bro. 406). "It is a singular head of Equity." (m)

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*There are cases in which the Court will help neither party, but will leave them both to their remedies at Law: of which the cases of *Gillam v. Briggs* [Rich. Eq. Cas. 432] and *Briggs v. Gillam*, mentioned by Chancellor Harper, in *Whitworth v. Stuckey* [1 Rich. Eq. 404], are examples. One of these bills was by the vendor, to enforce the contract of sale, and the other by the purchaser, to rescind it. Both bills were dismissed, on the ground of laches in the parties who filed them, and they were left in the condition they had placed themselves.

In this case, it is true, that by the terms of the contract, the making of titles was not a condition precedent to the defendant's first payment, as he seems to have supposed. The titles and the payments were independent. But if the defendant, after omitting his part of the contract, had filed his bill for titles, I should have dismissed it. And so here, the plaintiff seeking to enforce payment, is not entitled to a decree, because he neglected to perform his own part of the agreement.

In the case before me, it is difficult to perceive any excuse for the delay of the plaintiff to perfect his title. It was not a delay arising from, and made necessary by, the state of the title. If he had proceeded diligently in proper steps to perfect his title, and the proceeding had been necessarily protracted by the difficulty of the proceeding, he might have been excused. But that was not the case. The co-heirs of his mother were around him; yet he never appears to have even presented deeds for their signatures, till the very end of 1848. The infant heiresses of William Sabb Thompson and Mrs. Hampton were not moved against till 1851, and then there was no difficulty. Was not this delay in taking proper steps, or any steps, the merest laches, unless the plaintiff accounted for it? Was it not necessary for him to excuse himself by evidence? And what single circumstance has he shown, which prevented his proceeding? He was made aware, by the second letter of the defendant, what his plans and purposes were in the purchase, and could not expect that he would venture to sell woodlands in order to cover this purchase, until he was assured of the title.

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*He should, therefore, have had sufficient

(m) *Smith v. Clay*, Amb. 645; 3 Bro. c. v. 640, note; *Berkford v. Wade*, (17 Ves. 87), and see 2 Rich. Eq. 441. "Nothing," says Lord Camden, in *Smith v. Clay*, "can call forth the Court into activity, but conscience, good faith, and reasonable diligence. Where these are wanting, the Court is passive, and does nothing. Laches and neglect are always discountenanced."

(j) 2 Story Eq. § 775.

(k) 5 Ves. 720, note b, citing *Milward v. Thanet*.

(l) See *Milward v. Thanet*, (5 Ves. 720, note,) and *Guest v. Homfray*, (Id. 518.)

regard to his interests to have made him diligent in getting in his title.

But look at the time the plaintiff allowed to elapse without taking one single step to get it in. From February or March, 1847, when the agreement was made, the defendant was continually importuning him to perfect it, holding himself ready the whole time to perform what was incumbent on himself. He pointed out the defects in the title, and requested that the plaintiff should proceed to cure them. This importunity continued until near the close of 1848, and not a single step appears to have been taken by the plaintiff until the 25th of December, 1848, when he got in the deeds of some of his mother's heirs.

This was done under the spur of the notice extended by the defendant's letters of the 11th and 23d of December, 1848. If so much could be done in that short interval, what excuse can be given for the total neglect of, and indifference to, the previous importunities of nearly two years?

If the defendant had not been constantly pressing the plaintiff to take steps to perfect his title, before he gave the notice of the 23d of December, 1848, I might have inferred that he was acquiescing in the plaintiff's laches up to that time, and that so sudden a notice was calculated to surprise him. (n) But the whole correspondence repels that idea. The plaintiff could never, for a moment, have supposed, from anything in the defendant's letters, from first to last, that he was disposed to acquiesce in the least delay. He was indulgent, not acquiescent, and his kind forbearance should not, in good faith, be unreasonably turned against him. To all appearance, if he had not abandoned the premises and the contract, the plaintiff would never have proceeded to deduce his title. Was the defendant to wait forever?

It has been argued, that because the defendant, in throwing up the contract, offered

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the objection that he was advised good *titles could not be made, therefore he had no other justification for that act. Did the fact that the plaintiff could make good titles, justify his laches in not making them? Is it usual to limit a defendant to a single ground taken by him, merely because he fails to state others, equally, and indeed, more just? We might, it is true, infer, from the defendant's silence on that occasion, as to the plaintiff's laches, that though sensible of it, he had waived it; but when we look to his previous letters, in which his constant theme is "no delay:—make the titles forthwith,—early:—at once—I am acting under restraints until I get them," &c.—are these evidences of waiver? or are they not evidences of a contrary character? And as to the defendant's prolonged indulgence—its length is only proof

of the extent of his injury. Will it do to say, that the greater the delay—the more ripe the offence—the greater proof is the ending of it that complaint has been waived?

Though a party be not bound to make titles at a fixed time, he is, nevertheless, bound to make efforts to complete them in a reasonable time. If such a party manifests diligence, he will generally be sustained, if he is able to make titles at the time of the decree. But where there is not the least trace of diligence—but the reverse—I think it would be a sacrifice of sound policy to grant such indulgence. It must necessarily encourage laches, and leave the opposite party subject to unreasonable suspense and vexation.

In concluding to refuse the application for specific performance, I avail myself, with pleasure, of the offer of the defendant to make reasonable compensation for his use of the premises.

It is ordered, that the bill, so far as relates to a specific performance, be dismissed with costs; and that it be referred to one of the Masters, to inquire what sum should be paid by the defendant to the plaintiff, for his use of the land, the subject of the suit.

The plaintiff appealed, for the following reason:

That, as time was not of the essence of the

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contract, as his *Honor has well shown, the circumstances of this case entitle the complainant, on grounds of Equity, and according to the rules of this Court, to a specific performance.

1. That after the defendant had taken possession, the sale was not executory, but executed: so that the question is, rather about the rescinding than about the performing of a contract. That defendant has shown no sufficient cause for rescinding his agreement, and would probably never have thought of doing so, but for the advantage, which he supposed that he had in the provisions of the statute of frauds—an advantage which he owed to the suppression of his letter to William R. Rast, which, from the testimony of Rast, there is every reason to believe, came to his hands.

2. That all the delay was between February, 1847, and January, 1849. That great part of that delay is accounted for by the death of Mrs. Hampton. That complainant was not inactive: that he employed defendant's solicitor, who made progress, and obtained the releases of December, 1848: and the necessity for legal proceedings probably prevented him from going further. That, as soon as defendant assumed a position adverse to the fulfilment of his contract, complainant employed counsel, who lost no time in furnishing an abstract of the title, by their letter of the 9th February, 1849, and the bill was filed as soon as a reasonable time had been allowed to defendant to consider whether he would answer that letter.

(n) 2 Sug. 21, chap. 8, § 1. pl. 44; Knatchbull v. Grueber, (1 Mad. R. 91.)

And the cause was actually at issue before the day for the last payment had arrived.

3. That legal proceedings were necessary, not only to get in the legal estate vested in the infants, but to satisfy the defendant's doubts: for it is evident that he retained those doubts up to the time of the hearing, and that, even if complainant had been as ready in 1848 as he was at the hearing, he would have met with the same resistance. So that the case presents, in fact, an example of a purchaser, who would accept of no title, but such as would be pronounced

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good upon the hearing of a bill *for specific performance: and setting up, as a defence, that delay which he rendered inevitable.

Lastly. The defendant's possession was not disturbed, or threatened, or ever in danger: and the delay of the conveyances, which is the only matter of complaint, neither caused him any loss, nor deprived him of any opportunity of gain.

Taber, Petigru, for appellant, cited Morphet v. Jones, 1 Swanst. 172; Palmer v. Richardson, 3 Strob. Eq. 16; 2 Story Eq. § 776-7; Atk. on Tit. 20 Law Lib. 70; Radcliffe v. Warrington, 12 Ves. 326; Reynolds v. Nelson, 6 Mad. R. 26; Sugd. Vend. 282 et seq.; Pinke v. Curteis, 4 Bro. C. C. 329; Seton v. Slade, 7 Ves. 265; Langford v. Pitt, 2 P. Wms. 629; 6 Bro. P. Cas. 291; Hoggart v. Scott, 2 Russ. & M. 293; Hepburn v. Auld, 5 Cra. 262; Paton v. Rogers, 6 Mad. 256; Roach v. Rutherford, 4 Des. 136; 1 Sug. 415; Nokes v. Kilmorey, 1 DeG. & Sm. 444.

DeSaussure, contra, cited 2 Story, § 81-9, 771-8; 1 Wheat. 204; 5 Ves. 736; Id. 818; 4 Ves. 667; Heapy v. Hill, 1 Cond. Eng. Ch. R. 332; Watson v. Reid, 4 Id. 404; Benedict v. Lynch, 1 Johns. Ch. 370; 6 Wheat. 528; Taylor v. Brown, 2 Beav. 180; Perkins v. Wright, 3 Har. & McH. 326; 2 Wheat. 290; Bryan v. Reed, 1 Dev. & Batt. 78; 2 Cox Eq. C. 221; Dick. 400; Southcombe v. Exeter, 6 Hare, 213.

The opinion of the Court was delivered by

DUNKIN, Ch. This Court is so well satisfied with the conclusions of the Chancellor, upon the several legal propositions discussed in the decree, that it is deemed unnecessary to express more than a general concurrence in the principles announced. And in the application of those principles to many of the questions involved, the Court is equally well satisfied. The decree substantially determines, (and we think rightly,) the existence and validity of the contract of February, 1847, of which the complainant asks the specific performance; that possession was taken by the defendant under that contract, and that

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the plea of the *statute of frauds was inapplicable. It is further ruled, that when the complainant entered into the contract, he

had a good equitable title to the premises, of which he was in possession, and which he agreed to convey to the defendant.—the complainant had, in the language of the decree, "an equitable title, with the ability, at some time, sooner or later, to make a good legal title;" and furthermore, that "the contract proved did not provide for the making of titles by a specified time." "There was in the contract," says the Chancellor, "not only a want of stipulation as to the time when titles were to be made, but possession was to precede the title, and was taken accordingly." The decree also determines, after fully considering the defendant's exceptions to the Master's report of July 1, 1851, that the complainant had then a good legal title to the premises, and that, "if there is any impediment to the enforcement of the contract of sale, it does not consist in a present insufficiency in the title, but must arise from some other cause." The Chancellor then reviews the correspondence, and the conduct of the parties, from February, 1847, to the latter part of December, 1848, and concludes, that in consequence of the neglect or unnecessary delay of the complainant, under the circumstances, the defendant was well warranted in his abandonment or surrender of the premises, on January 1, 1849, and that the complainant was not entitled to the aid of this Court.

Although, as Mr. Sugden declares, "every case of this nature must, in a great measure, depend upon its own particular circumstances," (p. 445.) yet there are certain leading principles, which direct the judgment of the Court, in granting or refusing relief, where time is not an essential part of the contract. These are clearly stated in the decree. Where no time is fixed in the contract, or where time is not essential, it will not, however, be permitted to the party, who is to make the conveyance, to trifle with the interests of the opposite party, by unnecessary delay; and it is in the power of that party to fix some reasonable time, not capriciously or with intent to surprise, but a reasonable time according to the circumstances of the case, within which he will

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*expect the title to be made, at the peril of rescinding the agreement. These sound principles are abundantly sustained by the authorities cited. It remains only to add, that, after such pre-emptory notice, it becomes the party notified, if, from any cause, he is unable strictly to comply, to apply promptly for the aid of the Court by filing his bill.

About the principal facts, there is no dispute. As early as April, 1847, the defendant, having examined the complainant's papers, was aware of the defects in his legal title, and brought them to the particular notice of the complainant. In that year, however, he went into possession of part of the premises, and, in January, 1848, he took possession of

the whole, and planted and gathered the crop of that year. By the terms of his agreement, he was to pay the complainant one thousand dollars, on March 1, 1848. In his letter from Philadelphia, of January 11, 1848, he suggests to the complainant the propriety of having the land papers prepared at once, and when they are completed, submitted to the defendant's legal adviser, Mr. Hutson, of Orangeburgh, who would examine them, and advise him, so that he should be prepared to act. It does not appear, that the defendant made his payment of March 1, 1848, although, as the Chancellor has ruled, "the making of titles was not a condition precedent to the defendant's first payment, as he seems to have supposed." We concur with the Chancellor in this construction; and yet the defendant may, very excusably, have supposed that they were dependent covenants, and the complainant may also very well have supposed, that this was the extent of the penalty he might incur, for not having the title completed at that time. Certainly, the complainant should have taken measures to perfect his title prior to January, 1848, and the duty was still more imperative during that year. Viewing his conduct in the most favorable light, he was guilty of neglect; and the only inquiry is, as to the effect of that neglect on the rights of the parties. There is no arbitrary rule upon the subject. It depends very much, not only upon the situation and conduct of the parties, but also upon the state of the title. In 1847, the

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*defendant was let into possession of part of the premises, and in January, 1848, of the whole, under the contract set forth in the pleadings. He continued to use and cultivate the premises during these years. Early in 1847, he was aware of the complainant's equitable title, and became also informed of the infirmity or defects in his legal title. These were brought by him to the notice of the complainant, in the spring of 1847; and his entry into full possession in January, 1848, was done with perfect consciousness that the legal title was yet incomplete. In his letter of January 11, 1848, he says. "I take the liberty of suggesting the propriety of having the land papers prepared at once, and if, when they are completed, they are handed to Mr. Hutson, of Orangeburgh, who has attended to my law business, &c." The evidence affords strong reason to infer, that the complainant, as the most ready and certain mode of complying with this suggestion, addressed himself to the same professional gentleman for the purpose of having the papers prepared. An important defect in the complainant's chain of title was the want of a conveyance from the co-heirs of his deceased mother, Mrs. Elizabeth Thompson,—the partition of that estate, under which the complainant had held exclusive possession since 1839, having been informal. The deed

of conveyance for this purpose, to be executed by the several parties who were of age, was adduced at the hearing. It is in the hand-writing of Mr. Hutson, is dated by the draftsman, as prepared for signature, in the year 1848. The month was left in blank, and also the year of Independence. From which it is most probable that the deed was prepared prior to July 4, 1848. This conveyance was executed by the parties on December 25, 1848, and the renunciation of inheritance within fifteen days afterwards.

The other defects in the complainant's legal title were not to be supplied by so plain a process. A release from Mr. and Mrs. Hampton was to be obtained, and a conveyance from the infant heir of William Sabb Thompson; and it became furthermore necessary to establish by parol evidence the legal title of the complainant in the interest

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of Thomas Sabb, or the extinguish*ment or satisfaction of that interest. In the Spring of 1848, Mrs. Hampton died, and the infancy of her child added, very materially, to the difficulty and embarrassment in perfecting the legal title. It was for some time doubtful in what mode these difficulties could be obviated. So serious were they, that, in the judgment of Mr. Hutson, they had become insurmountable, and so, in the course of the year, he informed the defendant; for, on December 11, 1848, he writes to the complainant that he must relinquish the purchase, (not as it would seem from the letter, on account of the delay in completing the legal title,) but because of "being advised by his attorney, after an examination of the complainant's papers, that a clear title could not be made." It is now manifest, and it is so adjudged, that in this opinion the legal adviser of the defendant was mistaken. The difficulties have been removed, and the legal title perfected. But the embarrassing state of the title has always been recognized as affording a reasonable excuse for delay, and especially under the circumstances of this case. Where "a purchaser is aware of the objections to the title, and proceeds with the purchase, although the time fixed for the completion of the contract may have elapsed, and a much longer period may be requisite in order to make a good title, he will be held to have waived his right to object to the delay, and not be enabled to resist specific performance." See a collection of the cases in a note to *Seton v. Slade*, 2 vol. 2 part, p. 15, *White and Tudor's Lead. Cases in Equity*. But the defendant, in his letter of December 11, 1848, for the first time, notifies the complainant of his intention to relinquish the purchase, for the reason therein stated; and, in his more formal communication of the 23d of the same month, advises him, that if good titles are not tendered by the 1st January, he should consider the contract at an end; and accordingly, on January 1, 1849, he in-

forms him of the abandonment of the premises and of the contract. It is hardly necessary to say, that if it was the duty of the defendant, after having determined to abandon his purchase, unless the legal title were completed, to give the complainant reasonable

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notice of his intention, or, in "the language of the authorities, "to fix some reasonable time, according to the circumstances of the case, within which he would expect the title to be made, at the peril of rescinding the contract;" this notice was entirely insufficient. The defendant had been, during the whole year, in the full and undisturbed enjoyment of the premises which he had agreed to purchase. He had paid no part of the purchase money, although one thousand dollars had been payable on March 1, 1848. In his letter of April 13, he refers, it is true, to the delay in relation to the titles, but he says, "I am ready now, as I have been, to make the first payment when the titles were prepared, and I only wait your action." The complainant might very well understand from this, that the defendant intended to make no payment until the title was completed. But there is no evidence of his being apprised of any more serious consequence of his delay, until the receipt of the defendant's letter of December 11, communicating the legal opinion that a clear title could not be made, and the notice of 23d December, that unless good titles were made within eight days, the contract would be rescinded. From this period, certainly, the complainant seems to have been sufficiently on the alert, not only in having his title completed, but, as we all think, in applying for the aid of this Court in enforcing the performance of the contract. In the letter of his solicitors, of February 9, 1849, they inform the defendant of the precise nature of the difficulties in relation to the title, of the causes of delay, and of the mode of removing them, and intimate, if their opinion should not be satisfactory, as to his obligation to complete the contract, that he might select the forum, either of the State or Federal tribunals, in which the matter might be adjudicated. The bill was accordingly filed in August succeeding.

A recent decision in the English Court of Chancery has been brought to our notice, not as enunciating any novel principle, but as exhibiting the judgment of an able Chancellor in the application of well known and established rules. *Southcomb v. The Bishop of Exeter*, (6 Hare, 213,) 31 Eng. Ch. Rep. 212, is very analogous, in many of the cir-

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cumstances, to this case. *The bill was by the vendors, for the specific performance of a contract. It was dated October 16, 1840. The purchaser was to pay 20 per cent. deposit, and the balance on the 29th September, 1841, at which time the contract was to be completed, and the purchaser to have pos-

session. The abstract of title was delivered on the 30th October, 1840. After some correspondence in relation to the title, the defendant on August 20, 1841, informed the complainants, that his legal advisers regarded the title as defective, and desired the plaintiffs to regard that letter as notice of his intention to rescind the contract. Subsequent correspondence, however, ensued, but always under protest that the defendant relied on this notice. The correspondence was not concluded until January 17, 1842, when the defendant's solicitors informed the vendors' solicitors that their client would fall back to his position under the rescinded contract, and referred to the letter of August 20, 1841.

The bill was not filed until 30th August, 1843. The Vice-Chancellor (Sir James Wigram) says, "the position of the vendors and purchaser, in this case, was this: on the 20th August, 1841, the purchaser had taken upon himself to declare the contract at an end, &c.;" and then adverts to the other circumstances. "Now, if," says he, "the plaintiffs had, immediately on the receipt of the Bishop's letter of the 20th August, 1841, or had, within a reasonable time afterwards, filed their bill, I could have had no doubt of the vendors' right to the common reference as to title." The bill was, however, dismissed on the ground of the delay from 17th January, 1842, till 30th August, 1843. "I dismiss the bill," says the Vice-Chancellor, "upon the sole ground of the vendors' delay in filing the bill, after the purchaser had give him distinct notice that he asserted a right to rescind the contract, and considered it at an end." According to this decision, the complainant, in the cause before us, was entitled to the common reference of title; and it being well settled that the vendor is entitled to a decree, if he can make out the title at the time of the Master's report, we are of opinion, that the plaintiff is entitled to the aid which he seeks.

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*It is ordered and decreed, that upon the execution, by the complainant, of a conveyance in fee simple of the premises described in the pleadings, with the usual covenants, and delivery of the same to the defendant, or his solicitors, the defendant pay to the complainant the purchase money, to wit, the sum of six thousand dollars, with interest on the several instalments as they successively became due, according to the contract recognized and established by the Circuit decree, and that the premises stand pledged for the payment of the same.

It is finally ordered and decreed, that the costs, up to the filing of the Chancellor's Circuit decree, be paid by the complainant, the subsequently accruing costs by the defendant.

DARGAN and WARDLAW, CC., concurred.

Decree reversed.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT COLUMBIA, SOUTH CAROLINA—MAY TERM, 1853.

CHANCELLORS PRESENT,

HON. JOB JOHNSTON,

" BENJ. F. DUNKIN,

" GEORGE W. DARGAN,

" F. H. WARDLAW.

5 Rich. Eq. *405

*MARTHA F. OWENS and Others v. E. G. SIMPSON and Others.

(Columbia. May Term, 1853.)

[Wills ⚡714.]

A. B., who was old and infirm, requested C. D., her friend and connection, to take up an execution, for about \$800, which was pressing her;—he did so, and she gave him a confession of judgment for \$1,000. He afterwards, at her request, took up another execution against her, for about \$130, and she gave him another confession, for \$500. A. B. afterwards made her will, bequeathing to C. D. \$1,200, and directing payment of her debts out of the residue of her estate;—*Held*, upon the evidence, that C. D. was not entitled to hold, as creditor of A. B., the two judgments he had taken up, and the two confessions also—that he could claim only the two confessions;—*Held*, further, that the legacy was not given as satisfaction of the two confessions.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1702; Dec. Dig. ⚡714.]

[Wills ⚡490.]

Parol evidence was inadmissible, to show that the legacy was intended as satisfaction.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1055; Dec. Dig. ⚡490.]

[Wills ⚡714.]

That the legacy is less than the debt, and that the testator makes provision for the payment of debts, is sufficient to destroy the presumption that the legacy was intended as satisfaction.

[Ed. Note.—Cited in *Sullivan v. Latimer*, 38 S. C. 166, 17 S. E. 701.

For other cases, see Wills, Cent. Dig. §§ 1698-1703; Dec. Dig. ⚡714.]

Before Dunkin, Ch., at Abbeville, June, 1852.

Dunkin, Ch. Sarah Cunningham departed this life on the 28th April, 1851. She was, at

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the time of her death, seventy-two years of

age; had been, for many years, infirm, and was, latterly, in many respects, of weak mind. Her will bears date the 16th January, 1851. By the first clause, after certain specific bequests, and a direction of sale, she bequeaths twelve hundred dollars to the defendant, Dr. Edward Simpson, and then directs that the balance of her estate, after payment of her debts, be divided between the children of Elizabeth Owens, who are two infants of tender years, the complainants in these proceedings.(a) The defendant and Thomas Payne were appointed executors, the latter of whom never qualified. Immediately after the death of the testatrix, the defendant caused the real and personal estate of the testatrix to be levied on by the sheriff, under executions in his office, owned by the defendant, and, within a week after her decease—to wit, May 5th, 1851—the property was sold, and purchased by the defendant, for the sum of \$3,879. On the 15th May, 1851, defendant proved the will and qualified as executor, and on 30th of same month, a sale was made by him of the residue of the personalty, for \$334.46, at which sale, it is alleged, the defendant was the principal purchaser; but the sale bill was not put in evidence. On the 21st Janu-

(a) The will, after certain bequests of household furniture, is as follows: "It is my will and desire, that all the balance of my estate both real and personal, be sold at the discretion of my executors, and be distributed as follows, viz: 6th. I do give and bequeath to Dr. Edward Simpson twelve hundred dollars. 7th. It is my will and desire that all the balance of my estate, after paying my just debts, be equally divided between the children of Elizabeth Owens. 8th. And last, I do hereby appoint my friend, Dr. Edward Simpson, and my friend, Thomas Payne, executors of this, my last will and testament."

ary, 1852, (less than nine months after the death of the testatrix,) the defendant says he had a regular account and settlement with the Ordinary, "by which it will appear that, after the payment of the executions aforesaid, the assets were not sufficient to pay the legacy to the defendant, by near two hundred dollars, which legacy, under the will, was to be first paid. The defendant, therefore, insists that the complainants, who are merely residuary legatees under the will, have no available interest in the estate of the said Sarah

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Cun*ningham, and that there is no necessity for a new accounting in this Court, in relation to the said estate." It appeared, by the testimony of Allen Vance, that at the sale of Sarah Cunningham's property, the defendant said to witness that the negroes would be sold, and asked witness not to bid against him; that he would take it as a favor if he would not bid against him; that he wished to buy the negroes himself; the witness did not consent, however, not to bid against defendant, as defendant declined the terms proposed by witness. The negroes brought a fine price. Under these circumstances, it is not remarkable that the friends of the complainants should desire an inquiry into the regularity of the transactions by which the bountiful intentions of the testatrix towards them have become illusory.

The testatrix was a resident of Abbeville district, being possessed of a plantation and a few slaves, who, from indulgence, were of very little value to her. Being indebted to Joel Smith, she confessed a judgment to him, on the 4th May, 1847, for eight hundred dollars, fifteen cents, with interest from 1st Jan. previous, on which execution was lodged in Abbeville district. On the 28th March, 1848, the testatrix confessed a judgment to defendant for one thousand dollars, with interest from the day of the confession. On the following day, an execution was lodged in the office of the sheriff of Laurens district, but was not lodged with the sheriff of Abbeville until after the death of the testatrix. On the day last mentioned, Joel Smith's judgment was assigned to the defendant, who claims the amount of both judgments from the estate of the testatrix.

On this subject, the answer of the defendant states, among other things, that the testatrix was an old widowed lady of seventy-two or three years of age; that she owned a small tract of land and five slaves, to wit: one man and four women; that she was much attached to her negroes, and very indulgent to them, and, for some time prior to 1848, had not made a support; that her nearest relations were Dr. Robert Campbell, of Laurens district, a brother, whose daugh-

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ter witness had mar*ried, some other nephews, and the complainants, who are the great-grandchildren of the testatrix's deces-

ed brother, Angus Campbell; that "the testatrix was greatly troubled and excited, when, on the 5th January, 1848, the sheriff of Abbeville district, under the execution of Joel Smith, made a levy upon her land and negro woman, Lucinda." "Upon that occasion, when she saw the property was about to be sold, and her cherished object, of keeping her negroes together until her death, defeated, testatrix went to Laurens district, to the house of her brother, the said Dr. Robert Campbell, to see this defendant, who was there living with his father-in-law, the said Dr. Campbell." She stated to him her condition and distresses—"that her property was about to be sold, under an execution which Joel Smith had obtained against her; that she was very desirous to have a home while she lived," &c. "Testatrix proposed to defendant, that if he would assist her to keep her property together—if he would procure an assignment to himself of the Smith judgment, and wait for the payment of it until her death, she would give him a thousand dollars, to be paid at her death, and she proposed to secure him the thousand dollars by any writing which would accomplish the purpose." "Defendant thanked her for her kindness," &c. He "then immediately went to Stoney Point, in Abbeville district, to see Joel Smith, and induce him, if possible, to stay his execution for a time, and, upon defendant's representing to him that the money should be paid in the Spring, he consented to wait until sales' day in April then next." Defendant borrowed the money, by giving his own note, with security. About the same time, he mentioned the matter to a relative acquainted with legal forms, stated the proposition of the testatrix, and asked his advice "as to what paper ought to be prepared and signed, to carry out the agreement." "He advised a confession of judgment, which could be stayed until her death." "He accordingly procured a blank confession from a legal friend, who also concurred in the advice, and, on the 28th March, 1848, accompanied by Dr. Campbell, he went over to Ab-

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beville, to the house of testatrix. *The agreement was rehearsed, and she signed the note and confession of judgment in his presence. Dr. Campbell suggested, at the time, that the note would bear interest, and that, as the money was only to be paid at her death, some understanding ought to be had upon that object. Testatrix was unwilling that interest should run, and the defendant gave her an instrument in writing, that he would not exact the interest." On the same day he went to Joel Smith's, paid him the amount due on the execution, and took his receipt. The assignment was executed afterwards, but dated as of that date.

From this statement, it would appear that the moving cause of the testatrix's distress, when she applied to the defendant in Janu-

ary, 1848, was her apprehension of being broken up by Joel Smith, who then held the only execution against her property. "She was greatly troubled and excited," says the defendant, "when, on the 5th January, 1848, the sheriff of Abbeville, under this execution, levied upon her land and her negro woman Lucinda." She went to defendant, told him her property was about to be sold under this execution, and thereupon made the proposal stated. The defendant "went immediately to Stoney Point, to see Joel Smith, and induce him, if possible, to stay his execution for a time." Now, Joel Smith was examined as a witness before the Commissioner. On his cross-examination, he says the testatrix was "old and childish. She was desirous of keeping her property together; is convinced that the influence of her negroes prevented her from selling them; that she always appealed to witness for indulgence; that he was certain his debt was sure. Dr. Campbell and witness concluded that the best thing that could be done for her was that the property should be sold, and thereupon a levy was ordered. Payne (nephew of testatrix) may also have spoken to witness as to the propriety of ordering a levy. In having the levy made, witness was, to some extent, influenced by the representations of her friends. His object was not to injure, but to benefit her, by the course he took. He thinks he

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would *have sold the property twelve months earlier, had it not been for her friends."

Dr. Campbell's evidence accompanies this decree. He states his presence when the \$1,000 note was signed. It was drawn either by witness or the defendant. He said he had no particular conversation with the testatrix upon the subject. She was at witness's house. She was uneasy about Smith's judgment, and wanted it satisfied, (this was probably at the first meeting.) He says, that when the confession was given, defendant brought the papers ready. She wished the Smith judgment paid off; it was paid off, but it was kept as a lien upon the property. "Witness told her that she might certainly be easy for a year; that defendant would be easy with her. The \$1,000 had nothing to do with the Smith judgment. The \$1,000 was given to defendant in consideration of what he had done, was to do, and his connection in the family. It was a gratuity for services and connection in the family." He says afterwards, "The \$1,000 was a free gift." Witness says "he never liked the confession, and preferred it should be a deed of gift, and he (witness) proposed to draw it; but the defendant had consulted some of his friends. Testatrix did not object to the form of a gift, as it would be the same."

It seems that, some time after this transaction, to wit: on the 23d October, 1848, one Thomas Stewart obtained a judgment against testatrix for one hundred dollars, with inter-

est from 8th February, 1844, and lodged execution thereon in the office of the sheriff of Abbeville. On the 27th February, 1849, the testatrix confessed a judgment to the defendant for the sum of five hundred dollars, with interest from that day, on which judgment execution was lodged on the 1st March, 1849, in the office of the sheriff of Laurens district. It is charged that the defendant had agreed to pay off and satisfy the Stewart execution, and that the latter judgment was only intended as an indemnity or security to him. The defendant's answer is very much at length, and it is proposed only to state the

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substance *of it, which is, that Stewart had levied on the land of testatrix, and she again applied to defendant for advice and assistance. Proposed if he would get an assignment of the Stewart judgment, and wait for the payment till her death, and would take charge of herself, and her property, &c., "she would give him a confession of judgment for five hundred dollars, which was to be staid until her death, but which was to bear interest." That on 26th February, 1849, defendant having already paid a part of the Stewart execution, paid Stewart the remainder, and took his receipt in full for the money paid, which appears attached to the execution. That on the day after the last payment defendant went with Dr. John P. Watts to the house of testatrix, and he witnessed the confession of judgment.

Dr. Watts was examined before me, and testified, that he drew the note for \$500. Testatrix seemed grateful for defendant's kindness. Testatrix said "she had given defendant the five hundred dollars for what he had done, and what he had promised to do for her. She spoke of the Stewart case and of the Smith judgment. These were the two cases spoken of, and which seemed to prey on her mind. Witness thought the \$500 was to be in addition to what defendant had paid. Testatrix seemed to think the Smith and Stewart judgments were satisfied, and she was satisfied. Her gratitude to defendant seemed to be in consequence of his having settled those claims. He was to take care of her and her property until her death," &c. "Witness heard nothing of the compliment to be made to defendant, until he went to the house of testatrix. Defendant was to hold these matters—the Smith and Stewart judgments—as it were on a stay, and was to receive the five hundred dollars for having settled them." This last statement the witness repeated twice over, with positiveness and distinctness.

So far as the Court can gather from the defendant's answer, the proposition, in January, 1848, was that the defendant should "aid testatrix in keeping her property together till her death, should pay off the Smith judgment," and then, at her death, the defendant should be paid one thousand dollars.

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The defendant agreed to gratify her wishes, as far as in his power, and she gave him a note and confessed judgment for one thousand dollars. But, within less than eleven months after this agreement, testatrix's land was levied on, and about to be sold, under an execution for one hundred dollars, or thereabouts. There was no other lien upon her property, nor does it appear that any other debt of any consequence existed. Yet the defendant does not appear to have thought himself bound to aid her in keeping her property together until her death, by interfering in this case. But he says she applied to him, and "repeated what she had previously said to the defendant, upon the occasion of the levy under Joel Smith's judgment," &c., and said that, "if he would assist her to keep her property together during her life—if he would procure an assignment to himself of the Stewart judgment, as he had previously done the Smith judgment, and wait for the payment of it until her death, and take a general charge," &c.—"she would give him a confession, &c., for \$500, which was to be staid until her death, but which was to bear interest." Whatever may have been the impressions of the defendant, it was manifestly the settled conviction of the witness to whom his answer specially refers, Dr. John P. Watts, that the five hundred dollars was all that the defendant was to receive in the way of gratuity. "Mrs. Cunningham," (testatrix,) says Dr. Watts, "seemed very grateful for his (defendant's) kindness. She said she had given him the five hundred dollars for what he had done, and what he had promised to do for her. She spoke of the Stewart case and the Smith judgment—these were the cases spoken of," &c.—and he concludes his evidence by twice repeating "that the defendant was to hold the Smith and Stewart judgments, as it were, on a stay, and was to receive the \$500 for having settled them."

Another witness, W. B. Merriwether, testified that he lived within half a mile of testatrix, and knew something of her affairs; heard her repeatedly say what she owed; that she owed a judgment to Joel Smith for \$800 or \$900, and a judgment to Thomas Stewart, for about \$130; she said she had

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*Joel Smith's judgment settled; "that defendant had taken it up; that she had given the defendant a confession for \$1,000 for that purpose." "One morning testatrix sent for witness; he went; she said Stewart was pushing his judgment, and she wished witness to go and see Stewart, and get him to wait," &c. In a few days after, this witness saw her, "when she said that she had paid the Stewart judgment, through defendant, by giving him a confession for \$500, to pay him for the Stewart judgment and all her other debts. There were some debts then against

her not in judgment. She owed Red a debt of some seven or eight dollars, which defendant afterwards paid." "In her conversation about the Smith judgment, she said that to the confession for that debt, and also to the confession for \$500, Dr. Campbell and Dr. Watts were witnesses; that she owed nobody but the defendant." This witness further said, that "he was at defendant's house when the old lady (testatrix) died. The morning after her death he had a conversation with defendant, as to what the estate of testatrix owed him, and defendant said it owed him either eighteen hundred or two thousand dollars. This conversation was brought about by the defendant's asking witness how to proceed; whether he could sell the property under his execution, &c. Defendant said he had judgments against the estate to that amount; did not say in whose names they were."

Another witness, M. G. Overby, testified that "he had a conversation with defendant the night of testatrix's death, before her death. Defendant said he had paid off the Smith judgment and the Stewart debt also, and that he had secured himself by confessions, and, in the arrangement, had got one hundred dollars advantage, as a gift or donation for his services in paying off the Smith judgment," &c. "He also said he had paid off the Stewart case, and the old lady had given him \$500 for paying it off." From the report of this witness's evidence, he seems to have been closely cross-examined, but it is not perceived that his testimony materially varies. He said also, that testatrix was his aunt by marriage, and that the

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impression *made upon his mind, in conversations with her, was that she owed about twelve hundred dollars. There is much other evidence, which appears in the report. In the view which the Court will hereafter present, it seems most important to ascertain what were the impressions of the testatrix in relation to these transactions, when she made her will in January, 1851. By that instrument, she bequeathed to the defendant the sum of twelve hundred dollars. A witness, Thomas R. Puckett, who was present when the instructions were given and the will drawn, testified, among other things, that the instrument was drawn by Gen. Gilham, who had been sent for, for that purpose. When he asked for the outlines, "the first item was, she wanted defendant to have \$1,200, to pay him for his trouble." She afterwards repeated that "she desired that (the \$1,200) for defendant for all his trouble."

Without dissecting the testimony, or commenting further upon the answers, it is evident from all, that whatever the defendant was to receive, over and above the amount which he paid on the judgments of Joel Smith and Thomas Stewart, was intended and accepted as a gratuity. This is sub-

stantially the result of all the testimony. Any other acts of the defendant were, perhaps, not more than Dr. Campbell had rendered, and other relatives were willing to render. In comparing the evidence, it is not very easy to determine what the defendant supposed was the extent of this gratuity. He certainly paid Joel Smith about nine hundred dollars, and the testatrix gave him a confession for one thousand dollars. Overby says defendant told him he had paid the Smith judgment by a confession, and, in the arrangement, had obtained a gratuity of one hundred dollars. Dr. Watts, who is defendant's witness, says, that when he and defendant went to the house of testatrix, to get the confession of \$500, in February, 1849, she stated that this \$500 was a gift to defendant for what he had done, and had promised to do; that he was to receive this in addition to what he had paid, in taking up the judgments of Smith and Stewart; he was to receive the \$500 for having settled them. On

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the other *hand, Dr. Campbell certainly regarded the \$1,000 as a gift over and above the Smith judgment. He testifies nothing, of course, about the \$500 confession; but, as has been intimated, whatever may have been the impressions of the defendant, it can scarcely be doubted, after the evidence of Dr. Watts, what were the views of the testatrix, when she gave the confession of \$500 for having settled the Smith and Stewart judgments—she did not understand that she had already given the defendant one thousand dollars for having settled the Smith judgment. The Court is well satisfied, from the evidence, that when the testatrix made her will, in January, 1851, she felt under great obligations to the defendant for his kindness and his trouble, and was not unmindful of their family connections. She had promised that, at her death, he should be remunerated. Whether she had in mind, or memory, any consciousness of any particular sum or amount, which she had promised, it is impossible to determine. But she bequeathed to the defendant the sum of twelve hundred dollars, which, she declared to the draftsman, was to the defendant for all his trouble.

"Satisfaction," says Mr. Justice Story, (Story Eq. § 1099,) "may be defined in Equity to be the donation of a thing, with the intention, expressed or implied, that it is to be an extinguishment of some existing right or claim of the donee. It usually arises, as a matter of presumption, where a man, being under an obligation to do an act, (as to pay money,) does that by will, which is capable of being considered as a performance or satisfaction of it, the thing performed being ejusdem generis with that which he had engaged to perform. Under such circumstances, and in the absence of all countervailing circumstances, the ordinary presumption in

Courts of Equity is, that the testator has done the act in satisfaction of his obligation." Again, (§ 1100,) "The donation is held to be a satisfaction, unless that conclusion is repelled by the nature of the gift, the terms of the will, or the attendant circumstances." A distinction is noticed between satisfaction properly so called and cases of the performance of agreements or covenants. In the

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former *case, the donation is intended as a substitute or equivalent for the contract; in the latter as a fulfilment of it. The Court is strongly inclined to the conviction, that both the transactions—viz., the confession of \$1,000 and the confession of \$500—could, at most, be regarded as mere voluntary agreements or promises, on the part of testatrix, to pay at her death. Indeed, this is substantially admitted, and that the form adopted was merely a security for the performance of the agreement. It is quite manifest that they were so regarded by the testatrix. The Court is also satisfied, from the testimony, that, when the testatrix gave the confession for \$500, it was not intended by her that this sum, given for defendant's services, in taking up the Smith and Stewart judgments, was to be in addition to a sum of one thousand dollars; or, in other words, that when the testatrix signed the confession for \$500, in the presence of Dr. Watts, she did not understand that the defendant was to receive the amount paid to Smith, with interest, the amount paid to Stewart, with interest, the five hundred dollars, with interest, and, in addition, a gratuity of one thousand dollars. According to the positive statement of Dr. Watts, it was rehearsed that the confession of \$500 was for his services in taking up both judgments. The defendant cannot, therefore, claim the amount of both confessions as a gratuity for his services. If he be regarded as a creditor, the legacy of twelve hundred dollars is a larger amount than was due, was declared to be for the same consideration, and must be regarded as a satisfaction. On the other hand, the legacy may be regarded as at once an ample and generous fulfilment of a voluntary agreement or promise to the defendant, and a gratification of her feelings for his kindness. Although the testatrix was grateful to the defendant, and attached to his family, yet it is evident, both from the will and the evidence, that she had other objects of attachment, and whom she intended to be recipients of her bounty. It was said, too, at the hearing, that the mother of the complainants had resided with the testatrix from the age of fourteen years, till her marriage with complainants' father. After the legacy to

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*the defendant, and the payment of her just debts, she directs the balance of her estate to be equally divided between the complainants. The claims of the defendant would

not only exhaust the proceeds of the estate, (which was sold at a fair price,) but they would be insufficient to satisfy them. On the other hand, to regard the defendant as entitled to the sums paid to Smith and to Stewart, with interest, as well as the legacy of twelve hundred dollars, is in conformity with the views or declarations of the testatrix, as to the amount of her indebtedness at the time of her death, and a fulfilment of her intentions of bounty, both in regard to the defendant and the complainants.

It is ordered and decreed, that an account be taken by the Commissioner of the defendant's transactions as executor; that, in taking the account, he be allowed credit for the amount paid on the executions of Joel Smith and of Thomas Stewart, with interest; that he also be allowed credit for the twelve hundred dollars; and that the Commissioner report the result. And it is further ordered and decreed, that the defendant enter satisfaction, or cause the same to be done, on the several judgments against the testatrix described in the pleadings.

The defendant appealed upon the grounds:

1. It is respectfully submitted, his Honor erred in admitting in evidence loose declarations of Mrs. Sarah Cunningham, the testatrix, made after the judgments confessed to the defendant Simpson, to impeach said judgments.

2. It is respectfully submitted, his Honor erred in admitting parol testimony, to explain the will of Mrs. Sarah Cunningham, in relation to the legacy to the said defendant, Simpson.

3. Because a voluntary promise to pay money, secured by a judgment confessed or obtained, is a good executed lien or title, and such muniment is good against all persons claiming as volunteers. The fact that levy and sale, under the executions, are postponed until the death of the donor, cannot, upon principle, alter the case in any respect.

4. Because the judgments confessed in this

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case to the defendant, Simpson, were not voluntary, but based upon considerations both good and valuable—relationship, kindness, and services actually rendered. They were fairly obtained, and not only freely and cheerfully given, but placed in an executed and irrevocable condition by the donor herself; and the defendant insists that nothing could afterwards diminish or alter his vested rights.

5. Because his Honor erred in holding that Mrs. Cunningham did not intend to give the defendant, Simpson, both the judgment for one thousand dollars and the judgment for five hundred dollars. The defendant insists, with the utmost confidence, that the whole evidence, taken together, affords conclusive proof that Mrs. Cunningham intended to give him both judgments, as distinct and separate

liens, over and above the amount of money advanced.

6. Because the defendant, Simpson, was a creditor of Mrs. Cunningham's, to the extent of all the judgments held by him, and he is entitled to be paid all his judgments, at least, even if the doctrine of satisfaction applies, and he elects to claim his demands, but not to receive the legacy at all.

7. Because the doctrine of satisfaction is not applicable to the case, and the defendant is entitled to receive the amount of his judgments as creditor, and also the bequest in the will, as legatee.

McGowan, for appellant.

Marshall, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. It certainly was competent for Mrs. Cunningham—if she clearly understood the transaction, and entered into it with such an intention,—to make a gift to Dr. Simpson of the two confessions, and to allow him, in addition, to hold the two prior judgments, to reimburse him for the money he might advance on them. But, considering her advanced age and infirmity, and her great distress, and the confidence she reposed

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*in him, it would require clear evidence to establish this: clearer evidence than this case affords.

Considered in the light of a mere business transaction, it would be difficult to support a bargain, by which one party has obtained from the other enforceable securities to near \$2,500, for advancing little over \$1,000.

But my conviction, arising mainly from the evidence introduced by Dr. Simpson himself, with very slight aid from any other evidence, and without resorting at all to the after declarations of Mrs. Cunningham, (which I regard as incompetent,) is, that it was not the intention of the parties—especially of Mrs. Cunningham—that the judgments, which Dr. Simpson was to take up, were to be kept afoot by him, as demands against her.

Dr. Campbell, who was present when the bargain respecting Smith's judgment was made, says expressly, she "wanted it satisfied;" and again, that "she wished the Smith judgment paid off." And Anderson, who was present when Dr. Simpson paid it off to Smith, says, that it was in consequence of his suggesting to Simpson, that he had better take an assignment of it, to guard against prior liens, that Simpson, after some hesitation, concluded to do so. Would he have hesitated, if he had, at that time, understood that the judgment was to be kept afoot?

Whatever was said in relation to a gift, in connection with the \$1,000 confession which Mrs. Cunningham made for taking up Smith's judgment, is easily accounted for by the fact, that the confession exceeded the prior judgment nearly \$200. The gift consisted in this excess.

Smith's testimony is not opposed to this view. He was not present at the bargain; and only repeated what Simpson told him, — probably, after he had concluded to adopt Anderson's advice.

So much for Smith's judgment and the confession of \$1,000.

Dr. Watts was present when Dr. Simpson undertook to take up Stewart's judgment of \$100; on which occasion, the confession of \$500 was given. He testifies to Mrs. Cunningham's impression, that both Smith's and

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Stewart's judgments were to *be extinguished;—"She seemed to think the Smith and Stewart judgments were satisfied,—and she was satisfied."

On this occasion, she increased the rate of compensation beyond what she had agreed to give, when the treaty related to Smith's judgment alone. It will be remembered, that though Dr. Simpson was to receive \$200 for paying Smith off, yet he was to wait until her death for reimbursement, and, in the meantime, was to forego the interest on his confession. When Stewart's debt became the subject of further stipulations, it may have occurred to the parties, that, by the prolongation of her life, this might become a less advantageous bargain on his part than had been anticipated; and this occasion may have been taken to increase his compensation, as well as to give him compensation for undertaking to take care of her and her affairs, (which he now undertook,) by allowing him, in addition to the \$1,000 confession, which he already held, another for \$500;—thus, according to Dr. Watts, compensating him "for what he had done, and what he" now "promised to do for her."

Thus, it will be perceived, that, in my opinion, the justice of the case requires a decree, that the two judgments of Smith and Stewart, which Dr. Simpson sets up, be perpetually enjoined; and that he be allowed to set up his two confessions, with interest only from the death of the testatrix. This, I think, was the understanding and contract of the parties, and there appears to have been fair consideration for it.

I do not think evidence, to show, that the legacy of \$1,200 was intended as a satisfaction of what the testatrix owed Dr. Simpson, was admissible.

Nor do I think, that any presumption that it was so intended, can be raised under the will. The fact that the legacy is less than the just claim of a creditor, as in this instance, and the additional fact, which appears in this will, that the testator has made express provision for the payment of debts—both, according to authority, (b) repel the

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idea that a legacy, in terms of *donation merely, to one who happens to be a creditor,

(b) 2 Story Eq. § 1120, 1122.

was intended as a satisfaction of his demands.

It is ordered, that the defendant, Dr. Edward G. Simpson, be perpetually enjoined from setting up the judgments and executions of Smith and Stewart, mentioned in the pleadings, and that he enter satisfaction thereon.

And it is further ordered, that, in the account directed in the decree, the said defendant be allowed credit for the two confessions taken by him from his testatrix, described in the pleadings, with interest only from the death of said testatrix; and that he also be allowed credit for his said legacy of \$1,200.

That he do pay the costs of this suit. And that the decree appealed from be modified, according to this decree; and that, in all respects, except as so modified, it be affirmed.

WARDLAW, Ch., concurred.

DUNKIN, Ch. On reconsideration of the Circuit decree, I should still prefer the view there presented. But the transaction is very well susceptible of the construction which has been adopted by the Court, and I am content to concur in it.

Decree modified.

5 Rich. Eq. 421

R. F. SIMPSON v. SARAH DOWNS, and Others.

(Columbia. May Term, 1853.)

[*Appeal and Error* ⇨ 342.]

Bill by creditor to set aside a judgment against the debtor for fraud. The bill prayed relief on other grounds, against other parties. The creditors of the debtor were called in, and one object of the bill was to marshal his assets among them. A decree was made dismissing the bill, so far as it sought to set aside the judgment—ordering new parties to be made, and referring the case to the commissioner. At another term, a decree was made upon the report of the Commissioner, and exceptions thereto:—

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Held, *that it was then too late to appeal from the first decree refusing to set aside the judgment.

[Ed. Note. For other cases, see *Appeal and Error*, Cent. Dig. §§ 1889, 1899; Dec. Dig. ⇨ 342.]

[*Appeal and Error* ⇨ 344.]

Where there is a final decree as to any one of the parties, or any distinct branch of litigation, so that nothing remains to be adjudged as to that party, or that branch of the litigation, the appeal must be taken, within the time, and in the manner prescribed by the rules of Court, or the right of appeal will be lost.

[Ed. Note.—Cited in *Verdier v. Verdier*, 12 Rich. Eq. 143.

For other cases, see *Appeal and Error*, Cent. Dig. § 1889; Dec. Dig. ⇨ 344.]

[*Appeal and Error* ⇨ 342.]

Where the decree adjudges the liability of a party, and refers the matter to the Commissioner

to ascertain the amount due, or where something remains to be done, requiring the further judicial action of the Court, the appeal may be taken at once, or the party may wait the final judgment of the Court, and then appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1889, 1899; Dec. Dig. ☞ 342.]

[*Appeal and Error* ☞ 833.]

Petition to the Court of Appeals to rehear a case, in which a Circuit decree, not appealed from, had been made, on the ground of newly discovered evidence:—Petition dismissed, with an intimation of opinion, that application should be made to the Circuit Court for leave to file a supplemental bill, in the nature of a bill of review.

[Ed. Note.—Cited in *Tomlinson v. Tomlinson*, 10 Rich. Eq. 300; *Tomlinson v. Tomlinson*, 11 Rich. Eq. 69; *Ex parte Knox*, 17 S. C. 211, 212.

For other cases, see Appeal and Error, Cent. Dig. §§ 3214, 3229–3240, 3244–3246; Dec. Dig. ☞ 833.]

[*Equity* ☞ 392.]

A petition for a re-hearing is the proper mode of proceeding before the decree has been rendered; but where, after the filing of the decree, a party wishes to avail himself of newly discovered evidence, his application should be for leave to file a bill of review, or a supplemental bill, in the nature of a bill of review. (a)

[Ed. Note.—Cited in *Bennett v. Bell*, 10 Rich. Eq. 465; *Hill v. Watson*, 10 S. C. 275; *Durant v. Philpot*, 16 S. C. 125; *Yates v. Gridley*, Id. 500; *Ex parte Carolina National Bank*, 56 S. C. 20, 33 S. E. 781; *New York Life Ins. Co. v. Mobley*, 90 S. C. 560, 73 S. E. 1032.

For other cases, see Equity, Cent. Dig. § 835; Dec. Dig. ☞ 392.]

[*Courts* ☞ 206.]

The Court of Appeals having only appellate jurisdiction, an original application there to rehear a Circuit decree, not appealed from, cannot be entertained.

[Ed. Note.—Cited in *Ex parte Knox*, 17 S. C. 210.

For other cases, see Courts, Cent. Dig. § 738; Dec. Dig. ☞ 206.]

Before Dunkin, Ch., at Laurens, July, 1852.

This case will be sufficiently understood from the opinion delivered in the Court of Appeals.

Irby Sullivan, for appellant.

Young, Perry, contra.

The opinion of the Court was delivered by

DARGAN, Ch. The questions involved in this case are questions of practice.

Sarah Downs, by proceedings in the Court of Equity, had obtained a decree against her son, William F. Downs, for upwards of \$15,000. The plaintiff had a judgment against the said William F. Downs, of a junior date. He also had other demands against him, for a considerable amount, arising from partnership transactions; he and Downs having been the joint owners of a cotton and wool-

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en factory. He had filed a bill *against Downs for the adjustment of these claims, which was pending at the rendition of the decree, which will be hereafter mentioned. W. F. Downs was insolvent. And the decree of Sarah Downs against him, which was of an older date, and for a large amount, standing in the way of the satisfaction of the plaintiff's claims, he filed a bill against Sarah Downs, charging that her decree against William F. Downs, was a fraud upon creditors, and void; and prayed the Court to set it aside on that ground. He made other persons defendants to the cause, on other grounds of relief, in which Sarah Downs was not interested, and had no concern.

There was a fund under the control of the Court, arising from the sale of a tract of land, in which William F. Downs had an estate. The creditors of Downs were called in. The fund aforesaid constituted the only assets, which had not been appropriated. And one of the objects of the proceedings was, to marshal this fund among the creditors of William F. Downs, according to their respective rights.

The case was first heard in 1851, when the presiding Chancellor, holding that the evidence was not sufficient to impeach the bona fides and validity of the decree which Sarah Downs had obtained against W. F. Downs, dismissed the bill as to her. (b) He ordered new parties to be made, which was done. And he referred the case back to the Commissioner for further investigation as to the questions between the plaintiff and the representatives of W. F. Downs, and the other parties to the bill. From this decree no appeal was taken.

The case went on, and was again heard in 1852, on the report of the Commissioner and exceptions. In marshaling the fund, the Commissioner applied so much of it as was necessary to the satisfaction of claims admitted, on all hands, to be entitled to precedence. He then applied the residue to the decree in favor of Sarah Downs, which exhausted the fund without satisfying the decree. This was to the entire exclusion of the claims of the plaintiff and of the other

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creditors; and was a rightful application, if the decree in favor of Sarah Downs is valid. The plaintiff, and others of the creditors, filed exceptions to the report, which, in substance, may be resolved into the objection, that the decree in favor of Sarah Downs was fraudulent and void, and, therefore, entitled to no part of the fund, as against them. The Chancellor overruled the exceptions, and confirmed the report. And this decree purports to be a final disposition of all the issues growing out of the plaintiff's bill.

(b) That is, so far as it sought to set aside the decree in her favor.—R.

(a) See the case *Ex parte Vandersmissen and Wife* [5 Rich. Eq. 519, 60 Am. Dec. 102], in the appendix of this volume, where leave was granted to file a bill of review. See also the case of *Carr v. Green*, Rich. Eq. Cas. 405.—R.

The plaintiff now appeals from the first decree of 1851, on the ground, that the Chancellor should have set aside the decree in favor of Sarah Downs, for fraud.

A preliminary objection is interposed by the counsel for the appellees, which is, that the plaintiff can have no standing in this Court as an appellant, as to any alleged errors in the first decree; in other words, that he has lost his right of appeal, by not bringing it forward in the proper time. If the affirmative of this proposition be true, further consideration on this branch of the case will be unnecessary.

It is not my purpose to enter at large into the discussion of this question. But I will content myself with a simple statement of the result of our deliberations. The opinion of the Court is, that where there is a final decree as to any one of the parties, or any distinct branch of the litigation, so that nothing remains to be adjudged as to that party, or that branch of the litigation, the appeal must be taken within the time and in the manner prescribed by the rules of Court, or the right of appeal will be lost. It is different, where there has been a decree adjudging the liability of a party, with a reference to the Commissioner to ascertain the amount due; or where something remains to be done, requiring the further judicial action of the Court. Under these circumstances, the party, supposing himself aggrieved, may appeal at once from the decree, though it be interlocutory; or he may wait the final judgment of the Court, and take his appeal from that, and all the judicial orders and decrees, which preceded and led to the final judgment. This, as a rule of practice, was settled in

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*Brown v. Postell, 4 Rich. Eq. 71; and is not intended to be shaken, or modified by anything herein expressed.

The further opinion of the Court is; that the first decree rendered in this cause was final against the plaintiff as to all matters charged in his bill against Sarah Downs; and that the plaintiff, not having prosecuted his appeal within the time prescribed, the case is not before this Court, and cannot be heard. It is so ordered and decreed.

But the plaintiff, in addition to his attempt to be heard before this Court, by way of appeal from the decree of 1851, has filed

this Court a petition for a rehearing, on the alleged ground of newly discovered testimony in writing, not within his power to have been produced at the trial on which the said decree was rendered. The petition is supported by the affidavit of the plaintiff, and is certified to by counsel. The petition and the exhibits set forth the evidence alleged to have been newly discovered; and it seems to this Court, from a prima facie view of the facts stated, that if they had been proved on the former trial of the cause, they

might have had an important influence on the judgment of the Court.

I apprehend, however, that some of the rules of practice on this subject have been confounded in the present proceeding. This is a petition for a rehearing, which is the proper mode of proceeding before the decree has been rendered. But, after the filing of the decree, when a party wishes to avail himself of newly discovered evidence, the remedy should be sought by an application in the proper form, and properly vouched, for leave to file a bill of review, or a supplemental bill in the nature of a bill of review; the supplemental bill being, perhaps, the most appropriate form of proceeding.

Another very important distinction has been lost sight of in this application. This Court only entertains appellate jurisdiction. No cause can come before it except by way of appeal. This is familiar to all. By the decision announced in the first part of this decree, the petitioner's case is not, and cannot come before this Court for its judicial

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cognizance. The Court is precluded by its organization from entertaining the petition; which would be, to assume original jurisdiction. From the foregoing views, the dismissal of the petition follows as a matter of course. Here I might stop. To say more, would be, perhaps, to travel out of the record. It may, however, not be amiss for me to intimate, that, in the opinion of the Court, the proper mode of proceeding, under the circumstances alleged in the petition, would be to apply to the Circuit Court for leave to file a supplemental bill, in the nature of a bill of review. The petitioner, if he chooses, may avail himself of this privilege of proceeding in that Court, in such manner as he may be advised. The petition is dismissed.

JOHNSTON, DUNKIN and WARDLAW, CC., concurred.

Appeal and petition dismissed.

5 Rich. Eq. 426

WILLIAM A. CHINA and Others v. GEORGE W. WHITE and Others.

(Columbia. May Term, 1853.)

[Wills \S 417, 542.]

Testator, having four children, all of age, and a grandson, a minor, made his will, by which he bequeathed certain personalty, "to be equally divided amongst my children, and my grandson, to them and the lawful heirs of their body—if either of my children, or said grandson, shall die under age, or without leaving living issue, his or her part of my property is to return to my surviving heirs."—*Held*, that or must be construed and, that the contingency provided for was, the death of the first taker "under age, and without leaving living issue;" that, therefore, each of the children took an ab-

solute and indefeasible estate in his or her share.

[Ed. Note.—Cited in *Shands v. Rogers*, 7 Rich. Eq. 428.

For other cases, see Wills, Cent. Dig. §§ 900, 1166; Dec. Dig. ~~417~~, 542.]

Before Dargan, Ch., at Williamsburg, February, 1853.

Dargan, Ch. The will of William Taylor

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bears date the 4th March, 1821. He died in 1822, leaving the said will unrevoked. He left surviving him his wife, Mary Taylor, one son, Samuel P. Taylor, three daughters, Mary Nelson Taylor, Susannah Elizabeth Taylor, Maria Bonneau Taylor, who afterwards intermarried with Thomas China, and a grandson, George W. White, the only child of a daughter of the testator, who had died before the execution of the will.

The testator bequeathed to each of his children, and to his grandson, one negro. He had, in a previous clause, directed certain property to be sold for the payment of his debts. Having made these dispositions, he then declared as follows:

"The rest and residue of my personal property is to remain on my plantation, for the support and maintenance of my wife, Mary Taylor, and daughters who may remain unmarried at my death, during the life time of my wife, Mary Taylor; and at her death, the whole of my personal property, not already bequeathed, to be equally divided amongst my children, and my grandson, George W. White, share and share alike, to them and the lawful heirs of their body; but if one or more of my children or grandson shall die before that time, leaving issue, that issue is to have that which the parent would have been entitled to if living."

"It is my will and desire, that if either of my children, or said grandson, shall die under age, or without leaving living issue, his or her part of my property is to return to my surviving heirs. It is my will and desire also, that my plantation and lands shall remain for the use and benefit of my daughters, as long as any of them shall remain unmarried, and at the death or marriage of all my daughters that are single, then said lands to be sold at public auction, on a credit of twelve months, by the executor, and the money arising from such sale to be equally divided among my lawful heirs, share and share alike."

Samuel P. Taylor died in the life time of his mother, the testator's widow, without issue and unmarried. On her death, the testator's personal property, disposed of in the

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residuary clause, was divided among the testator's children, and his grandson, according to the directions of the will.

Maria Bonneau Taylor, who, after the testator's death, intermarried with Thomas China, died in April or May, 1852, leaving

her husband, the said Thomas China, and ten children, namely: William A. China, Thomas J. China, Louisa S. China, Mary T. China, Harriet A., the wife of David M. Mason, Magdaline, the wife of Peter R. Keals, Frances H. China, Samuel M. China, Lenora M. China, and John R. China, surviving her.

Mary Nelson Taylor died in August, 1852, aged sixty years or upwards, without issue, without ever having been married, and intestate.

The children of Maria B. China, above named, and the husbands of her married daughters, have filed this bill for a partition of the estate, of which Mary Nelson Taylor died possessed. They have made Susannah E. Taylor, George W. White, and Thomas China, (their father,) defendants in the cause. The plaintiffs allege, that all the negro property of which Mary Nelson Taylor died possessed, are the same negroes, or the issue thereof, which she derived from the will of her father, the said William Taylor; and this fact is not disputed. The plaintiffs further allege, that Mary Nelson Taylor took, by the will of her father, an estate in these negroes, defeasible upon a condition that has happened; that they, as remaindermen, are now entitled to a share in said negroes; and they claim that the division should be per capita. Failing in this proposition, they claim a division per stirpes; and failing in this, they claim as the distributees of the said Mary Nelson Taylor. They also ask for an account.

The defendants, Susannah E. Taylor and George W. White, in their answer say, that Thomas China, the father of the plaintiffs, has been improperly made a party, and that he has no part or lot in the matter. They further say, that they, as "the surviving heirs" of the said William Taylor, are entitled to the whole of the property of which Mary Nelson Taylor died possessed, and which she derived under her father's will; and if not so entitled, that, under the limita-

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tions of the will, or as the distributees of Mary Nelson Taylor, they are entitled to a division of the property per stirpes, and not per capita. These are the issues of the cause.

The construction of this will is not free from difficulty. The condition, upon which the estate given by the testator to his children and grandson, was to go over, or as he has expressed it, was to return to his surviving heirs, was their dying under age or without leaving living issue. If the will is to be construed by its own terms, without reference to collateral and extraneous facts, the interpretation would be easy, both upon principle and authority. To give to the language employed in this clause its literal import, the testator would be made to express two independent conditions, upon the happening of either of which, the estate was to pass away from the first object of his bounty. Upon

this construction, if the legatee died, either under age or without leaving issue, the estate would be defeated. Although the legatee might die under age, but leaving issue, the issue could take nothing. To avoid imputing to the testator so unreasonable, and, in many instances, so unnatural an intention, as to design that the property should pass away from the issue of the first object of his bounty, to collateral or distant kindred, or to persons of no kindred blood, the Court presumes that the testator has used the conjunction in a loose and ungrammatical sense, by no means uncommon in careless and in-artistic composition. Upon this ground, in cases like the present, the Court has presumed, that the testator has inaccurately used the disjunctive for the copulative conjunction, and for the purpose of carrying into effect his intention, "or" has been construed into "and." More particularly should this rule of construction apply in a case like the present, where the testator had, in a previous clause, given the property to his children and the lawful heirs of their body. The doctrine is fully recognized in the case of *Scanlan v. Porter*, 1 Bail. 427. It is the first reported case of the kind in South-Carolina. It has been frequently followed since. The principle is supported by the most unanswerable reasoning, and by the highest authority. See

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Burhans v. Blanshan, 6 Johns. 54, where Chancellor Kent has given a masterly analysis of the doctrine, and the authorities in support of it.

But the difficulty which has been suggested in this case, arises upon a matter outside of the will. Mary Nelson Taylor was thirty years of age at the date of her father's will. Each of his other children had, before that time, attained their majority; and, of all his legatees, his grandson, George W. White, alone, was under the age of twenty-one years. It is urged, that the testator must be presumed to know the ages of his children. I think this a reasonable presumption in most instances, particularly in this case, where the testator's children had advanced a considerable period beyond their minority. Upon this presumption, it is further contended, that the doctrine of *Scanlan v. Porter*, though it applies to the legacy in favor of George W. White, cannot apply to those in favor of Mary Nelson Taylor, and the testator's other children, who, at the execution of the will, had already attained the age of twenty-one years. For if this doctrine is to prevail, (the argument is,) then, at the very execution of the will, the limitation was ineffectual, because, at that period, it had already ceased to be possible that the testator's children could die under age and without leaving issue. This, as to them, it is said, is putting the limitation obviously intended by the testator upon an impossible condition, which is unreasonable. Why did he attempt

to create a limitation which was clearly a failure from the beginning? This is the argument in favor of the plaintiffs. The argument founded upon the *reductio ad absurdum*, may be retorted by the defendants with some degree of force. If the testator did remember the ages of his children, and intended the disjunctive construction contemplated for by the plaintiffs, why did he make the limitation to depend upon two separate conditions, one of which was impossible at the execution of the will? This construction would strike out the whole of the first condition, (the death of the children under age,) as a nullity. There could be no meaning in those words.

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They would be "utterly void of sense, and as if they did not occur in the will. Is not this difficulty, which is opposed to the interpretation of the plaintiffs, as great as that which they urge against the construction of the opposite party?

Again: it is admitted that the doctrine of *Scanlan v. Porter* would apply to the case of George W. White; that, as to his legacy, "or" would be construed "and;" and the limitation over would not take effect unless he died, both under age and without leaving issue. Hence would arise the incongruity and absurdity of deducing two different meanings for the testator, from the same language and from the same sentence. It can hardly be that he intended to give George W. White an estate different from that which he gave to his children.

An eminent English commentator, (Jarm. on Wills, 1 vol. 446.) in his remarks on this subject, uses the following language: "It is obvious that the ground for changing or into and exists a fortiori, where children or issue are the express objects of the testator's bounty."

At the same page, he further says: "It would seem that the principle in question would apply in every case, where the gift over is to arise in the event of the preceding devisee or legatee dying under certain prescribed circumstances, or leaving an object who would, or, at least, might, take a benefit derivatively, through the devisee or legatee, if his interest remained undivested; and to whom, therefore, it is probable that the testator intended indirectly a benefit, not dependent upon the devisee or legatee dying under the prescribed circumstances or not. In this point of view, it would seem to be immaterial whether the dying is confined to minority, or is associated with any other contingency: as in the case of a gift to A., and if he shall die in the life time of B., or without issue, then over; or whether the event is leaving issue, or leaving any other object who would derive a benefit through the legatee, if his or her interest was held absolute."

Upon the whole, though not without some misgivings, I am *of the opinion that the

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copulative construction should prevail; and it is so ordered and decreed.

This construction makes the property in question the absolute estate of Mary Nelson Taylor, in regard to which she died intestate, and which must be divided according to the provisions of the statute of distributions: one-third part thereof to the plaintiffs, one-third part to Susannah E. Taylor, and one-third part to George W. White. It is so ordered and decreed.

It is further ordered, that a writ of partition do issue, at the instance of either of said parties.

It is further ordered, that the accounts of the administrator of Mary Nelson Taylor be referred to the Commissioner.

It is further ordered, that the question as to the sale or gift of the negroes, Neptune and Lavity, be reserved, and that the Commissioner report thereon.

The complainants appealed, on the grounds:

1. That the limitation over, in the will of William Taylor, to his surviving heirs, without effect on the death of Mary N. Taylor, without leaving issue; and that she consequently did not take an absolute estate in the property sought to be partitioned in the bill of the complainants.

2. That the decree was, in other respects, contrary to law and evidence.

The defendants appealed, on the grounds:

1. Because, under a proper construction of the will, the defendants, George W. White and Susannah E. Taylor, are entitled to the slaves held by Mary N. Taylor, as the surviving heirs of the testator.

2. Because, conceding that Mary N. Taylor took an absolute estate in the property, the partition ordered is premature, as she has not been dead twelve months, and there has been no administration on her estate.

Miller, for plaintiffs.

Dargan and Porter, for defendants.

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*The opinion of the Court was delivered by

DARGAN, Ch. In announcing the judgment of the Court, in this case, I deem it necessary to add but little to what has been said in the Circuit decree.

The diffidence and doubt with which I arrived at and expressed my conclusion, upon the Circuit, have been greatly diminished, by finding my opinion supported by the judgment of the Court of Errors, in *Waller v. Ward*, 2 Sp. 786, which was not brought to my notice, or considered by me, upon the Circuit trial. In the case cited, the testator, William Waller, bequeathed legacies to his children; and among others, he bequeathed to his son, Samuel Waller, the use of certain negroes; to him and the lawful issue of his body forever. In a subsequent clause, the testator declared, "if any of his children before named should die under age, or without

leaving lawful issue of their body, that the legacy bequeathed unto them, and the property given to them, be equally divided among his surviving children." &c. The limitations of this will, it will be perceived, are very similar, in all respects, to the limitations under the will of William Taylor. There is another strong feature in the resemblance. The question was as to the limitation of the negroes given to the testator's son, Samuel Waller. And he was over the age of twenty-one years, at the execution of the will. This fact appears obscurely upon the report of the evidence, but is said to have been earnestly pressed in the argument, and was assumed by the Court of Errors, in the argument accompanying the judgment. The case was reasoned by the Court, upon the supposition that the fact existed. In the construction of William Waller's will, "or" was construed "and," and the fact that Samuel Waller, the first taker, was of age at the execution of the will, was considered not to vary the interpretation. The two cases, as to this point, could scarcely have been more similar. The decision is not without strong support from the case of *Usher v. Jessep*, 12 East, 288.

I am satisfied with the Circuit decree. Subsequent reflection has rather strengthened my opinion, therein expressed.

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*This Court concurs in the conclusions of the Circuit decree.

It is ordered and decreed, that the said decree be affirmed, and the appeal be dismissed.

JOHNSTON, DUNKIN and WARDLAW, CC., concurred.

Decree affirmed.

5 Rich. Eq. 434

E. L. DAVIS and Others v. DAVID KELLER and Others.

(Columbia. Mar Term, 1853.)

[*Estoppel* ⇐37.]

Husband's interest in wife's inheritance was sold by the sheriff. Purchaser, husband and wife, then joined in conveying the land, with warranty, to trustees, in trust (1) to sell the land, (2) to pay purchaser his bid, with interest, and (3) to hold surplus for sole and separate use of wife. Wife died before renouncing her inheritance. There was no sale by the trustees, and husband's interest was again levied on and sold by the sheriff:—*Held*, that the conveyance to the trustees passed, by way of estoppel, the husband's interest as heir of the wife, for the purpose for which the deed was made; but not the shares of other heirs, her children, two of whom were the trustees.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 93; Dec. Dig. ⇐37.]

[*Evidence* ⇐419.]

Held, also, that it was competent for the trustees to show, by parol, other considerations, as that they were to reimburse themselves for certain expenses of husband and wife before the trust deed was executed.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1912; Dec. Dig. ⇐419.]

[*Executors and Administrators* ⇐212.]

Held, further, that the second purchaser at sheriff's sale was entitled to no more than the surplus of husband's distributive share, (one-third,) after all incumbrances under the trust deed were satisfied out of that share.

[*Ed. Note.*—For other cases, see *Executors and Administrators*, Cent. Dig. § 762; Dec. Dig. ⇐212.]

Before Dunkin, Ch., at Abbeville, June, 1852.

Dunkin, Ch. It is admitted that Christiana Hamilton, the mother of the complainants, and of some of the defendants, became, while a widow, the proprietor in fee of the premises described in the pleadings. She afterwards married Joseph A. Hamilton. In the early part of 1849, the premises were levied on by the sheriff of Abbeville district, under exe-

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cutions against *Hamilton, and sold to Nathaniel J. Davis, at public outcry, for the sum of two hundred and thirty-three dollars. On 5th February, 1849, the sheriff executed a conveyance of the premises, together with the appurtenances, "and all and singular the estate, right, title, interest, property, claim or demand, which the said Joseph A. Hamilton, at the time of the sale of the said house and lot, had in the same." According to the proof, the house and lot were then worth fifteen hundred dollars; and it was announced at the biddings, that the sheriff sold only "Hamilton's interest in right of his wife." It appears, also, that neither Hamilton nor his family were living on the premises during the year 1849.

On the 19th November, 1849, a conveyance of the entire premises was executed by Nathaniel J. Davis, Joseph A. Hamilton, and his wife, Christiana Hamilton, to the complainants, in trust for the purposes therein declared. The rights of Nathaniel J. Davis are recited, and, on his part, the deed purports to warrant the premises only during the joint lives of Hamilton and wife. On the part of Hamilton and wife, there is a general covenant of warranty in fee. The trusts are, that the grantees should make sale of the premises, and from the proceeds pay, in the first place, to Nathaniel J. Davis, the amount of his bid at sheriff's sale, with interest thereon, and hold the surplus to the sole and separate use of Christiana Hamilton, not subject to the debts, contracts, control or engagements of her husband; and "to effect and carry out such end, the said Joseph A. Hamilton," should he have "any interest in said proceeds of sale, thereby assigned, transferred, and set over the same" to the complainants. (a)

(a) The following is a copy of the clauses of the deed in which the trusts are declared:

"It is understood that the said E. Lewis Davis and Joseph A. Davis will, as soon as convenient, make a sale of the house and lot above described; and a valid and absolute title, in fee simple, to the purchaser, who is not bound in any way to see to the application of the purchase money,

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*It seems from the evidence, that Hamilton was sold out early in 1849, and that he, with his family, removed to a rented place. The complainants were not inmates of his family, but they furnished the family with two negroes, and purchased a horse, to work in the crop, and made other advances. The witness, N. J. Davis, says that the deed of November, 1849, was made with a view to cover the expenses of living of 1849, incurred by complainants, for Hamilton and wife; that the negro hire was part of the expenses; that "when the deed was executed, the accounts for hire, &c., were spoken of, and estimated, in making the deed. Witness did not know exactly the amount of complainants' accounts for rent of land, hire of negroes, horse, furnishing provisions, &c., but he thinks they were reimbursed, for their outlay for Hamilton and family, except as to the horse and as to the negro hire." It appears to the Court, competent to show by parol evidence, as in *Banks v. Brown*, (2 Hill, Ch. 565 [30 Am. Dec. 380].) additional considerations besides that set forth in the deed. But the complainants specially undertook to reimburse N. J. Davis for the sum paid by him at sheriff's sale, in February previous. A note of one of the complainants was

below directed, but only to pay the same to E. Lewis Davis and Joseph A. Davis, or their heirs or assigns; from the proceeds of this sale, the said E. Lewis Davis and Joseph A. Davis shall pay to the said N. J. Davis the amount of his bid at the purchase at sheriff's sale, as aforesaid, and his lawful interest on such bid, until his money has been paid to him. All the residue of the proceeds of such sale the said E. Lewis Davis and Joseph A. Davis shall keep

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in their hands, not to be paid to the said *Joseph A. Hamilton; nor in any way subject to his disposition or control, nor in any way liable for his debts, nor shall pass by any assignment of him, the said Joseph A. Hamilton; and in no manner, in Law or Equity, the said money shall be liable for said Joseph A. Hamilton's debts, contracts or obligations, nor subject to his control, nor assignment. And to effect and carry out such end, the said Joseph A. Hamilton, should he have any interest in said proceeds of sale, hereby assigns, transfers and sets them over to the said E. Lewis Davis and Joseph A. Davis.

"The said E. Lewis Davis and Joseph A. Davis are to hold in trust the said proceeds of sale of said house and lot, for the sole and separate use and behalf of said Christiana, the wife of said Joseph A. Hamilton, subject to her separate control and disposition, and her's only. To be paid for her, and to her, in such sums and amounts, principal and interest, as she may designate and desire, by the said trustees, and her separate discharge, acquittance or receipt, shall be a sufficient voucher to the said trustees, E. Lewis Davis and Joseph A. Davis. The whole sum to be subject to her absolute, separate and alone control, as she may direct the said trustees to apply it. Only the legal interest shall remain in the said trustees forever, whilst any of the said proceeds remain unexpended, in order that the marital rights of the said Joseph A. Hamilton may not attach upon the same."

accordingly given to him, when the deed was executed, for the sum of two hundred and fifty-nine dollars, with interest; which note has been fully paid to him by the complainants. As has been said, both N. J. Davis and Joseph A. Hamilton, and his wife, joined in the deed to the complainants of 19th No-

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vember, 1849. Six *weeks afterwards, to wit, 30th December, 1849, Christiana Hamilton departed this life, and the complainants had made no sale of the premises. In January, 1850, the sheriff again levied on the premises, under an execution against Joseph A. Hamilton, whose interest was purchased by the defendant, David Keller, (with notice of the deed of November, 1849,) for the sum of one hundred dollars.

The deed of November, 1849, was supported by a valuable consideration; and Joseph A. Hamilton, or any one claiming under him, is estopped from disputing its validity for the purposes therein set forth. But the ulterior trusts of the deed ceased with the life of Mrs. Hamilton. No provision is made for the appropriation of the fund after her death. If she had executed a formal release of her inheritance on the deed of November, 1849, and the complainants, having sold the premises for two thousand dollars, and reimbursed themselves, had held fifteen hundred dollars for her sole and separate use, and she had then died, her husband would be entitled to his distributive share of what was left. His deed only estops him to the extent of the purposes therein declared. But those purposes were, to reimburse the complainants, and then secure the fund to his wife during her life. Mrs. Hamilton, however, never parted with her inheritance. Joseph A. Hamilton's interest, which accrued on the death of his wife, was affected by his covenant in the deed of November, 1849. (1 Inst. 476.) But the complainants can only be regarded as incumbrancers to the extent of their claim; and, subject thereto, the interest of Hamilton, vested in the defendant, Keller, under his purchase at sheriff's sales. (2 Story, Eq. § 790.)

It is ordered and decreed, that the house and lot be sold by the Commissioner, at such time and on such terms as the parties interested, or their solicitors, may agree upon; and in default of such agreement, as the Court may fix by a future order; that from the proceeds of sale the cost of these proceedings be first paid; that two-thirds of the residue to be distributed among the children of Christiana Hamilton, deceased; that

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out of the re*maining third, the complainants be reimbursed the amount paid to Nathaniel J. Davis, with interest thereon; as also the value of the services of the two slaves for the year 1849, and of the horse furnished; upon which several amounts the Commissioner is directed to report; that the surplus

of the said third be paid to the defendant, David Keller.

The defendant, David Keller, appealed, on the grounds:

1. Because, at the first sale by the sheriff, N. J. Davis purchased the right to the usufruct during the joint lives of Hamilton and wife, which he enjoyed; and he is not entitled to be reimbursed from any source.

2. Because the deed of 19th November, 1849, is a mere nullity. N. J. Davis never executed it. Joseph A. Hamilton had no right which he could convey; all his interest, during the life time of his wife, having been previously conveyed by the sheriff to N. J. Davis; and Mrs. Hamilton, being a feme covert, could not convey, without relinquishing her inheritance.

3. Because the distributive share of J. A. Hamilton in his wife's estate, which had no existence until her death, is improperly charged with the purchase of N. J. Davis, and the expenses of the family of Hamilton for the year 1849.

4. If the deed of November, 1849, is held to be good as against Hamilton, that will not authorize the incumbering of his share with what N. J. Davis paid for the usufruct during the joint lives of Hamilton and wife.

5. But if the purchase of N. J. Davis is an incumbrance upon the estate, it is an incumbrance upon the whole estate, and not a charge exclusively upon the share of Hamilton; and whether it constitutes a charge upon the whole, or upon Hamilton's share, that incumbrance has already been more than discharged by rents and profits received exclusively by the complainants.

6. The deed required the complainants to sell the lot, and from the proceeds to pay to the said N. J. Davis the amount of his bid, &c. The sale has not been made, but the

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rents and *profits, since the death of Mrs. Hamilton, will more than pay Davis the amount of his bid at the first sale.

7. Because, at the time of the execution of the said supposed deed, Hamilton was largely indebted, by judgments, to defendant, Keller, and others; and any attempted conveyance by him of any interest he had, or might have, in the premises, would be fraudulent, and void as to creditors.

8. If the share of J. A. Hamilton is affected by his covenant in the deed, it can only be so to the extent of the consideration received by himself and family, and that is limited to the expenses of 1849, already reimbursed. If his share is to be burdened with the bid of N. J. Davis, complainants should be required to account for the rents and profits of the premises, of which they have been in possession.

The plaintiffs also appealed:

Because the deed of 19th November, 1849, founded on a good consideration, was a valid conveyance of the possibility of Joseph A.

Hamilton to complainants, and an estoppel to him, and all claiming under him, or was an assignment of all his possible interest to complainants.

Wilson, McGowan, for defendant.
Thomson, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. The deed of November, 1849, though void as to Christiana Hamilton, was valid as to her husband, Joseph A. Hamilton; and so it was ruled in *Brown v. Spamm*, 2 Mill, 12. The deed purported to convey the entire premises, with a general warranty. However limited the interest of Hamilton might then have been, or if he had no interest, this affected the right which he subsequently acquired upon the death of his wife. Such is the doctrine of the authority cited in the decree; and in 1 Atk. 489, it is said, if a man convey land which

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is not *his, and he afterwards purchase the land, or it descend to him, the lease shall enure by way of estoppel. The subject is elaborately discussed by the Court of Appeals in Equity, in the case of the administrator of Smith v. Buford, Ms. Col. 1822.

The deed of November, 1849, was sustained by valuable consideration, and, if the grantee had been a stranger, it would seem to follow, that, on the death of Mrs. Hamilton, the right of her husband was in his grantee under the deed of November. The right of Mrs. Hamilton's children not being affected by the deed, two-thirds of the inheritance vested in them, and they became, at law, tenants in common with the grantees under the deed of November, 1849. But, for the reasons stated in the decree, the title in this Court is considered to pass to the grantees only for certain purposes, and when those purposes were accomplished, the grantees were accountable for the residue or surplus. It makes no difference in the relative rights of the parties, that the grantees in the deed were sons of Mrs. Hamilton. They paid a valuable consideration, and occupy the position of purchasers. The question of most doubt is, whether any interest passed to the defendant, Keller, under the purchase from the sheriff, in January, 1850. The principle is thus stated by Sir James Wigram, in *Bourne v. Bourne*, 2 Hare, 38: "If the trustee had taken the property with absolute directions to sell and convert it, the circumstance, that the directions had not been carried into effect at the death of the testator, might have been immaterial, and it might have been treated as personalty. But, in this case, there was no absolute or compulsory direction for the sale or conversion of the estate; it is merely an authority, in a certain event, to enter into possession of this estate, and, at the discretion of the trustee, to sell

it, for the purpose of recovering payment of the debt for the mortgage." So, here, the Circuit Chancellor thought there was no such clear indication that the land should be converted, out and out, as to prevent it from retaining the character of realty. It is not very clear. But Keller is also a judgment creditor of Hamilton; and, besides, there is no appeal on this point. It is not

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an inquiry in which *the complainants have any interest. It could only be important to Joseph A. Hamilton, or his general creditors.

It is ordered and decreed, that the appeal be dismissed.

JOHNSTON, DARGAN and WARDLAW, CC., concurred.

Decree affirmed.

5 Rich. Eq. 441

JONATHAN WRIGHT and Others v. WILLIAM H. HERRON and Others.

(Columbia. May Term, 1853.)

[Deeds \Leftrightarrow 126.]

The deed conveyed, with warranty, to N. H. "and the heirs of her body," a tract of land, "unto the said N. H., and the heirs of her body and assigns forever;"—*Held*, that N. H. took an estate in fee conditional.

[Ed. Note.—Cited in *Withers v. Jenkins*, 14 S. C. 608, 612; *Gaffney v. Peeler*, 21 S. C. 68, 69; *Miller v. Graham*, 47 S. C. 294, 296, 25 S. E. 165; *McMichael v. McMichael*, 51 S. C. 558, 29 S. E. 403; *Crawford v. Masters*, 98 S. C. 461, 82 S. E. 794.

For other cases, see *Deeds*, Cent. Dig. §§ 356½, 357, 420, 449; Dec. Dig. \Leftrightarrow 126.]

The question, whether the husband surviving, is entitled to hold for life as tenant by the curtesy, where the wife was tenant in fee conditional, referred to the Court of Errors.

[This case is also cited in *Gaffney v. Peeler*, 21 S. C. 67, as to the right of curtesy in fee-simple estates.]

Before Dargan, Ch., at Darlington, February, 1853.

Dargan, Ch. Newit Delk, by a deed dated 18th June, A. D. 1836, "for and in consideration of one dollar in hand paid, as also for the good will and affection which he bore towards his daughter, Nancy Herron; also for the better maintenance, support and livelihood of the said Nancy Herron and the heirs of her body," conveyed in proper words, "to the said Nancy Herron, and the heirs of her body," the land described in the pleadings, "unto the said Nancy Herron, and the heirs of her body and assigns, forever, peaceably and quietly to have and to hold, use and occupy, possess and enjoy, the said land granted and confirmed, against all other gifts, grants, bargains, sales, and against the said

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Newit Delk, his heirs and assigns, *or any other person, or persons, lawfully claiming the same, or any part thereof."

Nancy Herron was, at the date of this deed, the wife of the defendant, W. H. Herron, and had at that time five children. She departed this life in the year 1848, leaving her husband surviving her; and also leaving eleven children, one of whom (a daughter) has since died, leaving one child of tender years; some of the other heirs of her body are infants, and all of her heirs, including the husband, are parties to the cause, either complainants or defendants.

The bill is filed by Jonathan Wright and Eliza his wife, (a daughter of Nancy Herron,) and Darius L. Stuckey and Margaret his wife, (also a daughter of Nancy Herron,) against the other heirs of the body of the said Nancy Herron, and her surviving husband, the said William H. Herron. The plaintiffs claim that the deed of Newit Delk created a fee conditional in Nancy Herron, which, on her death, descended to the heirs of her body. They pray for a partition of the land among the heirs of the body of the said Nancy Herron; and that the said W. H. Herron, who has used and occupied the premises since the death of his wife, may be decreed to account for the rents and profits.

William H. Herron, in his answer, admits all the material allegations of the plaintiffs' bill. He concurs with them in the construction of the deed, which makes the estate a fee conditional in Nancy Herron. He admits, that on her death it descended to the heirs of her body; subject, nevertheless, to a life estate in himself, as tenant by the curtesy. He therefore contends that he is entitled to enjoy the estate during his life, free from any accounting for the rents and profits, and that the plaintiffs are not entitled to any present partition.

I assume, as beyond debate, that the fee conditional is recognized in the jurisprudence of South-Carolina. There are so many decisions to this effect, that to deny the proposition would manifest the most daring irreverence for established principles and institutions. I assume further, that a grant

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or devise to *one, and the heirs of his body, is the most proper and apt form of language to create such an estate. What was a fee conditional, as it was known to the common law, before the statute *de donis conditionibus*? It was an estate, upon the condition that the first taker had heirs of his body, to whom, upon his death, the estate was to descend, *per formam doni*, from generation to generation, until the line of the donee became extinct. By considering it an estate upon condition, it came to be held, that when the donee had issue capable of inheriting the estate, he had performed the condition. By this, his estate became enlarged, so as to admit of its being alienated in his life, though it could not be the subject of devise. Upon the failure of heirs capable of inheriting the estate, it reverted to the donor. It admitted

of restrictions, which confined the descent of the estate to issue of a particular class—as heirs male or female. As an estate of inheritance, it was subject to dower and curtesy. These are the principal incidents by which this estate may be defined.

The statute *de donis* destroyed the alienable qualities of the estate, and in the other respects left it very much as it was before. The effect of this legislation converted the possibility of reverter to the donor into a reversion. The estate tail into which the fee conditional was transmuted, thenceforward became in England a particular estate, capable of supporting a remainder. Where no remainder was limited upon the fee tail, on its termination by natural efflux, or in any other way, there was a reversion to the donor. The fee tail, though a less estate than the fee conditional, was subject to dower and curtesy:

"Tenant by the curtesy is he, who after his wife's death, (having had issue by her inheritable,) is introduced into her inheritance, and has an estate for life therein: and he is so called from the favor or curtesy of that law, which made this provision for him." *Bac. Abr. Tit. Curtesy*. The estate must be descendible. The condition seems to be, that the issue of such husband may by possibility inherit. *Ib.* letter C.

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*Before the statute *de donis*, conditional fees were subject to curtesy; when that statute converted them into estates tail, husbands were allowed to be tenants by the curtesy of them also. 1 Cruise, Dig. 117; 8 Rep. 70; 2 Inst. 336. In Paine's case, a husband was allowed his curtesy in an estate tail, after the possibility of issue extinct. 8 Rep. 67.

The curtesy of the husband and the dower of the wife seem to be correlative estates. While curtesy is a provision for life, allowed to the husband out of his deceased wife's inheritance; dower is a similar provision in favor of the wife, out of the descendible estate of her deceased husband. There is a remarkable analogy between these two freehold estates, in the circumstances under which they arise. In each, the estate is for life only. In each, there must be seizin. They attach upon legal, not upon trust estates. In each, the estate upon which they are engrafted must be a descendible estate; and descendible to such heirs as the husband or wife (as the case may be) might have had born to them in their life, capable of inheriting the estate.

The statute *de donis* has never been of force in South-Carolina, and the statute of distributions (1731) does not bear upon the question here presented: whether a husband can have his curtesy in his deceased wife's fee conditional estates. In the first clause of the last mentioned statute, it is declared, in sweeping language applicable to all in-

heritances, "that the right of primogeniture be, and the same is, hereby abolished." This clause, I apprehend, will apply equally to fees conditional as to fees simple. In the fee conditional, instead of descending according to the law of primogeniture, it would descend to all the issue, who could bring themselves within the description of the gift, as tenants in common, and to take per capita.

The subsequent parts of the Act clearly relate to the distribution of fee simple estates: for, after declaring the abolition of the right of primogeniture, it proceeds to enact "that when any person possessed of, interested in, or entitled unto, a real estate in his or her own right, in fee simple, shall die without

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disposing thereof by will, the same shall be distributed in the following manner." Then follows the various clauses, directing the mode of distributing such estates, that is to say, fee simple estates. This Act makes no innovation upon the common law principles which govern the fee conditional, except so far as it relates to the abolition of the right of primogeniture. It is impossible to suppose that the subsequent clauses of this statute have any bearing upon, or can modify the doctrines of the fee conditional, for reference is only made to fee simple estates. If its provisions embrace the fee conditional, then that estate is destroyed, and does not exist in South-Carolina. The statute speaks of intestate property. But the fee conditional is not the intestate property of the deceased tenant last seized. He has no power of devising it. Nor is such an estate distributable on his death among his heirs general; but it descends, per formam doni, to such of the heirs of his body as are entitled to take, according to the terms of the deed, or will, which created the estate. On the failure of such issue, it does not go to collaterals, and next of kin, (as the statute disposes, in such case, of a fee simple,) but it reverts to the donor or his heirs. There is not a feature in the distributory clauses which can be imagined to relate to the fee conditional, consistently with the preservation of the estate. Is there any legislation, whatever, modifying the common law incidents of the fee conditional? I am aware of none. If this proposition be admitted, no alternative is left me, but to decide according to the principles of the common law. If the common law concedes to the husband an estate by the curtesy, in the fee conditional of his deceased wife, (there being no legislation upon the subject,) the Court has no discretion or authority to disallow the claim. Why should we revere the principle, which secured the reverter to the donor—or that which compelled the descent to the issue per formam doni—and deny his curtesy to the husband? All these rights stand precisely upon the same authority. And it seems to me that it would be a very great inconsis-

tency to respect and enforce one of them, rather than another. It would not be irrelevant on

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this question, to inquire whether the correlative estate of dower is allowed by the law of South-Carolina, in the fee conditional. That it was allowed by the ancient common law, in such an estate, and that it is allowed by the present law of England, in fees tail, is indisputable. The statute of 1791 does not take away, absolutely, the widow's dower in fee simple estates. It makes a provision for her out of the husband's intestate property, and requires her to elect between the statutory provision and her common law right of dower. The statutory provision, when accepted, is in lieu of, and in bar of dower. This is expressly upon the principle of compensation. Her distributive share is considered an equivalent. But in the fee conditional there can be no compensation or equivalent. There is nothing which she can receive "in lieu" of dower. For that estate descends to the heirs of the body per formam doni. I see no reasonable ground for saying that the widow's right of dower, in the fee conditional, is abolished. And if dower be allowed in such an estate, why should not the corresponding estate of curtesy be also allowed?

The Act of 1791 makes no special provision as to the husband's estate, by the curtesy, in his wife's fee simple estate. In the 6th clause it declares, that "on the death of any married woman, the husband shall be entitled to the same share of her real estate, as is herein given to the widow out of the estate of the husband." Upon the construction of the Act, it has been held, that the husband is not entitled to his curtesy in fee simple estates. But, as the widow is allowed to elect between her distributive share and her dower, and as the Act expressly declares that the husband shall be entitled to the same share, in his deceased wife's real estate, as it allows to the widow, out of the husband's estate, would it not be a just construction, to allow the husband his election between his distributive share and his curtesy, and this even in fee simple estates? Is there any case which adjudges this question—which refuses him his election?

As to his estate by the curtesy, in the fee

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conditional of his deceased wife, there is, in my judgment, no reason, precedent or authority for disallowing it. I conclude what I have to say upon this interesting question, by referring to the able opinion of Chancellor Johnston, in the circuit decree, in *McLure v. Young*, 3 Rich. Eq. 559.

It will be proper for me now to notice some other views as to the construction of the deed, that were urged at the trial of the cause. In the habendum of the deed, the words are, "unto the said Nancy Herron, and the heirs of her body, and assigns forever," &c. It was

suggested that the words, "and assigns," might make a difference in the construction. It does not very clearly appear, whether by the words were intended the assignees of Nancy Herron, or the assignees of the heirs of her body. From the analogy, which this expression bears to the usual form of conveyances of fee simple estates, I apprehend it must be considered as meaning the assignees of Nancy Herron. If there be any force in the argument, as urged in behalf of the issue of Nancy Herron, and if the words have any power in modifying the construction, it must be to enlarge the estate from a fee conditional to a fee simple. This would be adverse to the parties urging the objection: for, if it be a fee simple, the husband would be entitled to take one-third absolutely, under the statute of distributions. But I think the expression, ("and assigns,") whether it means the assignees of Nancy Herron, or the assignees of the heirs of her body, can have no modifying influence upon the interpretation. Certainly, the estate in fee conditional is assignable absolutely, when the condition is performed; and before the birth of issue, it is assignable for the life of the tenant, for the time being, and so of every tenant for life in succession: thus the rule of construction, which demands, where it is possible, that every part of a deed must have some meaning, is satisfied, without resorting to a forced construction, to defeat the obvious intention which the grantor had, of giving some interest to the heirs of the body.

Again, it has been urged, that because the grantor warranted the title generally, and es-

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pecially against himself and those *who claimed by, or through him, the idea of a reverter to himself is excluded or negated. Again, I say, that the objection, if allowed, would be adverse to the parties making it: for, if there be no reverter, there can be no fee conditional; and if no fee conditional, it must be a fee simple—in which case the husband would be entitled to one-third, in fee, as his distributive share.

But it is a *petitio principii* to say, that the warranty excludes the idea of reverter. What title the grantor warranted, depends upon what title he intended to convey. If, from the other parts of the deed, it appears that the grantor intended to give to Nancy Herron a fee conditional, it would be a perversion of the language employed, to say that his warranty covered a larger estate than he intended to create. It is needless to dwell on this point.

In the judgment of the Court, the estate created by the deed of Newit Delk, to Nancy Herron, is a fee conditional, and that her surviving husband, W. H. Herron, is entitled to hold the said estate for his life, as tenant by the curtesy.

It is ordered and decreed, that the bill be dismissed.

The plaintiffs appealed, and moved this Court to reverse the decree, on the grounds:

1. Because his Honor erred in holding that Mrs. Herron took a fee conditional in the lands conveyed to her by the deed referred to in the pleadings.

2. That under a proper construction of said deed, Mrs. Herron took a life estate in the land, and, at her death, the remainder vested in her children absolutely, as purchasers; or, if this construction is erroneous, then Mrs. Herron and her children were jointly seized.

3. That the estate of tenancy by the curtesy does not exist in this State, has never been recognized by our Courts, and the reason and policy upon which it was founded in England does not exist here; and that his Honor erred in holding that W. H. Herron was entitled to said lands for life, as tenant by the curtesy.

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*4. Because the decree was, in other respects, contrary to Law, Equity, and a proper construction of the deed.

[For subsequent opinion, see 6 Rich. Eq. 406.]

Dargan, for appellants.

Moses, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. Whatever diversity of opinion there may be among the judges of this State, concerning the implication of a fee conditional, and as to some of the incidents of the estate, the existence of the estate itself, with most of its attributes, according to the Common Law, has been recognized by many decisions of our Courts.^(a) If there be mischiefs in this state of the law, the Legislature alone can correct them.

In the present instance, the grantor in the deed creates a fee conditional in strict, technical form, by donation to Nancy Herron and the heirs of her body. There is neither need nor room for implication. In the tenendum of the deed, the terms of tenure are, "unto the said Nancy Herron, and the heirs of her body, and assigns, forever;" and, in the

(a) Murrell v. Mathews, 1 Brev. 190; [Id.] 2 Bay, 397; Jones ads. Postell & Potter, Harp. 92; Bedon v. Bedon, 2 Bail. 231; Cruger v. Heyward, 2 Des. 112, 429; Thomas v. Benson, 4 Des. 18; Milledge v. Lamar, 4 Des. 638; Carr v. Porter, 1 McC. Eq. 90; Henry v. Felder, 2 McC. Eq. 330; Mazzyk v. Vanderhorst, Bail. Eq. 49; Izard v. Middleton, Bail. Eq. 228; Adams v. Chaplin, 1 Hill. Eq. 268, 276; Edwards v. Barksdale, 2 Hill. Eq. 189, 196; Deas v. Horry, 2 Hill. Eq. 246; Gray v. Givens, 2 Hill. Eq. 511; Laborde v. Penn, McM. Eq. 448; Dehay v. Porcher, 1 Rich. Eq. 269; Whitworth v. Stuckey, 1 Rich. Eq. 404; Chaplin v. Turner, 2 Rich. Eq. 138; Hull v. Hull, 2 Strob. Eq. 189; [Id.] 3 Rich. Eq. 77; Smith v. Hilliard, 3 Strob. Eq. 214; Barksdale v. Gamage, 3 Rich. Eq. 271; Hay v. Hay, 3 Rich. Eq. 390; McLure v. Young, 3 Rich. Eq. 563, 574; Buist v. Dawes, 4 Rich. Eq. 421; Bailey v. Seabrook, Rich. Eq. Cas. 419.

argument, much stress is laid upon the word "assigns." But it is plain that the term "assigns," by grammatical construction, must be referred to Nancy Herron, the tenant in fee conditional; and that, if it could be construed to refer to the heirs of her body, it cannot enlarge the heirs to take the inheritance, and expresses merely by pleonasm the right of "assignment" or alienation incident to the estate. We are satisfied with the reasoning and con-

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clusion *of the Chancellor on this point; and it is adjudged and decreed, that Nancy Herron took an estate in fee conditional.

This Court is not agreed on the question, whether the surviving husband of Nancy Herron be entitled to hold for his life, the whole lands, as tenant by the curtesy; and two Chancellors request, that this question be referred to the Court of Errors.

It is, therefore, ordered, that it be referred to the Court of Errors, to determine the question, whether the surviving husband of a wife, who is tenant in fee conditional, be entitled to hold by the curtesy, the land for his life, conveyed to the wife in fee conditional.

JOHNSTON, DUNKIN and DARGAN, CC., concurred.

5 Rich. Eq. 450

WILLIAM PARRIS and Others v. AMAZIAH B. COBB and Others.

(Columbia. May Term, 1853.)

[*Executors and Administrators* ⇐3.]

For any residue undisposed of by the will, the executor is a trustee for the distributees, and liable to account directly to them:—no administration is necessary.

[Ed. Note.—Cited in *Richardson v. Manning*, 12 Rich. Eq. 485.]

For other cases, see *Executors and Administrators*, Cent. Dig. § 3; Dec. Dig. ⇐3.]

[*Limitation of Actions* ⇐46.]

The statute of limitations does not commence to run, in favor of a general agent, until the termination of the agency.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 247; Dec. Dig. ⇐46.]

[*Slaves* ⇐7.]

An executor, claiming slaves under a gift (declared fraudulent) from the testator in his life time, not protected by the statute of limitations—his adverse possession not having continued four years before the death of testator.

[Ed. Note.—For other cases, see *Slaves*, Cent. Dig. §§ 20-29; Dec. Dig. ⇐7.]

[*Deeds* ⇐68.]

A deed of slaves and other personalty, reciting the consideration to be money advanced, &c., and love and affection, from a grandfather, ninety years of age, to his grandson and agent, set aside as obtained by fraud and undue influence.

[Ed. Note.—Cited in *Pressley v. Kemp*, 16 S. C. 347, 42 Am. Rep. 635.]

For other cases, see *Deeds*, Cent. Dig. § 153; Dec. Dig. ⇐68.]

[*Wills* ⇐55.]

The donor had at the same time executed his will, appointing the grandson and agent executor; the will had been impeached on the same grounds on which the deed was now impeached:—*Held*, that there was no variance between the decree setting aside the deed, and the judgment sustaining the validity of the will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 137-158, 161; Dec. Dig. ⇐55.]

[*Gifts* ⇐38.]

Principles upon which the Court proceeds in determining whether a gift by a principal to an agent, impeached on the ground of weakness of mind, fraud and undue influence, is valid or invalid—the same principles apply to all the variety of relations in which dominion may be exercised by one person over another: it should

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be made to appear, in *order to support the gift, that the confidence has not been abused; that all was fair; that the agent received the bounty freely and knowingly on the giver's part.

[Ed. Note.—Cited in *Ex parte Gadsden*, 89 S. C. 364, 71 S. E. 952.]

For other cases, see *Gifts*, Cent. Dig. § 74; Dec. Dig. ⇐38.]

[This case is also cited in *Norris v. Cobb*, 8 Rich. 58, as to facts.]

Before Dunkin, Ch., at Anderson, June, 1852.

Dunkin, Ch. On the 27th September, 1847, Henry Parris died, at the advanced age of between ninety and one hundred years. He had made his will on the 28th April, 1843, being at that time, according to the report of the Judge in a proceeding on that matter, ninety years of age. At the time of making his will, the testator had three sons, to wit: William Parris, complainant; Moses Parris and John Parris; and four daughters, to wit: Eleanor Cobb, (wife of Henry Cobb, since deceased, and mother of the defendant, A. B. Cobb;) Laurania, or Lauraney Jenkins, wife of Rolly Jenkins; Mary Mauldin, wife of Rucker Mauldin; and Elizabeth Gorden, and a lunatic daughter, Nancy Parris. By his will, the testator bequeaths a negro, Caroline, to the complainant, William Parris, and the negro girl, Harriet, to the complainant, Mary Parris, daughter of Wm. Parris, and since the wife of the complainant, James Hickey. To Lauraney Jenkins, he bequeaths some slaves; but it appears that these were already the property of her husband, Rolly Jenkins, as well as a family which he leaves to his son, Moses Parris: all were in the possession of Rolly Jenkins, at the date of the will, and had been for years previously. To his son, John Parris, he leaves five dollars, and to his daughter, Elizabeth Gorden, one dollar. He leaves the negro girl, Ann, to his executor, (the defendant, A. B. Cobb,) in trust, for his daughter, Mary Mauldin, for life, and on her death, the negro, with her increase, to be divided between the complainant, William Parris, and Eleanor Cobb. He directs that his daughter, Nancy Parris, should live with her sister, Mrs. Cobb, the slaves, Betsey and

her five children, remaining with her, for her support; and at her death, he leaves the slaves to Eleanor Cobb and her heirs. To his grand-daughter, Elizabeth Cobb, he bequeaths the negro Sally and her increase. The land on which he lived, and his slave, Hence, he directs to be sold for the payment of his debts. The will contains no residuary

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clause. *On the death of the testator, his will was proved in common form by the defendant, A. B. Cobb, who qualified as executor. He says in his answer, that in a short time after the death of Henry Parris, the complainant, William Parris, who resides in Tennessee, visited this State, and made a demand of the negroes specifically bequeathed to himself and his daughter; that the defendant "refused to deliver them, because the estate was unsettled, and he had not had time to settle it—that the estate was considerably indebted, and there were no assets to pay the debts, except the specific legacies, which would require the legacies to the complainants to abate proportionally;" that the complainant, finding he could not obtain the property specifically bequeathed, in company with other heirs at law, contested the validity of the will, which litigation was finally determined in favor of the will, by the Court of Appeals, in May, 1850. It does not appear at what time precisely the complainant came in and made the first demand for the negroes specifically bequeathed to him and his daughter; but from the answer, it is to be inferred, that the contest about the will soon followed the defendant's refusal to give them up. From the record, it is shown, that "the heirs commenced the contest against the will, on the 27th November, 1848." A judgment was entered up against the heirs for the costs, on the 11th December, 1850; and the complainants, having satisfied this judgment, again made a demand of the negroes specifically bequeathed under the will, which had been established. The defendant admits that he refused this second demand, because the complainants did not "offer to pay their part of the debts, and expenses of litigating the will, though they arranged the judgment for the taxed costs of the litigation." The defendant further says, that he has no doubt, if he had delivered the slaves when demanded the first time, the litigation about the will never would have arisen; or, if they had been delivered, when demanded the second and third times, this bill never would have been filed. It seems there had been a third demand

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when the parties *met in the Ordinary's office, soon after the second demand and refusal.

It may be important to inquire, what was the apparent condition of Henry Parris's estate in the Autumn of 1848, when the complainants first applied for the property spe-

cifically bequeathed to them. The complainants were then told that the estate was considerably indebted—that there were no assets—and that the specific legacies must abate. It does not appear, nor is it suggested, that any statement was then exhibited. The appraisement was made 2d February, 1848, and the sale of the property took place within the month thereafter. No return was made to the Ordinary until 16th December, 1850; the controversy about the will having terminated in the Appeal Court, May, 1850. The appraisement, over and above the negroes, amounted to \$103.24—the property sold appears to have amounted to \$52.25—the whole amount of the testator's indebtedness at the time of his death, (other than the claims held by defendant, to be hereafter noticed,) was \$38.87—the funeral expenses and Ordinary's fees brought the amount to \$54.87. But the defendant avers, that, on certain transactions of his, as the agent of the testator, testator owed him a balance of \$244.23, and as administrator of his father, Henry Cobb, deceased, \$184.50. Whether anything, and how much, was due on these claims, will depend entirely on an examination of the transactions between the defendant, A. B. Cobb, and his principal in his life time. Very much is it to be regretted, that the legal representative of the estate, who should defend its interests, and who alone has the adequate means of proof, is the only creditor calling for an abatement of the specific legacies to satisfy the demands which he sets up. It is, too, greatly to be regretted, that these demands were not specifically brought to the notice of the parties at an earlier date than the filing of the defendant's answer.

In the Fall of 1848, four hundred and thirty dollars would have satisfied every demand which the defendant now insists on. This sum, too, would have been apparently to be paid from the slaves bequeathed to the complainants—the slave Ann, bequeathed to Mrs. Mauldin for life, and the slaves bequeathed

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*to Eleanor Cobb, (defendant's mother,) on the death of Nancy Parris, who had, in fact, pre-deceased the testator.

The will, however, was disputed, and as the defendant says, "after a severe contest," was finally established. The record was in evidence, together with the evidence of some of the witnesses. When the complainants, having paid the costs of the litigation, again demanded the negroes, they were met with the same reply. But, in addition to the former alleged indebtedness, the defendant now insists that the sum of five hundred dollars, for counsel fees in controverting the will, should be charged on the specific legacies, and, as will be presently shewn, on the specific legacies of the complainants alone. The effect of this would be to exclude the complainants entirely, as their

legacies would probably be insufficient to satisfy the demands of the defendant.

Under these circumstances, the complainants were compelled to ask the aid of this Court, and in doing so, they insist, that the property really belonging to the testator was for more than sufficient to satisfy his just debts, which were few and inconsiderable if any. The answer of the defendant substantially insists that the debts and charges should be paid by the complainants alone. Admitting the other specific legacies, he alleges that the slave Ann, bequeathed to Mrs. Mauldin, had been given by the testator to the defendant's sister, Elizabeth Cobb, and that the slaves bequeathed to Eleanor Cobb, defendant's mother, had been given in testator's life time, and were the property of her husband, Henry Cobb, deceased, and that the defendant took them as his administrator. In the contest concerning the will, one of the strongest arguments was, that the will was chiefly for the benefit of the defendant and his family. But, according to the narrative in the defendant's answer, his family had no interest whatever in the will. On the contrary, his sister and his mother held by a title anterior to the will, and, in some measure, in opposition to its provisions. The answer insists that the testator left no property, except the two slaves bequeathed to the complainants, and \$52.25 worth of furniture,

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*&c., and that the slave, Ann, which the defendant had caused to be appraised, was in fact not testator's property at his decease, but the property of defendant's sister, under a parol gift of the testator. It is unfortunate here, too, that the instrument which the defendant is officially bound to sustain, derives, at least, no support from his efforts.

It is not proposed, at this time, to discuss the various issues raised by the pleadings. It is admitted, that the complainants are entitled to specific legacies under the testator's will. The defendant insists that the estate of his testator is indebted to him—that there were no assets to pay these debts, and that the same, together with certain subsequent charges, must be paid by the specific legatees. On the part of the complainants, the indebtedness is denied, and it is, moreover, insisted, that the defendant has received property and funds, belonging to the estate, for which he ought to account, and for which he has not accounted. It is charged among other things, that about the time when the validity of the will was contested, in the Fall of 1848, the defendant carried out of the State, and sold, certain slaves of the testator; and that he also received certain oxen, cattle, horses, sheep, &c., for which he has not accounted. As to some of these negroes, to wit: Charly, Frances, Eliza, David, Cinda, and Walker, six in number, the defendant admits, that, in 1848, he took them to Mississippi, and sold

them in the aggregate for \$3,000, or \$3,050. But he avers, that Henry Parris made him a parol gift of these slaves in the latter part of the year 1841, or early in 1842,—and that when he was making his will, April 28, 1843, he executed to him a deed of conveyance for these slaves, and other property mentioned in the said deed, of which a copy is exhibited with the answer. The complainants object to the validity of this deed, in consequence of the fiduciary relation in which the defendant stood to Henry Parris; the condition of his mind; and other circumstances detailed in the testimony.

It appears that, in the early part of 1841, the defendant went to live with his grand-

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father, Henry Parris. The defendant *was a young man, and as well as the Court can collect, had previously been engaged in negro trading, (buying and selling slaves,) in which he had not been successful. His grandfather was far advanced in years, being then on the verge of eternity, and was besides, afflicted with a sore leg. He resided in Greenville district, between three or four miles from the Court-house, on a place, which was afterwards sold to Mrs. Townes, for seven hundred dollars. The number of slaves which he then had in possession does not precisely appear. He managed badly—the slaves did not make a support for him and them, and he was not unfrequently indebted to Mrs. Townes for supplies.

The defendant appears to the Court, to have had the entire management of the property so long as they remained together, and to have acted as the agent of his grandfather from that time, (early in 1841,) until his death, in September, 1847. This is deducible, not only from the current of the testimony, but from the narrative contained in the defendant's answer. When he took up his residence at his grandfather's, the latter was in possession of his homestead, of a valuable slave named Hence, another called Bob, and probably of some sixteen other negroes, of more or less value. The defendant's expression to one of the witnesses was, that he had come to take care of his grandfather, as he was old and childish. On the 28th April, 1843, the old man's will was executed, with the provisions stated; on the same day, at the same time, the deed in favor of the defendant was executed. Not many months after this arrangement, the establishment near Greenville was abandoned. Parris removed to Anderson, to the residence of Henry Cobb, and the defendant took possession of the Garrison place, three or four miles distant from his father's, taking with him the negroes included in the deed. It seems that, in '45 or '46, two negroes were given to Moses Parris. But between the period of the execution of the deed and the death of Henry Parris, in September, 1847, Hence, and probably Bob, and

certainly his homestead, had been disposed of. At his death, the condition of his affairs was this: the defendant claimed and held

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the six negroes under the deed; *his father, Henry Cobb, or his mother, Eleanor Cobb, laid claim to the remaining six negroes enumerated in the fifth clause of the will, alleging a parol gift by Henry Parris, subsequent to the date of the will. The slave, Ann, bequeathed to Mrs. Mauldin, was claimed by defendant's sister, Elizabeth Cobb, under another parol gift, said to have been made after the execution of the will; and, notwithstanding the sales of property above stated, the defendant now claims the only remaining negroes, to wit: the two or three bequeathed to the complainants, on the ground that they are the only assets to pay and satisfy the testator's indebtedness to him, (the defendant,) contracted during his agency, and in the transaction of his business. So that, pending defendant's management, sums, arising from the sales of property, to a not less amount than \$1,600 or \$1,700, have been appropriated in some way, and, excepting the two slaves to Moses Parris, all the other slaves of the testator, with the rest of his effects, will have become the property of the defendant, and his immediate family. It is this extraordinary result which has naturally stimulated an inquiry by the complainants, not merely why the other objects of the testator's bounty were overlooked, or neglected; but why the poor pittance, allotted to those who were remembered and noticed, should be taken from them.

The prominent question presented, relates to the validity of the deed of April, 1843. The complainants submit, that a transaction of this character, between parties occupying these relations to each other, is always regarded jealously; and that when the comparative helplessness, both physical and intellectual, of one of the parties is considered, the Court will at least demand the most ample and satisfactory proof, not only of the free will of the donor, but, more especially, of his distinct comprehension of the transaction in which he was engaged.

It is true, that this relationship between the parties would not necessarily invalidate a gift. As was argued in *Huguenin v. Basely*, 14 Ves., 273, "there is no authority that a mere agent is not capable of receiving a

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gift." But the propositions of Sir *Samuel Romilly, in that case, received the distinct approbation of Lord Eldon. He says, that though the Court disclaimed any jurisdiction to annul donations merely as being improvident, and that it was not necessary to affirm that an agent might not accept any bounty; yet he says, the interference of the Court stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person

over another. The Court regards such transactions with a jealous eye. If the donor is a weak man, and liable to be imposed upon, the Court "will very strictly examine the conduct of the person in whose favor the gift is made, and, if it sees any arts or stratagems, or any undue means have been used; if it sees the least speck of imposition at the bottom, or that the donor is in such a situation, with respect to the donee, as may naturally give an undue influence over him; if there be the least scintilla of fraud, this Court will and ought to interpose; and, by the exercise of such a jurisdiction, they are so far from infringing the right of alienation, which is the inseparable incident of property, that they act upon the principle of securing the full, ample, and uninfluenced enjoyment of it." Both the English and American decisions upon this subject are collected in *White and Tudor's* leading cases in Eq., 2 vol., 406. No arbitrary general rule can be established; nor, as is suggested in one of the cases, "would it be advisable that any strict rule should be laid down—any precise line be drawn. If it were stated that certain acts should be the test, or certain things should be required to rebut the presumption, how easy would it be for cunning men to place themselves beyond the denunciations of the law." When these confidential relations are shown to exist, it should be made to appear, in order to support the deed, that the confidence has not been abused—that all was fair—that the agent received the bounty freely and knowingly on the giver's part. The circumstances of each particular case are to be considered.

Let us apply these principles. The deed on which the defendant relies, bears date

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28th April, 1843, and purports to *have been executed in the presence of W. P. Turpin. The consideration is thus stated, "in consideration of four hundred and eighty-nine dollars and ninety-eight cents, money laid out and expended in and about the management of my business; the justice of which account has been acknowledged by me, paid by Amaziah B. Cobb, and for the services, care and attention, and the love and affection to him, the said Amaziah B. Cobb, (my grandson,) I bargain, sell and deliver unto the said Amaziah B. Cobb, 'the slaves, Charity, and her child, Julian, Dave, Walker, Cinda, and Frances, and also the cattle, horses, hogs, and sheep, that are at this time upon the plantation,'" concluding with a general warranty of the said bargained property.

The defendant's account is, that "some time shortly before or after the parol transfer and delivery of the slaves," (said to have been in the latter part of 1841, or early in 1842,) "this defendant lent and advanced to the said Henry Parris, the money above mentioned, (\$489.98,) during the year 1841,

as has been before stated; and when, at the drawing of the deed, this defendant learned that the said Henry Parris was about to convey to him the said slaves by deed, feeling grateful for his generous munificence, this defendant offered to include the note for lent money, which was accordingly done, and the said Henry Parris added and included the other property mentioned in the deed." This deed had been prepared by Joseph Powell, some time before its execution, 28th April, 1843, but the said Henry Parris had delayed its execution till the making of his will.

A large number of witnesses were examined, as to the mental capacity of Henry Parris, at the time when this deed was executed. Some of the witnesses, such as John Watson, the Ordinary of Greenville district, "thought him not a man of sound mind; he was weak, and subject to influence, &c.," and others testified, on the contrary, that he had good common sense, and always knew what he was about. The Court will not pretend to review the evidence, but, in the course of the investigation, prefers to adopt certain leading and admitted facts, and the statements of some

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of the defendant's witnesses, in *relation to the capacity of Henry Parris. The Court can perceive no proof of what is properly unsoundness of mind. He had arrived at an age very rarely reached by any of his fellow-creatures. He had long passed the period when "the strength of man is but labor and sorrow." The defendant's highly respectable witness, George F. Townes, Esq., who had known him from his (witness') infancy, says, in his cross-examination, that "Parris was 95 years of age when he died, in 1847. He never was a smart man, his mind always was weak." Another of the defendant's witnesses speaks of Henry Parris, in April, 1843, as being "very old and passive." Without the testimony of witnesses, this would probably be the condition both of his mind and will, at this advanced age. He was precisely in the condition to be much under the influence of those about him, and such is the general current of the testimony. His age and his infirmities demanded the attention of his friends, that he should not act unadvisedly. According to some of the evidence, one of the purposes of the defendant in going to live with him, was to prevent him from squandering his property, and particularly to prevent further bargain of slaves to P. Cauble, who appears to have had influence with him.

There was no want of care or precaution in the preparation of the deed. Not only is the pecuniary consideration recited with minute particularity, but that it was "money laid out and expended in and about the management of my business, the justice of which account has been acknowledged by me." (The answer says it was money loaned to Henry Parris, in 1841, for which he held his note for money lent.) The negroes constituted a

large portion of those in the donor's possession. But besides this, the deed made an absolute and immediate transfer of "the cattle, horses, hogs, and sheep, that were at that time upon the plantation," where the donor resided. It was not a testamentary disposition, nor a *donatio causa mortis*, but an absolute bargain and sale, accompanied with a warranty. If it was intended, that the donor should at once be deprived of the use of the cattle, horses, hogs, and sheep, which were

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so indispensable for his support, *(not to include the slaves,) it would in itself be such an act of improvidence, as would strongly imply mental imbecility, or undue influence, or both. But, if Henry Parris was still to remain in the possession and enjoyment of the property, why did not this act of "generous munificence," as it is termed by the defendant, constitute a clause of the will executed at the same time? Without pursuing this inquiry, it seems hardly necessary to remark, that a party, situated as the defendant was, and claiming the benefit of this instrument, should show that its provisions were well understood, its effects well considered, and that the act done was the result of his own unbiassed will. It is first proper to scan carefully, the circumstances accompanying the execution of the instrument. The law, for wise purposes, has required that in some dispositions of property, witnesses should be called to attest the transaction. This is important for both parties. To testamentary dispositions, a large number of witnesses is required—and one of the prominent reasons is, to throw a guard around those who are likely to require protection—to secure from imposition those whose situation may render them most obnoxious to its influence. Dr. William P. Turpin is the attesting witness to the deed of 28th April, 1843. He had never known Henry Parris until one week previous, when he was called to see him professionally. He had visited him on the 27th April, and told them he should not return until the 29th April. But, on the morning of the 28th, defendant called upon him to go and see his grandfather, and he accompanied him. He says, "his acquaintance with Mr. Parris was limited; knew nothing of the state of his mind at that time; he was laboring under great bodily suffering from a severe sore leg;" that, "at the time he witnessed the will, he also signed a paper, (as witness,) which was represented to be a deed for the land on which Mr. Parris lived." He says, that, "Joseph Powell, C. Larke, and another man, were present. Mr. Powell wrote and produced the papers;"—"the defendant was not present, but was in an adjoining room." He says, "his (Parris's) health was bad, and he was confined to bed—he had to

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be propped up to sign *the two papers—his sufferings were so great that they rendered

him physically unfit for business;—he was very feeble at the time spoken of." In his reply to the defendant's fourth interrogatory in chief, he says, "he saw Mr. Parris sign the paper referred to, but did not see him deliver the same to Mr. Cobb;" and he repeats that the paper, which he thus attested, was "represented to be a deed for the land on which Mr. Parris lived."

Charles Larke was also examined for the defendant, A. B. Cobb. He said, among other things, that "he was present when Henry Parris signed his will, and he subscribed his name as witness to it;" also "saw him sign another paper at that time, but did not know what it was; that he was at Parris's house about two hours;" that "there was only a minute or two between the signing of the two papers." On his cross-examination, he says, "A. B. Cobb came to witness's house that morning, and said his grandfather wanted him to go over and witness his will." "When the will was signed, Mr. Parris was sitting on the bed, and complained that his leg hurt him; the will was read before Parris signed it, but the other paper was not read; Powell handed the paper to Parris, and he signed it. He (witness) did not hear it read, but he saw Parris have it in his hand looking at it, and long enough to have read it; there was nobody present, except Mr. Powell, Dr. Turpin, and witness. A. B. Cobb was not there." This witness said, he was himself a German; that he came to this country from Germany, in 1834; that he cannot read writing in English—and his acquaintance with the language seems imperfect;—he understands, (he says), "low English, but did not understand high English." Both these witnesses are adduced in behalf of the defendant;—their evidence is very instructive;—neither of them was called in, with reference to this transaction. Dr. Turpin was called in, that morning, professionally, and was surprised, he says, to find that for that purpose he was not wanted. Larke was told that Henry Parris wished him to come and witness his will; the old man is very feeble; obliged to be propped up in his

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bed; physi*cally unfit for business; the will is read, and executed and attested. At the same time, Dr. Turpin thinks, after the will, "this paper is handed by Mr. Powell to Henry Parris;" the paper is not read, but Parris signed it. If the will was read to the testator, why should it be deemed unnecessary to read this instrument? Larke says it was not read. Dr. Turpin proves not only that it was not read, but he proves much more. He is the defendant's witness;—he is the attesting witness. He says that the defendant requested him to sign as a witness, and then retired into an adjoining room. Mr. Powell had prepared, and he produced the papers;—one, the witness understood to be a will;—this paper was represented to be a deed for the land on which Mr. Parris lived. Thus represented, it

was handed to Mr. Parris, and executed by him, and attested by the witness, but he saw no delivery of the deed to the defendant. Dr. Turpin is evidently an intelligent witness, and his statement on this subject is positive, distinct, and twice repeated, in reply to the defendant's inquiry. By whom was this representation made? Not by Larke certainly; perhaps not by the defendant, Cobb. The only persons, then, by whom the representation could have been made in the presence of Dr. Turpin, were either Joseph Powell, or Henry Parris himself, or both. The Court has in vain sought for any explanation, any evidence which would repel the inference, or rather impair the force of the positive statement, that this instrument, containing the acknowledgment of an indebtedness of \$489.98, and a gift of six slaves, with cattle, horses, hogs, &c., was misrepresented by the draughtsman, who handed it for signature to the party, to be "a deed for the land on which he lived;"—that it was so represented in the presence of the attesting witness. It is possible that Dr. Turpin is mistaken in his evidence, or that the defendant himself had no part in this misrepresentation, and is incapable of it. But any such arbitrary speculation on the part of the Court derives no confirmation from other sources, and is painfully chilled by the testimony of William Choice, a witness adduced by defendant, and who was cross-exam-

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ined by the complainants. Among *other matters, he testified that Henry Parris was weak minded, failing, and easily influenced, in the latter years of his life, by his friends. He never considered Mr. Parris competent to attend to complicated transactions. At the time mentioned, he considered him to be easily imposed upon by those who had his confidence. "He regarded the defendant as the general agent for Parris,—he claimed to be so." Witness "understood, both from A. B. Cobb and Henry Parris, that Cobb was the general agent of Parris." Witness instituted a suit in the name of Parris, against Rolly Jenkins, the whole of which was commenced and conducted by A. B. Cobb, without any communication between witness and Parris. But the transaction, to which this witness particularly testifies, took place "before he heard of Parris's will, which was drawn by Mr. Powell, who became the counsel of Mr. Cobb;" he cannot fix the precise date of the occurrence, but what then took place, "has been impressed on his mind by frequent examinations since their occurrence." On the occasion to which he refers, he says, "Mr. Cobb called on me, and asked me to draw an instrument of writing, conveying to himself a considerable portion of Henry Parris's property, to be signed by Henry Parris; and, on being told by me that, if Mr. Parris would call and tell me what kind of an instrument he wanted, and if I believed he understood

its nature and character. I would draw it for him, Mr. Cobb said, that if I would tell Henry Parris it was right for him to do it, he, Henry Parris, would do it—if I would procure such an instrument, he, A. B. Cobb, would give me one hundred dollars. Afterwards, Mr. Henry Parris called at my office, and said, A. B. Cobb had told him to call there and sign a power of attorney, authorizing A. B. Cobb to attend to the affairs of said Parris. I told Parris it was unnecessary to give such an instrument, as Cobb was already acting as his general agent." When asked by the defendant as to his inference, he says, that "he has stated the facts, from which conclusions may be drawn." After this unsuccessful experiment with the witness, he says, "that Mr. Powell became the

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counsel of Mr. Cobb, and he heard of *the will that he had drawn;" although there is good reason to believe that neither he, nor any one else, except the defendant and his counsel, was aware, until after the decease of Henry Parris, in 1847, that a deed of this character, and containing these provisions, had been executed. Except the evidence of Mr. Powell, there is no proof of delivery. It was never recorded, nor was it ever proved for record. If no fiduciary relation had existed between the defendant and Henry Parris, the Court would come to the conclusion, upon the clear preponderance of the testimony, that this transaction cannot stand; that, whether the defendant relies upon the parol gift of the slaves, or the bargain and sale of the slaves and stock, his claim must equally fail. It may be, that Henry Parris was grateful to the defendant, and intended, and was willing to have rewarded him for his services. As Lord Eldon says, in *Huguenin v. Baseley*, this is not enough. "Was all the care and providence placed round this aged and infirm person, as against those who advised him, which, from their situation and relation with respect to him, they were bound to exert in his behalf?" So far from it, it is impossible to read, and to credit the testimony of Mr. Choice, without being forced to the conclusion of the unworthy designs of the defendant; or the evidence of Dr. Turpin, without a deep conviction that those designs had been consummated.

Leaving this branch of the case, it is proposed now to advert to the purchase of the Charles Garrison tract of land. It was sold by the Sheriff in July, 1842. Henry Parris lived at this time between three and four miles from Greenville Court House, at his homestead. He was ninety years old, feeble, and so incapable of attending to his own farm, that he was obliged yearly to purchase supplies—and he was annoyed by petty debts, which he had not the means to satisfy, without a sale of property. The Garrison place was some fourteen miles from the Court House. Yet the Court is told, in the

defendant's answer, that, at the Sheriff's sale in 1842, this land was bid off by Henry Cobb, (the father of the defendant,) for Henry Parris, for the sum of eleven hundred and

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ten dollars; that Parris *armed the contract, and afterwards sold the land to the defendant. The whole transaction is complicated. But if Parris understood anything about it, it affords the most striking evidence of his general incapacity, or of the absolute control exercised by the defendant. He was on the brink of the grave, with more land than he could possibly improve, and so embarrassed in his pecuniary affairs, that he had sometimes a constable at the door, with a magistrate's summons. Yet, at this period of life, under these circumstances, he embarks in a new purchase of four hundred and twenty acres of land, situate ten miles off, which was sold, as the defendant says, at a fair price, and for which he, Henry Parris, was to pay eleven hundred and ten dollars, cash. "The money was raised," (says the defendant,) "by borrowing six hundred dollars from Jeremiah Cleveland, and five hundred dollars from Joseph Powell, and the ten dollars was paid by this defendant." Mr. Choice says, "he distinctly remembers, that in July, 1842, the Cobbs wanted to borrow money for the payment of the Charles Garrison land, bought at Sheriff's sale. As far as his memory serves him, the Cobbs borrowed the money, and Mr. Parris was security." Witness, "as attorney of Capt. Cleveland, took the confession of judgment, and in that way became acquainted with the transaction." The Sheriff's deed to Parris was not obtained until December, 1842. On the 19th December, 1842, Parris conveyed the premises to the defendant for the same sum, and on the next day proceedings were instituted against Garrison. Defendant went to live on the Garrison place in the beginning of 1844, and continued to reside there until December, 1847, when he sold the premises to William Meares, for thirteen hundred and fifty dollars. The defendant insists on the validity of the purchase for Henry Parris, at Sheriff's sale, and the Court is not disposed to disturb it, nor do the complainants ask it. But the Court is of opinion, that, in the condition which the defendant occupied in December, 1842, and under the circumstances which have been developed, the transfer of the 19th December, 1842, ought not to be

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sustained, and that the *defendant must account for the enhanced price at which he sold the premises to Meares, as well as for the rent, from the time he took possession, in 1844, until the sale to Meares, as against whom the bill must be dismissed.

It is ordered and decreed, that the defendant, A. B. Cobb, deliver up to the complainants the slaves, with their issue, specifically

bequeathed to them, respectively, by the testator, Henry Parris, and that he account for their hire from the Fall of 1848, until such delivery.

It is further ordered and decreed, that the instrument bearing date 28th April, 1843, be delivered up to be cancelled; that the defendant account for the amount for which he sold the slaves therein mentioned, with interest from the time of their removal from this State, in 1848, and that he account for their hire from the beginning of 1844, until such removal, in 1848; that he account also for the residue of the property purporting to be transferred by said deed. It is also ordered, that it be referred to the Commissioner, to take an account of the moneys received and disbursed by the defendant, both during his agency in the life time of the testator, and as executor since his death; and that he report thereon, preparatory to a final adjustment among the parties interested in the residuary estate of Henry Parris, deceased, as his next of kin.

It is finally ordered, that the costs of the complainants, as well as those of the defendant, William Meares, be paid by the defendant, Amariah B. Cobb. Parties to be at liberty to apply for any other orders which may be necessary in carrying the decree into effect.

The defendant, A. B. Cobb, appealed, and moved this Court to reverse or modify the Circuit decree, on the grounds:

1. Because the will of Henry Parris is a will of specific legacies, without a residuary clause; and therefore Cobb, as executor, is only chargeable, in this form, with the specific legacies committed to him by the will. If there are other means belonging to the estate of Parris, they can only be reach-

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ed by *taking administration on the estate; and that not having been done, Cobb is not liable to account to the plaintiff in this form.

2. Because A. B. Cobb was the special, and not the general agent of Parris, especially after their separation in January, 1844; and, as such, the statute of limitations ought to protect him against the several matters mentioned in the bill.

3. Because, even if he had been the general agent of Parris, which he never was, the statute ought to protect him, as to conveyances of property made to him by Parris, after the lapse of four years from such conveyances.

4. Because the deed of April 28, 1843, having been executed at the same time that Parris executed his will, and the will having been established before every tribunal in which the appellants were entitled to be heard, in the face of the same objections here urged against the deed, the Circuit decree ought to have established the deed.

5. Because, independent of the adjudication

in favor of the will, the evidence is sufficient to establish the deed.

6. Because the Circuit decree ought to have sustained both the purchase and sale by Parris of the Garrison place, as the two conveyances were executed within seven days of each other, or ought to have set both aside; and therefore the Chancellor erred in declaring the purchase by Parris valid, and the sale by him invalid, and in requiring A. B. Cobb to account for the rents, and for the excess for which he sold the place to Meares.

7. Because, if the deed to A. B. Cobb, of 28th April, 1843, cannot stand, he is entitled to payment for his services, in the years 1841, 1842 and 1843, as overseer for Parris; and, therefore, the Chancellor erred in setting aside the deed, without allowing Cobb payment for said services.

8. Because the demand of \$184.50, in the hands of A. B. Cobb, as administrator of Henry Cobb, was money paid by Henry Cobb, on 12th October, 1847, for Parris, as clearly shown by the evidence and is a valid, subsisting demand, due to the estate of Henry Cobb by the estate of Henry Parris; and

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therefore the Chancellor erred in his decree, in not making the said demand a charge on the estate of Parris.

Vandiver, for appellant.

Perry, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. The defendant's first ground of appeal has certainly no foundation. But it is due to the zeal and earnestness with which it was insisted upon by both the counsel of the appellant, that it should be more fully explained. It is said this is a will of specific legacies, without any residuary clause, and that the defendant, the executor, is either not accountable at all, beyond the payment of debts and legacies, or that, if so accountable, the surplus (in the language of the appeal) "can only be reached by taking administration on the estate of Henry Parris, deceased."

It is stated in the decree, that when the testator made his will, he had three sons and four daughters. One of his sons had since died. All the daughters, the two surviving sons, and the representatives of the deceased son, were parties, either as complainants or defendants. It is not suggested that there were any other distributees, nor is it a ground of appeal, that all the distributees are not before the Court. Then, whence the necessity, or propriety, of an administration? By law, the title of all the testator's personalty, whether disposed of by his will or not, is vested in the executor. It is true, that in England, the surplus, after payment of debts and legacies, was held, at law, to belong to the executor; but even there, this general rule of law was controlled in Equity, in all cases where a necessary implication or strong

presumption appeared, that the testator meant only to give the office of executor, and not the beneficial interest in the residue. In all such cases, the executor has been considered a trustee for the next of kin of the testator. And now, by the statutes of 11 Geo. IV. and 1 Wm. IV., Courts of Equity are required always to consider executors as trustees for the persons who would be en-

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titled to distribution, in respect of *any residue not disposed of by the will. 2 Wms. Exors. 1050. But in South-Carolina executors have been always so regarded. As executors, they have no interest beyond the commissions allowed by law, and for any surplus of their testator's estate they are accountable as trustees, to the next of kin. In nearly every volume of our Reports, cases may be found in which this liability of the executor is familiarly recognized, such as *Hinson v. Pickett*, 1 Hill Eq. 35; *Broughton v. Telfer*, 3 Rich. Eq. 431, &c.; although it may be true that no direct decision upon the subject may be found, because no such question has been made.

Then it is contended that the defendant is protected by the statute of limitations, and that, particularly after January, 1844, he was only the special agent of the testator. But the testimony is very full, both from his own acts and declarations, as well as the declarations of the testator, that the defendant was his general agent. One of the demands on which he insists, is for a note which he signed, in the name of the testator, and as his agent, subsequent to January, 1844, and which he alleges was paid by the surety, Henry Cobb. It is well settled, that in such cases, the statute does not commence to run until the termination of the agency. *Hopkins v. Hopkins*, 4 Strob. Eq. 207 [53 Am. Dec. 663]. And, even if the general agency ceased, as contended, in January, 1844, the bar had not attached in September, 1847, when the defendant became executor.

The defendant having refused to deliver the two slaves specifically bequeathed to the complainants, (the son and granddaughter of testator,) on account of the insufficiency of the estate to pay the debts, this bill was filed, alleging, among other things, that the defendant, soon after testator's decease, had carried off to the West and sold certain of testator's slaves, and the bill prayed not only a specific delivery of the slaves bequeathed, and an account of their hire, but that the defendant might account for his actings and doings as executor, and also for what he had received and disposed of during the testator's imbecility. The answer admits the re-

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moval and sale of the *negroes, in 1848, for \$3,050; but insists that they had become the property of the defendant by the deed of April, 1843. The infirmity of that deed has been adjudged, for the reasons stated in

the decree, and which need not be repeated. And as no adverse possession of the property included therein is suggested to have existed, until the defendant's removal in January, 1844, the bar of the statute (if applicable under such circumstances) was not completed at the testator's death.

It is argued that the conclusions of the Chancellor upon the facts are at variance with the verdict of the jury, in relation to the will. This is an entire misapprehension. The Chancellor was of opinion, and so stated, that the testimony did not establish incapacity to make a will, but only such condition, both of mind and body, as would render the testator peculiarly subject to be influenced, and, it might be, misled, by those in his confidence, and that the defendant stood in that relation, and, in the matter of the deed, had abused the confidence. But, under the will, the defendant took no part of the testator's estate, and, besides, it was proved that the will was read aloud, in the presence of the attesting witnesses. Under the deed, the defendant took a large part of the testator's estate. It was executed at the same time with the will, but it was not read to the testator, and, according to the testimony of the only attesting witness, it was represented to be a deed of the land on which he lived. Further, on the trial of the will, Mr. Choice gave the same evidence as on this occasion. In the report of the presiding Judge to the Court of Appeals, advertent to this evidence, he says he "charged the jury that even the offer of a fee, or a bribe, to a lawyer, to induce him to persuade the testator to make a will in favor of the executor—and there was no further proof that such base intention was carried out—was not, of itself, conclusive evidence of either fraud or undue influence." But what would have been the ruling of that pure and enlightened magistrate, if such unworthy intention had been too successfully carried into effect? or if a party, who was proved to have unsuccessfully tampered with the integ-

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riety of *one of those who should be ministers at the altar of justice, had afterwards sought to defend his pretensions under an instrument of precisely the same character as that which he had attempted to procure? As already intimated, it does not appear that, at the trial of the will, the parties knew anything about the existence of this deed. It had not been read in the hearing of the by-standers. It was never put on record; and, for all that appeared on that trial, the defendant had very little personal interest in the transactions that took place at the bedside of Henry Parris, on the 28th April, 1843. Subsequent developments have given more marked significance to his conduct. It may be that witnesses are mistaken—or worse. It may be that appearances are delusive. But Courts of Justice are bound to form conclusions from the evidence before

them. They must deal with the materials presented to them, and are not permitted to indulge in speculations. According to the evidence submitted, and the approved principles of this Court, as applicable to the relations of these parties, the judgment of the Circuit Court should be sustained. It is so ordered and decreed, and the appeal dismissed.

JOHNSTON, DARGAN and WARDLAW, CC., concurred.

Decree affirmed.

5 Rich. Eq. *473

*Ex parte WILLIAM WARE.

(Columbia. May Term, 1853.)

[*Executors and Administrators* ⇨263.]

A surety to a single bill, who pays it off after the death of the principal, is entitled to rank as a specialty creditor of the estate of the principal.

[Ed. Note.—Cited in *Edwards v. Sanders*, 6 S. C. 333; *Robinson v. Robinson*, 20 S. C. 573.

For other cases, see *Executors and Administrators*, Cent. Dig. § 994; Dec. Dig. ⇨263.]

Before Dunkin, Ch., at Abbeville, June, 1852.

This was an appeal from the judgment of the Ordinary.

N. M. Ware, deceased, the intestate, and William Ware, were, at the death of the former indebted to the representatives of Thos. Kirkpatrick, by two joint and several sealed notes. N. M. Ware was the principal, and William Ware his surety. The notes were paid by William Ware after the death of his principal. He presented them before the Ordinary, and claimed to be entitled to rank as a specialty creditor of the estate of the intestate. The Ordinary thought, he was only entitled as for so much money paid; and rejected his claim as a specialty creditor. He appealed.

Dunkin, Ch. The statement of facts appears from the brief of the solicitors, together with the judgment of the ordinary.

It will be remarked, that the sealed note is joint and several. At the decease of the intestate, N. M. Ware, the representatives of Thos. Kirkpatrick, the payees, were specialty creditors of the estate of N. M. Ware, deceased. In *Morton & Courteny v. Caldwell*, 3 Strob. Eq. 161, it was ruled by the Court, that "the proper mode of determining the proportion of assets liable to the respective creditors of a deceased debtor, is to assign them according to the amount of the debts as they existed at his death." It is there said, that "if upon any of the demands thus taken into consideration, any payments have subsequently been made by a third party, that does not release the proportion of the deceased's assets originally liable to the creditor, if there still remains due on the demand a balance re-

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quiring that proportion to satisfy *it." The Chancellor also clearly intimates the opinion, that if the party who made the payment was only surety for the debt, he would become entitled, (if he had paid the whole debt,) by way of reimbursement, to the proportion to which the original creditor was entitled. And in *King v. Aughtry*, Id. 149, the right of the surety who pays off the debt of the principal was considered, and the doctrine of our own Courts, in affording protection to sureties, recognized and enforced. See also, *Thomson v. Palmer*, 3 Rich. Eq. 139. (a) My opinion is, that the appellant was entitled to rank as a specialty creditor of the estate of N. M. Ware, deceased; and, in conformity with the thirteenth section of the Act of 1839, regulating appeals from the court of ordinary, it is ordered and decreed, that it be referred to the Commissioner of this Court to re-state the account according to the principles herein declared.

The administrator of N. M. Ware, appealed, on the grounds:

1. Because, it is respectfully submitted, his Honor erred in deciding that a surety who paid a single bill to the obligee, after the death of the intestate, the principal, was remitted to the rights of the obligee, and ranked as a specialty creditor.

2. Because the Ordinary, in deciding questions in his Court, must be governed by the law and practice established therein, which do not recognize the right of subrogation; and that, to require the Court of Ordinary to conform in all respects to the Court of Equity, would subvert the independence of the former Court, and render it, in substance, a subordinate branch of the Court of Equity.

Thomson & Fair, for appellant.

Ferrin & McGowan, contra.

PER CURIAM. This Court is of opinion,

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that there is no error *in the decree of the Chancellor; and it is ordered, that it be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., concurring.

Decree affirmed.

(a) See also *Perkins v. Kershaw*, 1 Hill, Eq. 351; *Pride v. Boyce*, Rice Eq. 275 [33 Am. Dec. 78].

5 Rich. Eq. 475

DUNCAN McRAE and Others v. JOSHUA DAVID, Ordinary.

(Columbia. May Term, 1853.)

[*Executors and Administrators* ⇨26.]

The statute 22 and 23, Car. II, c. 10, making it the duty of the Ordinary, in granting administration, to take sufficient bond, "with two or more able sureties,—respect being had to the

value of the estate," is not repealed by the Act of 1789, requiring that "every administrator shall enter into bond, with good security, to be approved by the Court, in a sum equal to the full value of the estate." The two Acts are to be construed together.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 144–170; Dec. Dig. ⚭26.]

[*Executors and Administrators* ⚭26.]

In determining the sufficiency of the bond, the responsibility of the administrator himself is not to be considered. The ability of the sureties is alone to be looked to.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 144–170; Dec. Dig. ⚭26.]

[*Executors and Administrators* ⚭26.]

It is the duty of the Ordinary to take bond, with at least two sureties; and each surety must be able, in a pecuniary or property point of view respect being had to the value of the estate to be administered.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 144–170; Dec. Dig. ⚭26.]

[*Executors and Administrators* ⚭26.]

The Ordinary, in determining upon the ability of the sureties, acts ministerially, and not judicially.

[Ed. Note.—Cited in *Williams v. Weeks*, 70 S. C. 5, 48 S. E. 619.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 144–170; Dec. Dig. ⚭26.]

[*Judges* ⚭36.]

If the loss, which has been sustained from the insufficiency of the bond, has not resulted from negligence on the part of the Ordinary, but has arisen from causes, which, acting faithfully, he could not foresee or control, he is not liable.

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. § 166; Dec. Dig. ⚭36.]

[*Executors and Administrators* ⚭26.]

The evidence as to the ability of the sureties to an administration bond considered, and the Ordinary held liable to distributees for taking an insufficient bond.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 144–170; Dec. Dig. ⚭26.]

Before Dargan, Ch., at Marlborough, March, 1853.

Dargan, Ch. Daniel McRae, late of Marlborough district, departed this life on the 5th August, 1842, intestate, and left a personal estate estimated at the time as worth between four and five thousand dollars. The defendant, Joshua David, who was then (as he is now) ordinary of the district, granted

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letters of *administration to Colin McRae. The latter executed an administration bond to the ordinary, bearing date the 29th August, 1842: to which Ephraim L. Henagan and John L. McRae were the sureties. Colin McRae, the administrator, made only one return. He reduced the assets to possession; and in the year 1845, died intestate and insolvent, without having accounted for any portion of the estate of Daniel McRae, which had come into his hands. After his death,

the defendant, as ordinary, administered de bonis non on the estate of Daniel McRae, as a derelict estate.

The sureties, E. L. Henagan and John L. McRae, have both died intestate, and totally insolvent; and nothing, by any possibility, could have been derived from their estates to satisfy the claims of the distributees of Daniel McRae.

This bill has been filed by parties claiming to be the distributees of Daniel McRae, against the defendant, as ordinary, for the purpose of making him liable for the maladministration of Colin McRae. They charge that he is so liable on account of his official default and misconduct in taking inadequate and insolvent security on the administration bond of Colin McRae. Failing in this, they claim an account of such portions of the derelict estate of Daniel McRae, as have come into his hands, after the death of Colin McRae.

As to the question of the defendant's liability for the official default charged in the bill, much evidence has been offered; and if the charges of the bill had been sustained, the defendant would of course have been liable.

The Act of 1679, 2 Brev. Dig. 89, directs the ordinary, in granting letters of administration, to take the bond of the administrator, with "two or more able sureties." The Act of 1789 directs him, under the same circumstances, to take good security, to be approved by the Court. The two Acts, in this respect, have precisely the same meaning: where sureties are required by law to be given for any purpose, it means good and sufficient security, adequate to the end proposed.

The ordinary, like every other public offi-

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cer, is bound to discharge the duties imposed upon him by his office in an honest, faithful and prudent manner. If he has not so discharged his duties, and loss and damage result, he should be, and is responsible, to the parties aggrieved. The duties of an ordinary are judicial and ministerial. In the discharge of his judicial duties, nothing short of wilful default, amounting to corruption, would make him liable. In the performance of his ministerial functions, he is not (for the best of reasons) so hedged in and protected by the law. In regard to his merely ministerial duties, he may be answerable for damages resulting from his neglect, though it may not amount to corruption, or a wilful default. The taking of an administration bond by an ordinary, as by law required, is a ministerial, and not a judicial act. The omission to take good and sufficient sureties to an administration bond, by which loss accrues to the parties interested, is an official default, for which an ordinary would be liable, if it be the result of carelessness or neglect. Still, in reference to the

discharge of his merely ministerial duties, infallibility of judgment is not required. Neither is he to be regarded as a guarantor of the solvency of the sureties which he takes. If he discharges a duty like this, with the circumspection and diligence which prudent men would observe, under similar circumstances, in the management of their private affairs, that is sufficient to exempt him from liability for any subsequent loss.

Every public officer is presumed to have discharged his duties in a proper manner. The onus is upon the party alleging the contrary of this presumption, to prove his allegations. The defendant has the advantage of this presumption in the commencement of this investigation. And it would not have been sufficient for the plaintiffs to have made a doubtful case against him. The proof must be strong enough to produce a conviction, unaccompanied with doubt, that the defendant has committed an official default.

When I come to apply the foregoing principles to the evidence which has been taken in this case, I cannot perceive that the defendant has committed an official default of

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such a character *as to make him liable to the plaintiffs. The result of the administration has been most disastrous. And E. L. Henagan, I am satisfied, was insolvent at the date of the bond. John L. McRae, the other surety, was not worth more than \$2,500 at that time. But there is strong proof, from intelligent and disinterested sources, that the bond was deemed a good one at the time; and there are many witnesses, who have been, and are, in public stations, (sheriffs, clerks, ordinaries, and merchants,) who were well acquainted with the obligors on the administration bond, and whose duty and interest it was to learn and know the pecuniary circumstances of their neighbors, who have testified strongly, that the bond would have been deemed by them adequately secured at the time it was taken, and that, if they had been the ordinary, they would have taken the bond under the like circumstances. I refer to the evidence on this point. It is ample and conclusive. Unless infallibility of judgment is to be required of the defendant, he cannot be made responsible for the insolvency of the obligors of the bond in question.

It is ordered and decreed, that so much of the complainants' bill as seeks an account against the defendant, for the devastavits of the administrator, Colin McRae, be dismissed.

The defendant, as I have before stated, on the death of the administrator of Daniel McRae, as ordinary, took charge of what remained of said estate, as derelict. It is in evidence, that the case of Joshua David, Ordinary, v. Duncan McRae, which has been collected by sheriff McGilvary, and which he is now ready to pay over to the defendant, is a portion of the assets of Daniel McRae. Whether the defendant has been able to save

anything from the wreck, does not appear. He must account for so much as he has received, and it is so ordered and decreed. This is subject, however, to the condition that follows:

The defendant, not knowing the plaintiffs in the bill to be the distributees of Daniel McRae, insisted in his answer, that they should be required to make proof on that

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point. This was *not done on the trial. But the solicitors of the parties, on both sides, insisted that the case should be tried, with a reservation as to the right of the plaintiffs to be considered as the distributees of Daniel McRae. I consented reluctantly, and I think improperly, to the arrangement. The trial, however, was gone into upon this condition.

It is ordered and decreed, that the plaintiffs have leave to prove themselves to be the distributees of Daniel McRae; and after that, the Commissioner will proceed to take the account above ordered against the defendant, as the assets of the estate of Daniel McRae, which have come into his hands.

The plaintiffs appealed upon the grounds:

1. Because his Honor has adjudged, that the ordinary is not responsible for the consequences of having taken insufficient sureties on an administration bond, unless it is proven by the parties claiming such responsibility, that he did not exercise such care and diligence, as prudent men use in the management of their private affairs: Whereas, it is respectfully submitted, the true question, in every case of the kind is, whether there was in fact, under the particular circumstances, negligence on the part of the ordinary, to which the resulting injury is fairly attributable, and when the sureties are proven to have been in fact insufficient, and injury is shown to have resulted, the burden is upon the ordinary of showing that his having taken such surety was owing to no negligence on his part.

2. Because, in the case before the Court, the evidence was abundant to exclude the defendant from the terms of even that rule of diligence, which his Honor affirmed in his decree; and whether the test of responsibility be that contended for in the first ground of appeal, or that stated by his Honor, the defendant is, upon the evidence, liable to the distributees of the estate of Daniel McRae, for the loss resulting from his having taken insufficient sureties on the administration bond of Colin McRae.

3. Because, it is most respectfully submit-

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ted, in determining *the question, what a prudent officer would have done under the circumstances of the defendant, his Honor has attached, altogether, an undue importance to the wild opinions, which witnesses profess to have entertained, some ten or eleven years ago, of the solvency and responsibility of E. L. Henagan and John L. McRae;

whereas, these opinions are worthless, unless founded upon, and supported by, reasons which would have been entirely satisfactory to prudent men, making diligent inquiry into the solvency of these parties.

4. Because, it is respectfully suggested, his Honor appears to consider, in his decree, the legal obligation of the ordinary "to take bond, with two or more able sureties," sufficiently fulfilled by his simply taking a good bond, with two sureties, and this, it is submitted, is error.

[For subsequent opinion, see 7 Rich. Eq. 375.]

Thornwell, Inglis, for the motion, cited, 2 Stat. 523; 5 Ib. 110; 2 Green. Ev. § 586; Sparhawk v. Bartlett, 2 Mass. 198; Oxley v. Coperthwaite, 1 Dal. 349; Clark v. Moore, 1 Tread. 151; Treasurers v. DeSaussure, 2 Speer, 186; Jenner v. Joliffe, 9 Johns. R. 381; Simmons v. Watson, 2 Speer, 97; Smith on Stat. 599; Hext v. Porcher, 1 Strob. Eq. 170; Boggs v. Adger, 4 Rich. Eq. 408; 1 McC. Ch. 464; 2 Hill, Ch. 364; McM. Eq. 153, 155; 1 Smith Lead. Cas. 283, Amer. note; 2 Mill, 382; Bail. Eq. 482; 4 McC. 547.

Dudley, contra, cited Sewill on Sheriffs, 162, 169, 457; 3 Rich. 59; Teasdale v. Kennedy, 1 Bay, 322; Stat. 11 Geo. 2 c. 19, § 23; Act 1839, 11 Stat. 15, 29, 30.

The opinion of the Court was delivered by

JOHNSTON, Ch. We agree with the Chancellor in relation to the application of the statute 22 and 23 Charles 2, ch. 10, 2 Stat. 523, to this case.

This statute, which was made of force by our statute of 1712, makes it the duty of the ordinary, in granting administration of intestates' estates, to take sufficient bond, "with

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two or more able *sureties,—respect being had of the value of the estate." It constituted the law on the subject at the passage of our statute of 1789. (5 Stat. 110.) This latter statute requires that "every administrator shall enter into bond, with good security, to be approved by the Court, in a sum equal to the full value of the estate."

These two statutes are to be construed together. There are no express terms in the latter repealing the former; therefore, if repealed, it must be by implication. The doctrine of repeal by implication is not favored in law. (a) Where repeal arises by implication, the implication must be necessary, and arise from incompatibility or incongruity, more or less, between the provisions of the new law and the old. But there is no repugnance between them in this instance.

The true interpretation of the statute of 1789, in connection with the statute of Charles, is, that when the former requires bond, "with good security," it means that se-

curity which the latter required and made good,—to wit, the security of two "able sureties,—respect being had to the value of the estate."

If this interpretation of our statute law were doubtful, we should feel inclined to adopt it, from its conformity to the practical construction which, we believe, has uniformly been put upon the Act of 1789, from the time of its enactment. We believe, in every ordinary's office in the State, the rule is, to require at least two sureties to administration bonds.

In our view, the responsibility of the administrator himself does not enter into the consideration of the sufficiency of the bond. The creditors and distributees of the estate never needed his bond to make him responsible. He was responsible without it. The security, which the law intended to give them, was additional to his. This will be more clearly seen, when it is considered that the legislature had established a rule, regulating the right to claim administration, irrespective of the responsibility of the person upon whom this right devolved. The person entitled to administer, must have letters

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granted to him upon *the sole condition, that he give suitable sureties; and this shows that the ability of the sureties was alone looked to by the legislature.

We have thus ascertained the duty of the ordinary. He must take bond, with at least two able sureties. He was not to inquire whether the bond was good, reference being had to the solvency of the administrator. The inquiry was not, whether compounding the responsibility of all the parties to it, it was sufficient. He must look to the sureties alone. If they were "able" to respond for the estate, the "security" was good; otherwise, it was not such as he was required to take. Nor was his duty performed, unless he took two such sureties. If he had taken a bond, with one surety only—however able that one might be to answer for the value of the estate,—this would have been no compliance with the statute. He must take another. Nor would it have been a substantial compliance, if, having taken one able surety, he had accepted a man of straw for the second. It would have been a mere evasion of duty. The second surety must be able—respect being had to the value of the estate—as well as the first. Each surety must be "able," and "able" with reference to the estate to be secured. (b) That is the standard by which

(a) State v. Woodside, 9 Ired. 496; Bruce v. Schuyler, 4 Gilman, 4.

(b) NOTE BY CHANCELLOR JOHNSTON.—Since the delivery of this opinion, I have reconsidered this point, and find some reason to doubt whether a proper construction of the statute of Charles demands an ability in each surety equal to the value of the estate to be administered. In advancing the opinion I did, I understood myself to be expressing the views of my brethren, in which I, at the time, concurred. Perhaps it would have been better to have abstained, altogether, from expressing any opinion on

the statute requires the ability of a surety to be measured.

It seems hardly necessary to observe, that the ability to which the statute refers, is a pecuniary, or property, ability. It has no

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*reference to the intelligence, industry, or activity of the party, by which he may repair an embarrassed estate, or acquire property. But it refers to the apparent means, or property, possessed by the party, to which resort may be had to repair the loss, if the estate should be wasted.

The duty of the ordinary was, to have taken such a bond as we have described. It was a duty imposed on him by law, and which, when he accepted office, he undertook to perform. In his performance of it, he was not under the control of the parties interested in the estate. It seems to be just that an officer, to whom the law has committed the care of estates, belonging, in many instances, to helpless parties—(widows and infants;—) whose conduct is beyond their control or interference, and who possesses an ample, almost a capricious, power to reject any security, the sufficiency of which he may doubt or suspect,—should be held to a strict account for any neglect in taking security, by which they have sustained loss.

A question has been presented, whether the ordinary, in taking bond in this instance, acted judicially or ministerially. The question is important; because, if the act was judicial, he is not responsible for error in its performance. It is otherwise, if the act was ministerial.

We think the Chancellor was right in regarding the act of the ordinary as ministerial.

A judicial act generally intends the decision of some question of law, falling within the jurisdiction of the forum, in which the question arises between parties. There may be cases in which the decision may be judicial, although there be no litigation, and, of course, no parties; but, even then, the decision must, generally, involve some question or point of law.

The mere circumstance, that an official act demands, on the part of the officer, the exercise of discretion, vigilance, circumspection or prudence, is not sufficient to make it a judicial act. Many acts, clearly recognized in law as ministerial, require the exercise of these qualities; as, for instance, of a sheriff making levies, taking bail, &c.

this point of the case. There was no necessity for it. Independently of any such construction, the result attained by the Court of Appeals was inevitable: for even supposing that, by proper construction of the statute, it was sufficient that one of the sureties, or both of them together, should be of ability to make good the estate; the proof in this case was, that neither of them, nor the two combined, possessed such ability: and the ordinary had no reason to suppose—from appearances presented to him, or from any representations made to him, upon inquiry,—that either of them, or both together, were able to indemnify parties interested for the loss of the estate.

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*If the ordinary had not determined, in this instance, to take two sureties, it might, possibly, have been supposed that he had gone into an inquiry, whether it was his duty to do so; and, in the course of that inquiry, had determined that the statute of Charles was no longer of force, and that the whole of his duty was to be gathered from the Act of 1789. This might, possibly, have been regarded as a judicial error, for which he was not responsible. But the taking of two sureties shows that, if that question arose in his mind, he decided it correctly; and that the only error he committed was in accepting two insufficient sureties.

According to the principles of many decisions in this State(c) ordinaries, in granting administration and taking bond, act ministerially; and they have been held liable for omitting to take bonds, for not taking them at the right time, or of the proper form, or for taking them with inadequate surety. This, together with the fact that ordinaries are to give bond, (d) on which they are amenable(e) and are expressly made liable by the 21st section of the Act of 1789, 5 Stat. 110, for omission to take administration bonds, as required by law,—shows, we think, that the legislature, especially in the last instance, did not contemplate the duty in question as judicial.

But viewing the act of the ordinary, in the case before us, as ministerial, and not judicial, the plaintiffs' counsel have properly conceded, that if the loss, which has been sustained, has not resulted from negligence on his part, but has arisen from causes which, acting faithfully, he could not foresee or control—he is not amenable, especially in this Court. Indeed, according to my recollection, such was the doctrine held at law, in a case brought by the distributees of Cates against Cureton, Ordinary of Newberry, and decided in the Appeal Court, about 1826; which decision cannot now be found in the Clerk's office.

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*This is, substantially, the doctrine of the Chancellor in this case; and we are satisfied with it. He announces the position, that the measure of a public officer's duty is, the exercise of that degree of prudence and diligence, which a discreet individual would employ about his private affairs of the same nature. If an officer, after the exercise of that degree of discretion, should, from unforeseen causes, fail to attain the end attempted by him, he is excusable.

If the evidence adduced at the hearing had been directed to this point, and the Chancellor had concluded from that evidence that

(c) *Simmons v. Watson*, 2 Sp. 97; *Boggs v. Hamilton* 2 Mill, 382; *Somerall v. Gibbes*, 4 McC. 547; *State v. Patterson*, 1 Strob. 35; *Treasurers v. Clowney*, 2 McM. 510.

(d) 11 Stat. 39.

(e) 6 Stat. 384.

the defendant had come up to this rule, we should not have disturbed his decree: for we desire to adhere to the rule of this Court, which is, that a Chancellor's conclusion upon matters of fact is to be respected, like the verdict of a jury; and not to be set aside, unless for gross error. We shall recur to this point hereafter.

Let us now proceed to the evidence in this case.

The fact is incontestibly made out, that, at the date of the bond, neither of the sureties taken, nor both together, nor the two with the aid of their principal, were of sufficient means to answer for the estate. Though their insufficiency was developed by subsequent events, it really existed at the time.

But, to confine ourselves to the two sureties to the bond,—which is the true view,—it is certain, that John L. McRae, one of them, never had property equivalent to the estate which he undertook to insure. No witness ventured to value his ostensible means beyond \$2,000 or \$2,500; and the weight of evidence was much lower. The land of the other, (Henegan,) had been sold out; and with executions against him, amounting really to about \$12,000, but apparently to near \$19,000, he had but nineteen negroes, (with some inconsiderable property besides,) to answer these judgment debts.

These were the circumstances under which the bond was taken. Do they not show that, in fact, the sureties were—neither of them—able, in the sense of the statute, for their un-

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*dertaking? And that the bond which the ordinary took was not, in fact, such a bond as the legislature required him to take?

Now, admitting that the ordinary is allowed to show an excuse for his failure, we conceive that the excuse is not to be presumed.

If, in a collateral proceeding, there was a deficiency of proof that a bond had been taken, we might presume that the officer had done his duty, and infer that one was taken. But even in that case, if it were proved that there never was a bond, we could neither presume the performance of official duty nor the existence of a bond. And in this case, if there was no proof of the inability of the sureties, we should presume their ability, and discard the imputation of official neglect.

But when the fact is made out, that the sureties taken by the ordinary were not "able," the plaintiffs are not bound to go on, and prove that the ordinary had no justifiable reason for taking them.(f) When a default is proved on him the burden of proof shifts, and he must show his excuse:—in analogy to the criminal law, which, though it presumes every man innocent of crime yet, if a homicide be proved on an accused person,

will hold him guilty of murder, unless he extenuates the offense by evidence.

After the proof made by the plaintiffs in this case, the burden of proof was upon the ordinary, to show that the bond—shown to be insufficient—was taken by him under circumstances which would have imposed a belief, on men of circumspection and prudence, that it was of the character which the law required: that though the sureties were not "able," they appeared to be so; that they had the appearance of ability,—and that he was deceived.

His proof was not directed to this point; and has signally failed of making out a defence. The ordinary himself has not, in his answer, pretended to aver, that either of the

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sureties *was, or that he at the time believed either of them to be, possessed of property equal to the value of the estate. Nor has any witness said that they had, or appeared to have, property of that value.

The proper question was not, whether the bond, by the compound ability of all the obligors, was good. That was not the character of the bond which the ordinary was to take. The law was that the sureties were, severally, to be of ability to pay the amount of the estate: and the question was, whether they exhibited substantial appearances of such ability.

This inquiry was not solved by witnesses saying, that they would have taken the bond for that amount. In the first place, the prudence of the ordinary's taking the bond was not to be left to the opinion of witnesses. It was a matter to be inferred by the Court, upon the evidence of facts. In the next place, it is manifest that the opinion of the witnesses proceeded upon a principle different from that which the exigency of the case required. They supposed that the prudence of taking the bond depended upon the sufficiency of all the obligors together. Viewed in that light, it might be prudent to take it. But the law required a bond, good in reference to each of the sureties; and it was not prudent to take one which did not promise to come up to this standard. No witness was found who proved that he would have taken this bond, if his object had been,—or if he had been required,—to take one of the character described. Therefore, though the position be true, that the ordinary might stand excused, if he exercised the prudence of ordinary men, in similar circumstances; the proof adduced does not apply to persons in similar circumstances, but to others acting under a different rule of conduct, and by no means makes out the defence required in the case.

Most of the witnesses, who said they would have taken the bond, appear to have been imperfectly acquainted with the property and indebtedness of the sureties. Not one of them says that John L. McRae appeared to be "able" to make good the estate. Those

(f) Sparhawk v. Bartlett, 2 Mass. R. 198.

who appeared best acquainted with Henegan,

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*relied, for their opinion, more on his capacity than his property.

But, in opposition to the opinion of the whole of them, is the declaration of the defendant to Weatherly, that, in taking the bond, he relied more on Colin McRea, the administrator, than on the sureties—which shows that he deemed it unnecessary to make the investigation which his duty required, or, if he did, that he was left in doubt as to the condition of the latter; and (contrary to his duty) risked the bond on the means of the principal.

Besides, it is not to be forgotten, that the condition of Henegan was one which the defendant was bound to notice. Overwhelming judgments existed on record against him, and his remaining property was levied on, and advertised on the door of the very Court House in which the ordinary's office was. Did not this oblige him at least to inquire? and has he produced a single witness to prove that he ever did so? or has he proved that he ever had a favorable representation of the means of this surety, or of his co-surety, from any person whomsoever?

On the whole, we are of opinion, that the decree, so far as it exonerates the defendant from accountability for the assets which came to the hands of Colin McRae, was erroneous, and should be reversed: and it is so ordered: and it is adjudged that he is accountable for the same.

We are of opinion, that the objection to the exercise of jurisdiction, taken in the

pleadings, is obviated by the fact, that ~~it~~ was waived at the hearing, and has not been insisted on here. Were it otherwise, it is not clear that it could prevail.

Certainly, the plaintiffs have a right to claim an account of so much of the estate as came to the hands of the defendant. This gives jurisdiction to the Court: and, when complete justice requires it to go on, it may dispose of the whole case.

Not only so, but the plaintiffs have a right to an account of the assets which came to the hands of Colin McRea: and, for that purpose, may bring in all persons who have

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made them*selves answerable for his administration of them. The defendant, as we have adjudged, has made himself thus answerable. It may be, however, that he stands as surety for the parties to the administration bond: and it is left to the consideration of the plaintiffs, whether they will venture to ask a final decree, until they have brought in the sureties, or their representatives. It would seem proper to bring them in.

In closing this judgment, it may be proper to observe further, on the subject of jurisdiction, that a ground of jurisdiction exists in preventing a multiplicity and circuitry of suits.

It is ordered, that the Circuit decree be modified, according to this judgment, and that the cause be remanded to the Circuit Court.

DUNKIN and WARDLAW, CC., concurred.
Decree modified.

IN THE COURT OF ERRORS

COLUMBIA—DECEMBER, 1852.

ALL THE JUDGES AND CHANCELLORS PRESENT, EXCEPT EVANS, J.

5 Rich. Eq. *491

*R. C. FOWKE, Ordinary, v. WM. H. THOMPSON.

(Columbia, Dec., 1852.)

[Judges 33.]

The out-going Ordinary is bound to turn over to his successor all moneys in his hands, in his official capacity as Ordinary, as well as the books, papers and furniture, and every thing else, belonging to the office. If the moneys belong to derelict estates, he is bound to turn them over, even in a case where the estate has been in his hands more than six months, and nothing remains to be done but to deposit the money in Bank; or, where proceedings in the Court of Equity are pending against him, and an order has been made, requiring him to pay out the money.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 108; Dec. Dig. 33.]

[Courts 39.]

Unless questions of jurisdiction are raised, according to the established forms, and at the proper stage of the proceedings, parties cannot require the Court, as a matter of right, to consider and decide them.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 152-156; Dec. Dig. 39.]

This was an appeal from the decision of his Honor, Chancellor Wardlaw. The Equity Court of Appeals ordered the case to this Court, where it was now heard.

Hutson, Bellinger, for appellant.

J. T. Aldrich, A. P. Aldrich, contra.

The opinion of the Court was delivered by

DARGAN, Ch. The defendant was the Ordinary of Barnwell District. His term of office expired on or about the 14th April, 1852, when his successor, the plaintiff, having been previously elected, was duly qualified, and entered upon the discharge of the duties of his office.

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*The plaintiff complains, that whilst the said Thompson was in office as Ordinary, he took charge, in his official character, of various estates, as derelict, under the provisions of the Act of Assembly of 1839, and sold considerable real estate, by virtue of his office as Ordinary; and that large sums of money, both on account of said derelict estates, and on account of the sales of real

estate, remained undistributed and undisposed of, in the hands of the said W. H. Thompson, at the expiration of his term of office. The plaintiff refers to a statement of various sums so received by the said W. H. Thompson, but professes to be ignorant whether the statement is full and complete, as to all the sums received by the said W. H. Thompson, as Ordinary, during his term of office, and remaining in his hands at the termination thereof. He prays not to be concluded by the statement referred to in his bill, and to be permitted to show other amounts received by the said W. H. Thompson, of a like character, and not embraced in the said statement. The plaintiff contends that all sums of money remaining in the hands of his predecessor, the said W. H. Thompson, on account of the sale of real estate made by him, and on account of derelict estates, whereof he had charge, during his term of office; and also all sums of money received by the said defendant, since the expiration of his term of office, ought to be paid to him, (the plaintiff,) and are of right receivable by him. The plaintiff further says, that on application to the defendant for the sums of money which have come into his hands, in the manner before stated, the said defendant has refused, &c.

The plaintiff prays for the usual process, and for an injunction against the defendant, and for a discovery and account of all sums of money which have come into his hands, as Ordinary, during his term of office, undistributed and undisposed of, whether the said sums of money have been received by him on account of the sales of real estate, or on account of derelict estates; and also of all sums of money which he may have received and paid over as Ordinary, since the expiration of his term of office. The plain-

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tiff further prays, that the said defendant may be decreed to pay over to him, as the present Ordinary, all the said several sums of money, and for general relief in the premises.

The defendant, in his answer, admits that he was the Ordinary of Barnwell District;

and that he was elected and entered upon the duties of his office; and that his official term has expired, as stated in the bill. He admits, that the plaintiff is his successor; that he was duly qualified, and entered upon the discharge of his duties as Ordinary of Barnwell District. He admits, that he has sold, in many cases, real estate for partition, and received for the same large sums of money, some portions of which still remained in his hands, at the expiration of his term, and have been retained by him against the demand of the plaintiff. He admits, that he had in his charge, as Ordinary, during the continuance of his term, sundry estates as derelict; that, as to the derelict estate of William J. Fickling, and that of B. M. Ennicks, he has paid away moneys since the expiration of his term of office. As to the derelict estate of Jno. A. Bronson, he says, the assets of said estate have been collected, and all the debts paid, and proceedings are now pending in this Court against him for a distribution of the said estate, the said proceedings having been commenced against him before he retired from the said office; that, as to the derelict estate of John McDaniel, he has collected some of the assets, and paid all the debts of a higher order, such as judgments, mortgages and bonds, and that the balance of the choses in action of the said estate have been turned over to the complainant, with the papers of the office; but before retiring from the said office, a bill was filed against the defendant by one Barnett Ashley, the surviving partner of the said McDaniel, for an account of the said partnership, and the cause is still pending in this Court. That, as to the derelict estates of the aforesaid Wm. J. Fickling and B. M. Ennicks, and the derelict estates of Julia Kuhlman and T. L. Ennicks, proceedings have been had in this Court, while the defendant was acting as

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Ordinary, *and orders were made directing him to settle and pay out the moneys of the said estates.

The defendant bases his defence for refusing to pay over those moneys to his successor, the plaintiff, on the ground that the law did not require him to turn over those moneys to his successor, and did not authorize his successor to receive the same, and, consequently, the plaintiff could give him, for such payment and transfer of the funds, no legal discharge. The defence set up in the answer involves the legal proposition, whether the defendant, as the out-going Ordinary, was required to turn over to his successor the sums of money received by the former, in the manner before stated; and whether the plaintiff, as his successor, was duly authorized to receive the same.

The case came to a hearing on the bill and answer before the Chancellor, who made a decree as follows:

"It is ordered, that Wm. H. Thompson, the retiring Ordinary, do pay to his successor, Richard C. Fowke, the moneys remaining in his hands, arising from the sale of real estate.

"It is also ordered, that he pay to the said Richard C. Fowke the moneys remaining in his hands, in those derelict estates where the six months had not expired when the said Wm. H. Thompson retired from office.

"It is further ordered, that the injunction be dissolved, as to those derelict estates where orders have been made by this Court."

The injunction which the decree refers to, and dissolves in part, was an order for an injunction, granted by the Commissioner, on the usual conditions, restraining and forbidding the defendant from disposing of, or paying to any person except the plaintiff, any sum or sums of money in his hands, arising from the sale of real estate, and any sums of money in his hands belonging to any derelict estate or estates.

The plaintiff, by way of appeal from the Circuit decree, moves this Court to enlarge "the said Circuit decree, so as to pass an order, compelling the retiring Ordinary, Wil-

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liam H. *Thompson, to pay over and account for all the moneys of derelict estates remaining unpaid in his hands at the expiration of his office, whether orders had been made, or proceedings were pending, or whether six months had expired or not."

The defendant was content with the decree, and has not appealed. Such is the state of the pleadings, and of the facts upon which his appeal has been heard.

No question as to the jurisdiction of the Court to entertain the cause was made on the Circuit trial, nor has any such proposition been assumed and submitted to the Court by way of appeal. It is usual to leave questions of this kind to the astuteness of parties, and they must be raised according to the established forms, and at the proper stage of the proceedings. Presented in no other way, is the Court bound, as a matter of right, to be demanded by the parties, to consider and decide the question of jurisdiction. The Court may, in its discretion and on its own motion, take notice of its want of jurisdiction. The defect of jurisdiction should be glaring, and the motive urgent, which would render such a course proper. When a party has instituted proceedings, which overstep and disregard the great and distinguishing boundaries, which mark and separate the different branches of the judicature of the country, the Court will, and it becomes its imperative duty to, notice the objection, at any stage of the proceedings, and thus counteract the tendency to a general amalgamation of the powers of the different Courts.

I must not be understood, however, as intimating that the objection to the jurisdiction, if it had been properly pleaded, would have prevailed. On the contrary, I think that

the jurisdiction of the Court, on a strict consideration of the subject, may be sustained. It is true, that the plaintiff may have preferred his complaint to a Court of Law, and, on the case made here, may have obtained a very effectual relief. The Judges of that Court are invested with all the powers of the Court of King's Bench, in the supervision, control and restraint of all the inferior tribunals of the State. And this power may be

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as well exercised in the restraint of those who illegally intrude themselves into the performance of official functions, as in confining such as have the legitimate official investiture within the just limits of their power and authority. It does not follow, because a Court of Law may have issued its mandamus to Wm. H. Thompson, the out-going Ordinary, to transfer all the funds which came into his possession, as Ordinary, to his successor, that his successor may not come into this Court for a discovery and an account as to those funds. The Law Court may have been embarrassed, for the want of facilities, in taking the account, and its mandate may have been rendered nugatory, for the want of a discovery. The plaintiff's bill, though not after the most approved form, is a bill for discovery, account and relief, and may well be sustained, upon the jurisdiction which this Court possesses over such matters.

The retiring Ordinary rests his defence for not transferring the moneys in his hands to his successor, on the broad position, that he is not bound by law to make the transfer, and that the in-coming Ordinary is not entitled to receive such moneys. He deduces his conclusion from the fact, that the Act of 1839, entitled, "An Act concerning the office and duties of Ordinary," (11 Stat. 39,) contains no explicit provision to this effect. The 37th section of the Act declares that "every Ordinary shall be responsible for the books, papers, and also for the furniture in his office; and upon his retiring from office, or his death, he, or his representatives, shall be bound to transfer all such books, papers and furniture to his successor, immediately after such successor shall have entered upon the duties of his office, under a penalty of one thousand dollars, to be recovered by indictment, and of imprisonment, not exceeding one year." The absence of any specific requisition in this, and the other clauses of the Act, that the retiring Ordinary shall transfer moneys received during his term, in his official capacity, to his successor, serves as the ground of that construction, by which the defendant felt himself authorized to detain such moneys, in opposition to the right and the demand of his successor. It is obvious that

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this construction is a negation of the right of the incoming Ordinary to receive from his predecessor, not only the moneys of derelict estates remaining in his hands, under all circumstances, but also moneys in his hands

arising from the sale of real estate; in regard to which the defendant has submitted, without appeal, to the decree that he should pay over; and in opposition to which not one specious reason can be urged. The length to which such a construction leads, very naturally creates a suspicion of its unsoundness. It is the opinion of this Court, that, upon a fair and proper interpretation of the Act, considered in all its provisions, and in reference to the objects the Legislature had in view, the implication arises, that the out-going Ordinary was bound to turn over to his successor, as well the moneys in his possession, as the books, papers and furniture. There is certainly nothing expressed to the contrary, nor is a negation of such a construction to be implied.

The question was presented to this Court, in the argument at the bar, as if the obligation of the retiring Ordinary to turn over to his successor the books, papers, furniture and money in his possession, had its origin in, and depended upon, the provisions of the Act of 1839. It would be a great fallacy to consider and decide the question upon such a narrow view of the subject. The Act of 1839 did not establish the office of Ordinary, but was intended to regulate in a more perfect manner its powers and responsibilities, to consolidate the scattered and pre-existing statutory provisions into a more intelligible system, and to create some additional guarantees, for the performance of its high and important trusts. Thus, the Act of 1839 provides, in express terms, that the retiring Ordinary shall deliver over to his successor the books, papers and furniture in his possession, appertaining to the office, under certain specified penalties. Those penalties were then for the first time declared, but who can doubt that the obligation to transfer books, papers and furniture was anterior to that Act. How is it possible, from the very nature and constitution of the office, for it to be otherwise, than that the incumbent, who is the legal

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custodian of the books, papers and furniture of his office, who is responsible for their safe keeping, and who is daily required to perform responsible duties connected with them, should not have them in his possession? The same principle applies to all offices, and to all subject matter of which the officer, as such, is to have the charge, in connection with which he is to perform the duties, and for which the law makes him responsible.

This view of the subject applies with equal propriety to moneys and other things that have come into the hands of the Ordinary, virtute officii, as it does to books, papers and furniture. It may be that the omission of all mention of money in connection with books, papers and furniture, in the 37th section of the Act, if a casus omissus as to the penalties imposed by the Act. But the obligation of the retiring Ordinary to transfer to his successor moneys and every thing else which

have come into his possession, in his official character, may well be made to rest on the nature of the office, the duties to be performed, the obligations incurred by the incumbent, and the great principles of fitness and expediency. It is not fit or expedient that the duties of this office should be partitioned among several persons at the same time; or that the out-going Ordinary, in retiring from office, should withdraw with him, as attached to his personal character, some portion of the duties, and some portion of the subject matter concerning which those duties are to be performed. There is an unity in regard to the incumbency of the office contemplated by all the provisions of the law, as to its duties and trusts, which forbids any such conclusion. The inference to my mind seems to be inevitable, that whatever has come into the possession of an Ordinary, as such, and in his official capacity, cannot attach to him in his personal character, and must, at the expiration of his term, be transferred to his successor.

And the duties of the office are to be performed by but one incumbent for the time being. This must be the great rule, to which there may be some exceptions, called for by particular emergencies—as, for example,

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when the Ordinary himself de*sires to become executor or administrator, it is provided that he may qualify before the Clerk of the Court of the same District, who, *pro hac vice*, becomes the Ordinary.

This brings me, in a natural order, to the consideration of that branch of the discussion which has arisen under the 7th section of the Act of 1839, which is in the following words:

"In case any estate shall be left derelict, either from partial administration by an executor or administrator, or by reason of no application for letters of administration or letters testamentary, or otherwise, the Ordinary of the District, who might be entitled to grant such letters, shall collect and take charge of the same, for the period of six months, after which time, if administration be not sooner applied for, he shall sell the same, after due public notice, either for cash, or upon a credit of six months; and, after payment of the debts of said deceased, shall deposit in the Bank of the State of South-Carolina, or in some one of its branches, the net proceeds, to the account of the estate to which it belongs, and shall file in the office of the Clerk of Common Pleas, of his District, a certificate of such deposit; and, to the end that he may so collect such estate and effects, he shall have power to institute and maintain all necessary legal proceedings. And, for the services aforesaid, he shall be entitled to five per cent. of the value of the estate."

It has been contended, that when an Ordinary for the time being, administers upon a derelict estate, under this provision of the

Act, he is not bound to transfer to his successor, at the expiration of his term, the money remaining in his hands, appertaining to such derelict estates. It is further contended, that if bound to transfer the moneys in his hands belonging to derelict estates, where such estates had not been in his hands for six months previous to the expiration of his term, yet that he was not bound to transfer the moneys in his hands belonging to derelict estates, in cases where such estates had been in his possession for more than six months previous to the expiration of his term, nor in those cases of dere-

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lict estates in which orders *had been made by the Court of Equity, and in which proceedings are now pending.

The Chancellor who rendered the Circuit decree overruled the first proposition, and ostensibly sustained the two last, as exceptions. But the Chancellor was informed at the hearing, (as conceded by counsel here,) that in all derelict estates remaining in the hands of the retiring Ordinary, of more than six months standing, either none of the prescribed acts of administration were unperformed, except the deposit in bank of the net balance, after the payment of debts, or bills had been filed by the distributees in the Court of Equity, against the Ordinary. And he meant to hold that the incumbent was not entitled to the transfer of moneys, where the ministerial act of making the deposit had alone remained, or the Court of Equity had then taken cognizance. He employed the term "six months" as a brief description, sufficient in the supposed facts, where some act of administration beyond making the deposit remained to be done.

Thus the Chancellor held, that where the retiring Ordinary had not been in the possession of the derelict estates for six months previous to the expiration of his term, he was bound to turn over to his successor the moneys remaining in his hands belonging to such derelict estates; but that he was not so bound, where the derelict estate had been in his hands for more than six months previous to the expiration of his term, and nothing remained to be done but to make the deposit; nor in any case of derelict estate, where orders of any kind have been made by the Court of Equity in reference to it, and in which proceedings were pending.

I am unable to discriminate as the Chancellor has done. If, in reference to those derelict estates which had been in the hands of the defendant for more than six months before the expiration of his term, he had complied with the requirements of law, had deposited the money in the Bank of the State of South-Carolina, or some one of its

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branches, had taken a certificate of deposit, and had filed the certificate in the office of the Clerk of the Common Pleas of his Dis-

trict, I should have no hesitation in saying that the duty of the Ordinary, in reference to that fund, was complete and discharged, and that the in-coming Ordinary would have, of right, no power or control over it. It would be as much beyond the reach of the officer who made the deposit, as of his successor. It would have to remain on deposit until some Court of competent jurisdiction, at the instance of the parties interested, should order its removal or distribution.

But that is not the case we are considering. This defendant, in reference to some of these derelict estates in his hands, though he has collected the assets, and though more than six months have expired after said estates have come into his possession, in contumacy of the law, has made no deposit in any Bank. And it was admitted by his counsel, that he had made no deposit in Bank, on account of derelict estates, during his whole term of office. And the question is, whether he shall be permitted to retain, after the expiration of his term, the funds of derelict estates, which he has thus held over against the requirements of the law. Is he to be permitted to retain them, because he has not done his duty, and has failed to make the deposit? Is his non-feasance to place him in a better condition than if he had properly discharged his trusts? As the money has not been deposited in Bank, where the law intended it to go, the next best and safest place of keeping is, the possession of the Ordinary for the time being.

What I have said in the preceding part of this opinion, and the conclusions at which I have arrived, leave me but little to add on this branch of the subject. My conclusion was, that all books, papers, furniture, moneys, and everything else, which have come into the hands of an Ordinary *virtute officii*, and which remain in his hands at the expiration of his term, go over to his successor as a matter of course, unless there be some special provision of law to the contrary, constituting an exception.

Do derelict estates, under the 7th section

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of the Act of 1839, *pass into the hands of the Ordinary in his official character? It is the Ordinary of the district, who may be entitled to grant letters of administration, or letters testamentary, on such derelict estates, who is required to take charge of them. Surely, where the officer is invested with a power, or subjected to a duty or responsibility, in his official name, the power and the duty attach to him in his official, and not in his personal character. It means, the incumbent for the time being, shall do this or that, and be subject thus and so. There can scarcely be a difference of opinion on the construction of the Act of 1839 in this particular. It plainly means, that the Ordinary for the time being, and as such, shall take charge of derelict estates, and

that he shall administer them in his official character.

It remains to be seen, whether a distinction can be drawn in favor of the defendant, in reference to those derelict estates where orders have been made by the Court of Equity, and in which proceedings are pending. This distinction, if sustained, would embrace all cases where orders have been made, though it may have been merely a preliminary order; and perhaps all cases where proceedings were pending and orders made, though the retiring Ordinary had not been in possession six months. I do not think that the distinction is warranted by any sound construction of the Act. If proceedings be instituted against the Ordinary for the time being, and during the pendency of the proceedings, his term of office expires, I perceive no reason why this should be an exception to the general rule, that he should transfer all the funds in his hands, as Ordinary, to his successor. If he be required by law to pay, and does, in fact, pay to his successor, his plea to that effect would discharge him. The new Ordinary might, and ought to, be made a party by supplemental bill, and it might be necessary and proper to retain the bill against both. There could be no difficulty or injury to any. The case bears a strong analogy to one, where an executor or administrator has died, and letters of administration, *de bonis non*, have been sued out. The parties interested in the estate might proceed for account against the

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administrator *de bonis non*, and at the same time against the legal representatives of the first executor or administrator. And this, in the case supposed, would be the proper course.

Some difficulty has been felt, in reference to cases of derelict estates, in which the retiring Ordinary, on proceedings against him, during his term, has been ordered to pay out a particular sum of money to particular individuals. And it is said (though the fact does not appear in the brief) that such is the predicament of the defendant as to one or more of the derelict estates in his hands—the funds of which he is holding over. This fact is apt for my argument. For it is also stated, that the persons, in whose favor such orders for payment have been made, are absent, and have long been absent, from the State—are ignorant of their rights—and their places of residence, and even whether they be living or dead, unknown. Is the retiring Ordinary to hold in his hands, as a private person, and for an indefinite period, the funds of these absent, and perhaps deceased persons? It is not assuming much to say, that such funds would be safer in the keeping of a responsible officer, than in that of a private person; besides, it would be the duty of the new Ordinary to make a deposit in the Bank forthwith, on receiving the funds.

There can be no difficulty in the fact, that the defendant, Thompson, has been ordered to pay money to particular individuals; for, if his successor is entitled to receive from him money so ordered to be paid out, the receipt of his successor will operate as a discharge from the claim of the person to whom payment was ordered to be made. Such claimant would, in the event of a receipt by the new Ordinary, have to look to him, and to hold him responsible for any mis-application of his funds.

The Circuit decree must be modified and enlarged.

It is ordered and decreed, that the defendant, W. H. Thompson, late Ordinary of Barnwell district, do account for, and pay over, to his successor in office, R. C. Fowke, all moneys remaining in his hands as Ordinary, and not lawfully appropriated or disposed of at the expiration of his term of office, wheth-

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er said *moneys were derived from derelict estates, taken charge of by the said defendant, during his official term—from the sales of real estate—or from any other source whatsoever.

It is further ordered and decreed, that the defendant pay the costs.

DUNKIN, Ch., and O'NEALL, WARDLAW, and FROST, JJ. concurred.

WARDLAW, Ch. I dissent from so much of the decree, in this case, as requires the ex-Ordinary to transfer funds in his possession to his successor, where bills in Equity have been filed against the former, by the distributees of the derelict estates in his hands. In some of these cases, the Court of Equity has adjudged and ordered, by final decrees, that William H. Thompson pay to persons, by name, specific sums of money; and I do not see how he could protect himself from process of attachment, if he failed to perform the decrees. This Court, sitting as a Court of Equity, now orders the defendant to do that which is directly inconsistent with former subsisting decrees, namely, to pay to the present plaintiff the same money previously ordered to be paid to Kottman, and others. By the judgment of this Court, error is imputed to the Chancellor who heard the cause, because he did not entertain appeals from the decisions of his equals in authority, and reverse or modify their decrees.

The notion is unfounded, that when a person is effectually sued as an officer, the judgment is against him officially, or in other words, against the metaphysical entity of his office. Upon this conceit, if a rule against a sheriff to pay money be made absolute, the liability would follow the office into the hands of his successor, where there was no default on the part of the successor. It is no answer to this illustration to say, that by statute, a sheriff may be ruled for two years aft-

er he retires from office. That provision only shows, that for some purposes, two persons may coterminously fill the office of sheriff; and, if judgments against an officer be

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against the office, both would be liable, *under the rule made absolute. All proceedings of Courts are, in effect, against natural persons. This is least obvious where judgments are obtained against the corporate assets of corporations aggregate, but even there, the assets must be found in the possession of corporators, or other men. The Ordinary is a corporation sole; but, in proceedings in Courts, reference is necessarily had to the individuals who have filled, and fill, and shall fill, the office. The present suit is Fowke against Thompson—man against man—not an office against what has been an office. There is nothing peculiar in the circumstance, that the liability of the person sued, may be restricted to the estate he holds in a particular capacity. Such is usually the fact as to judgments against executors, administrators, and other trustees.

It may be said, that if the ex-Ordinary pay to the incumbent the moneys he has been decreed to pay to others, he may plead, to any process against him personally, that he has transferred the funds that were in his possession, at the dates of the decrees, to his successor in office. But it may be, that those who may have decrees against him, will not indulge him with leisure, to open, or to plead, and will lodge him in jail. Besides, the procedure of pleading after judgment is anomalous. Moreover, even indulgent creditors, having judgments against him, may well be disinclined to surrender their lien and ready remedy against one undoubtedly solvent, and take in substitution a claim against another, who is no party to the record, and who, possibly, may be less able, or utterly unable, to pay.

It is argued, however, that these decrees by the Court of Equity for payment by the Ordinary, to the distributees of derelict estates, are void, as the Court has no jurisdiction or authority to contravene the special and limited mode of administering derelict estates, prescribed to the Ordinary by the legislature. The Court, in making these decrees, did not assume any power to repeal or modify the Acts of the legislature. Yet it did not construe the Acts as ousting the Court of its jurisdiction against trustees, under the general heads of discovery, account,

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and *partition. It is plain, that the course of administration of derelict estates prescribed to the Ordinary, is, in its whole arrangement, alternative and substitutional. The Ordinary may, at any stage of his transactions, be superseded by a regular administrator, or arrested in his action by the Superior Courts. He is to pursue a certain routine, if not interfered with by the parties in

interest, or the Courts; but not, at all events, to take the round, where, by the intervention of the distributees, the estates cease, in substance, to be derelict.

There is no doubt that the Ordinary, in administering these estates, is a trustee, nor that this Court is the proper tribunal for enforcing trusts. The purpose of the legislature was, to provide a trustee, where the usual modes of appointment failed, but surely not to exempt the trustee from the usual remedies of beneficiaries against him. If the Ordinary is not liable to interference from this Court, it would seem to follow, that the only resort of distributees is upon the funds he chooses to deposit in Bank, as the net balance of his transactions. His judgment in his own favor, rendered without opportunity of contestation, however inadequate or fraudulent, will be conclusive. In the Court of Equity, an interested party does not adjust his own accounts, and the administration of trusts is subjected to thorough examination by competent officers, under the vigilant oversight of the parties in interest.

In all cases pending in this Court, against the ex-Ordinary, whether in judgment or not, the funds are transferred by operation of law from the inferior to the superior tribunal; and the 7th section of the Act of 1839, has no longer application. Wherever this Court takes cognizance of a cause, it must have the charge, in some sort the custody, of the funds in controversy, to enable it to do justice to the parties, in the distribution of the funds, and it immediately ousts the inferior tribunal of all authority to act, concerning the subject of controversy, except under the direction of this Court. Where, for example, an administrator, or other trustee, is called to account in this Court, he is required, by the

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procedure of the Court, to make his annual returns, pending the suit, to the proper officer

of this Court, and is liable to punishment for contempt, if he make returns to the Ordinary. It is a mistake, however, to suppose, that it is any contest between Courts, when an Ordinary is required to account here for his management of derelict estates. When he administers such an estate, he acts, not judicially, but ministerially. The term administration itself implies the ministerial character of his acts in such case. He is not only Judge, but Clerk, of his Court; and many of his acts, besides the administration of estates, are ministerial. In 1837, the legislature, by Act, required the solicitors to examine the condition of the Ordinary's office, as of other district offices, and to report annually to the Court of Common Pleas. It would be strange if the legislature really intended to give to such subordinate officers, as the solicitors, powers of supervision, which it withheld from this Court.

In those cases pending against the defendant, in which decrees have not been rendered, it is impossible for him to foreknow the precise extent of liability that may be imposed upon him by the Court. Yet, it would seem to be fair, that, if he is required to pay the moneys to his successor, he should be relieved from all trouble and expense in defending the suits; but that is impracticable.

JOHNSTON, Ch., and WHITNER, J., concurred.

WITHERS, J. Where nothing more is in view than to enforce the transfer, required by law, by a retiring Ordinary to the incumbent, I think the Common Pleas the proper tribunal and competent, by a proceeding for mandamus. Saving, therefore, all doubts of general jurisdiction of Equity, I concur in this opinion.

EVANS, J., absent from indisposition.
Decree modified.

IN THE COURT OF ERRORS

COLUMBIA—MAY, 1853.

ALL THE JUDGES AND CHANCELLORS PRESENT.

5 Rich. Eq. *509

*GABRIEL FELDER and Others v. PAUL S. FELDER and Others.

(Columbia. May, 1853.)

[*Descent and Distribution* ⇐35.]

Where the distributees of an intestate are brothers and sisters of the half-blood, and children of pre-deceased brothers and sisters of the whole blood, taking under the 5th clause of the 1st section of the Act of 1791, they do not take equally; but the brothers and sisters of the half-blood take equally, and the children of every pre-deceased brother or sister of the whole-blood take among them a share equal to the share of a brother or sister of the half-blood.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 107; Dec. Dig. ⇐35.]

The bill in this case was filed in Orangeburg; and this was an appeal from the decision of his Honor, Chancellor Wardlaw, made, at Chambers, December 3, 1852. The Equity Court of Appeals, in December, 1852, ordered the case to this Court, where it was now heard.

Bellinger, DeSaussure, for appellants.
Treville, Petigru, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. John M. Felder, late of Orangeburg, died intestate, leaving a large estate, real and personal, to be distributed according to the provisions of our Act of 1791. He left no wife, nor lineal descendant, nor father, nor mother, nor brother or sister of the whole-blood; and the distributees of

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his estate are two brothers *and a sister of the half-blood, namely, Gabriel Felder, Edmund J. Felder, and Eliza M. Pou, wife of Joseph Pou, and nine nephews and nieces, the children of Samuel J. Felder, a pre-deceased brother of the whole blood, namely, Paul S. Felder, John H. Felder, Louisa, wife of A. D. Federick, Samuel J. Felder, Alfred F. Felder, Eugenia M., wife of John Buchanan, jun., Eliza A. Felder, Adella Felder, and Edmund J. Felder. The plaintiffs are the brothers and sister of the half-blood, and the husband of the sister; and the defendants are the children of the pre-deceased

brother of the whole-blood, and the husbands of the married women among them. The pleadings present various questions, but the only point submitted to the Chancellor on Circuit was, as to the proportions in which the distributees should take the estate. He decreed, pro forma, to facilitate the parties in obtaining the judgment of the Court of Appeals on the question, that the brothers and sister of the half-blood, and the children of the brother of the whole blood, should each take an equal share. From this decree, the plaintiffs appealed, insisting that the estate of the intestate is to be distributed so that each of the brothers and the sister of the half-blood shall take one-fourth, and the children of the brother of the whole-blood shall take the remaining fourth, to be equally divided among them. After some progress in hearing the appeal, in the Court of Appeals in Equity, argument was stopped; and the case was referred to the Court of Errors, at the request of two Chancellors, who desired the aid of the Law Judges in settling a rule of property.

The determination of the question between the parties depends upon the construction of the 5th clause of the 1st section of the Act of 1791, for distributing the estates of intestates. (5 Stat. 162.) The clause is in these words: "If the intestate shall leave no lineal descendant, father, mother, brother or sister of the whole blood, but shall leave a widow, and a brother or sister of the half-blood, and a child or children of a brother or sister of the whole-blood, the widow shall take one moiety of the estate, and the other moiety

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shall be equally divided between the brothers and sisters of the half-blood, and the children of the brothers and sisters of the whole-blood—The children of every deceased brother or sister of the whole-blood, taking among them a share equal to the share of a brother or sister of the half blood. But if there be no brother or sister of the half-blood, then a moiety of the estate shall descend to the child or children of the deceased brother or sister; And if there be no child of a deceased brother or sister of the whole-

blood, then the said moiety shall descend to the brothers and sisters of the half-blood."

The 8th clause of 1st section provides, that "if the intestate shall leave no widow, the provision for her shall go as the rest of his estate is directed to be distributed, in the respective clauses in which the widow is provided for."

This Act regulates the distribution of both real and personal estate of intestates. Its scheme is, first, to provide, by general canons, for the distribution of real estate, (which explains the employment of the word descend in the 5th clause,) and then, by a general provision, to declare, that personal estates shall be distributed in the same manner as the canons prescribe for real estate. Sec. 2. It is at once a statute of descents and a statute of distributions; and, if we advert to the mischiefs in the previous state of the law, in aid of the construction of the Act, we should seek them both in the common law concerning descents, and in the statute regulating the succession to personalty. 22 and 23 Ch. 2, c. 10; 2 Stat. 523. The nature of the estate, as real or personal, may affect the rights and interests of the distributees in some cases; for instance, an alien, although he may be next of kin, cannot take the real estate, and may take the personalty of an intestate. But the purpose of the legislature, in the passage of the Act, is not to be ascertained by exclusive reference to one or the other systems of law concerning the two descriptions of estate.

By the law, as it stood at the passage of the Act, those of the half-blood were entirely excluded from the inheritance of real estate, and were admitted, according to propinquity,

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equally *with the whole-blood to the succession of personalty. Our Act making both descriptions of estate a common fund for distribution, compounds as to the half-blood between total exclusion as to one estate, and unrestricted admission as to the other, by prescribing that a brother or sister of the whole-blood shall exclude a brother or sister of the half-blood, and by not admitting the children of a deceased brother or sister of the half-blood to represent the parent, as in the case of nephews and nieces of the whole-blood; and, except in these instances, by placing or leaving the whole-blood and half-blood in the same category as to succession. Any doubt as to the truth of the last proposition, which might exist upon the terms of the Act, has been removed by authoritative decisions. The cases cited to us on the construction of the Act, are collected in a note, (a)

The distribution of the estate, which is the

(a) No representation among collaterals beyond brothers' and sisters' children, grandchild of a deceased brother of the whole-blood excluded by brothers, and children of brothers, of the whole-blood. Poaug ads. Gadsden, 2 Bay. 293. Maternal aunt excludes children of paternal

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subject of *the present suit, is confessedly regulated by the 5th canon above quoted. It is conceded on all sides, that the plain terms of the canon call the brothers of the half-blood and the nephews of the whole-blood to the succession; and the only dispute between the parties is, as to the proportion in which these distributees shall take the estate.

The statute does not designate, in such case, the persons to take more definitely than it does the shares to be respectively taken. "The children of every deceased brother or sister of the whole-blood taking among them a share equal to the share of a brother or sister of the half-blood." It would be difficult by any form of words, to express more clearly the purpose of the legislature, that each half-brother should take a share as large as the share to be distributed among the children, however numerous, of a deceased brother of the whole-blood. No ambiguity in the construction of this sentence, standing by itself, has been suggested, except that the extent of the share of a half-brother is not precisely defined. But equality of shares is necessarily implied in every direction for division, unless inequality be expressly prescribed. If a testator should bequeath \$1,000, among A., B. and C., so that B. and C. should together take as much as A., undoubtedly A. would take \$500, and B. and C. each \$250. This inference of equality is aided in the present instance by the context of the sentence; and some remarks on the context will be made in the course of the discussion.

If, then, there be no ambiguity in the

uncle. Shaffer and Wife v. Nail, 2 Brev. 160. Watson v. Hill, 1 McC. 161. as to construction of the Act of 1797. Brother, in the Act of 1797, means brother of the whole-blood. Mother excludes brother of the half-blood. Lawson v. Perdriau, 1 McC. 456. Wrenn v. Carnes, 4 Des. 405.

Ex parte Mays, 2 Rich. 61. Brother of the half-blood excludes children of a pre-deceased brother of the half-blood.

Karwon v. Lowndes, 2 Des. 210. Uncle of the half-blood excludes first-cousins of the whole-blood.

Witsell v. Linder, 3 Des. 481. Next of kin in the fifth degree exclude those in the sixth.

Guerard v. Guerard, 4 Des. 405, n. Uncle of the half-blood shares equally with uncle of the whole-blood.

Porter v. Fleming, Ms. Col. 1822. Nephews of the whole-blood exclude uncles.

Brevard v. Matthews, Ms. Col. April, 1824. Matthews v. Matthews, Ms. Col. Dec. 1824. Stent v. McLeod, 2 McC. Eq. 354. Nephews of the whole-blood take per stirpes, and not per capita.

Edwards v. Barksdale, 2 Hill, Eq. 416. Cousins of the half the whole and of the half-blood take equally as next of kin.

Hagermayer v. City Council, Riley's Eq. 117. Sister of half-blood excluded by sisters and children of pre-deceased sister of the whole-blood.

North v. Valk, Dud. Eq. 212. Nieces exclude a grand nephew.

Payne v. Harris, 3 Strob. Eq. 37. Great-grand-children entitled to take per stirpes.

words of the enactment, any exposition contrary to the words comes under the ban of the maxim, *maledicta expositio quæ corrumpit textum*. Courts have no authority to make an interpretation of a statute contrary to its express letter, uncontradicted by the context, for nothing can so well exhibit the intention of the legislature, as the words they have employed. *A verbis legis non est recedendum*. *Index animi sermo*. Edrich's case, 5 Rep. 119. It is dangerous, in any case, to allow scope for construction against express words; but it might be tolerated, where, from the context, or perhaps allunde, the meaning of the makers is ascertained to

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*be opposed to the words, and great inconvenience would follow from the literal interpretation. In the present instance, no such opposite intention of the legislature, nor such consequent inconvenience, is manifested. If the terms of an Act, liable to no constitutional objection, be clear and positive, Courts must construe and enforce the Act, without regard to the utility or wisdom of its provisions, or to the prudence and learning of those by whom it was enacted. The authority of judicial decisions may depend much upon the reasons assigned for the judgments; the number of the Judges deciding, and their reputation for ability, learning and probity; and the subsequent recognition of the decisions by the profession: but no discrimination, founded upon the character of the members, can be made in the authority or construction of the Acts of different legislatures. 2 Des. Eq. R. 647, App. As a matter of liberal curiosity, however, it is desirable to know something of the men who had the chief agency in the preparation and passage of a measure so important and fundamental as to be recommended in the constitution itself. That eminent person, Chancellor DeSaussure, who has contributed more than any other, to the structure of Equity in South-Carolina, and who was a member of the legislature in 1791, informs us, in *Stent v. McLeod*, that "the statute in question was drawn up with great care by the late Mr. Edward Rutledge, afterwards Governor of this State, whose head was as clear as his breast was benevolent and his tongue eloquent, and he had the aid of the revision of the bill by the late eminent lawyer and distinguished citizen, Gen. C. C. Pinckney, as well as several other learned lawyers." Among these learned lawyers, was Chancellor DeSaussure himself, who, at the same session, drew the Act concerning the Circuit Courts; and probably Thomas Pinckney, afterwards Governor of the State, who drew the Act, of that session, to establish a Court of Equity. (Ch. Harper's memoir of Ch. DeSaussure; Ch. DeSaussure's memoranda in a copy of 1 Faust.) The Act was carefully considered and discussed, (*Journal of 1791*, pp. 50, 148, 203, 245,) and its general pro-

visions have been always most acceptable to the people.

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*It is urged, that we should depart from the plain import of the words above quoted, because the sentence immediately preceding directs that the estate "shall be equally divided between the brothers and sisters of the half blood and the children of the brothers and sisters of the whole blood." If there be repugnance between the two sentences, principle would require us to give effect to the last expression of the will of the Legislature; but there is, in fact, no inconsistency. The latter provision is a specification of the mode in which the equal division directed by the foregoing words shall be made. The dash separating the sentences has the import of "so that" or "provided." "Equally divided" does not necessarily import division into equal shares, and, from its collocation here, must mean divided upon terms of equality and equity—the result of an "equitable distribution," according to the phrase of the preamble. The 7th section of this same Act, providing for partition among distributees, who may have unequal shares, gives authority to the Commissioners to recommend specific assignment to one or more of the distributees, or sale of the premises, if, in their opinion, the estate cannot "be fairly and equally divided between the parties interested therein"—and surely, here, "equally divided" imports no more than divided upon terms of equal justice to the parties. So, also, the English statute of distributions, of which, as to personalty, our Act of 1791 is merely an amendment, in the third section, provides for the just and equal distribution of the estate of an intestate "amongst the wife and children, or children's children" of the intestate, although it is obvious that the shares might be unequal. It was held by this Court, in *Collier v. Collier*, 3 Rich. Eq. 555 [55 Am. Dec. 653], that the direction of a testator that his estate should be "equally divided among his heirs above named," was satisfied by such division as regarded a class of children as one heir. In the more recent case, of *Crim v. Knotts*, 4 Rich. Eq. 340, the Court of Appeals in Equity decided that the provision of a testator for equal division among the children of his two brothers, and for the "use of their children's part or portion by

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the two *brothers for life," was satisfied as to equality, by equal division, in the first instance, between the two brothers. It may be further remarked, that it is the former sentence alone which provides for equal division among the half brothers, and thus defines their shares—and this satisfactorily disposes of the phrase "equally divided."

Again, it is urged, that the literal interpretation we have adopted violates the general purpose of the Act to postpone the half blood to the whole blood. But there is no evi-

dence of such purpose to postpone, except in the instances enumerated in the Act; and postponement, in specific cases, raises the presumption that general postponement was not intended. There is a seeming anomaly in excluding a half brother and admitting the children of a deceased brother of the whole blood, *jure representationis*, where there is a brother of the whole blood; and admitting a half brother, and not enlarging the interest of the children of a brother of the whole blood, where there is no brother of the whole blood. But it is quite as just to say that the anomaly consists in excluding the half brother, in the former instance, as to say that it consists in not extending the share of the nephews of the whole blood in the latter instance. If the principle running through the Act be, as Chancellor Harper suggests, in *Edwards v. Barksdale*, to call the kindred of the intestate to the succession, according to propinquity, not quantity of blood, the exclusion of the half brother, where there is a brother of the whole blood, is not symmetrical. In fact, however, neither this nor any uniform principle pervades all the canons. The right of kindred to inheritance and succession in estates is not a natural right, but entirely of civil institution; and the laws of different States differ widely, both as to the persons who shall take, and the shares in which they shall take. The Act of 1791 consists of a series of positive regulations on this subject, and our province, as Judges, is to expound them, and not to defect or overrule them, on conceits of symmetry and policy. It may be that, in the proper arena, the wisdom of the Legislature

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in these regulations concerning *the half blood could be vindicated; but, as Judge Waties remarks, in *Poaug ads. Gadsden*, "It is unnecessary to inquire into the reasons of the Legislature for limiting the distribution in this way—the words of the Act require this construction, and we have no right to look further." Where the terms of an Act are not free from ambiguity, it is safer to adhere to any settled construction of them, which may have been long and frequently acted upon, as a rule of property, than to make a contrary decision upon a more exact exposition of the words. An illustration is furnished by our decisions upon the Registry Acts. In the present instance, the maxim of *stare decisis* has no application. The question we are considering seems never before to have been submitted to judicial determination; nor is it remembered by any member of the Court, or suggested to us by counsel, that any estate has been distributed upon one or the other construction contended for. We have been pressed, however, with opinions, expressed by Judge Grimke, in his *Law of Executors*, published in 1798, (pp. 303 and 305,) and by Judge Brevard, in his *Digest*, published in 1814, (vol. 1, p. 426, n.) in op-

position to the conclusion we have attained. A nice criticism would show that the opinions of these Judges are equivocally expressed; but, passing that by, the opinions are not upon a case made, nor after argument, and they are not entitled to much weight. Judge Reeve, of Connecticut, in his treatise on descents, (pp. 339, 410, 512,) prefers the view we have taken. Much reliance is usually placed upon the construction given to a statute by the Judges who lived at the time the statute was passed, as, from their knowledge of the circumstances in which the Legislature acted, they have greater insight of the intention of the Legislature. But Judges Grimke and Brevard express their opinions in pursuance of the ordinary rules of construction, and do not profess to have, and could not well have, any peculiar knowledge of the intention of the Legislature, in the provisions concerning the half blood. Now, in the exposition of a statute by the general rules of construction, Judges contemporaneous with the statute have no advantage whatever over

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their *successors: indeed, are more liable to be misled by knowledge aliunde of the intention of the Legislature.

It is adjudged and decreed, that the estate of the intestate be so distributed, that each of the brothers and the sister of the half blood, shall take one-fourth, and the children of the predeceased brother of the whole blood shall take the remaining fourth, to be equally divided among them; and it is ordered that the Circuit decree be modified accordingly.

JOHNSTON, DUNKIN and DARGAN, CC., and WARDLAW, FROST, WITHERS and WHITNER, JJ., concurred.

O'NEALL, J., dissenting. In this case I do not agree to the conclusion of the rest of the Court.

It seems to me to be plain, that the Legislature did not intend to place the half blood in advance of those who, in a previous section of the same Act, had been preferred to them.

The children of a brother of the whole blood may, in the 5th section of the Act, be considered, by an interpretation of the words used by the Legislature in it, compared with and construed by the words used in the 4th section, as placed on an exact footing of equality with the half blood, when they are allowed to have parts of the inheritance.

This accords with the construction given by Judges Grimke, Brevard, and the profession generally, till the agitation of the question in this case. I am therewith content, and do not wish to unsettle a received construction of the Act, even if it were erroneous in the words.

GLOVER, J., having been of counsel, did not hear the case.

Decree modified.

APPENDIX

5 Rich. Eq. *519

*Ex parte JACQUES LOUIS DOMINIQUE VANDERSMISSEN and LOUISA CATHARINA COLLETON, His Wife.

(Charleston. March, 1829.)

[Equity ⇐446.]

Petition for leave to file a bill of review. The petitioners were defendants to the original bill, and were residents of a foreign country. A certain deed, written in the French language, on parchment, folded, but not endorsed, was sent by them, with other papers, to their counsel in this State. This deed, which was most material to the claim of the petitioners, was overlooked by their counsel, and not discovered until after the appeal decree in the original cause was delivered:—Ordered, that petitioners have leave to file a bill of review.

[Ed. Note.—Cited in *Simpson v. Watts*, 6 Rich. Eq. 368, 62 Am. Dec. 392; *Ex parte Knox*, 17 S. C. 212.

For other cases, see *Equity*, Cent. Dig. § 1087; Dec. Dig. ⇐446.]

[Equity ⇐447.]

"New proof, that is come to light after the decree was made," is ground for granting leave to file a bill of review.

[Ed. Note.—Cited in *Durant v. Philpot*, 16 S. C. 124; *Ex parte Knox*, 17 S. C. 210.

For other cases, see *Equity*, Cent. Dig. §§ 1091-1094; Dec. Dig. ⇐447.]

The petition in this case, which was filed December 30, 1828, in the Circuit Court for Charleston, states, "that about the first day of June, 1824, a bill was filed in this honorable Court, by the firm of Davidson & Simpson, of London, merchants, against Admiral Richard Graves, the father of your petitioner, Louisa Catharina, and against your petitioners, and the other children of the said Richard Graves, and their husbands or representatives therein named, the object of which bill was to set aside certain deeds made by the said Richard Graves and wife, and by his son, Samuel Colleton Graves, and to have the estates thereby settled sold, and the proceeds applied to the payment of a large sum, to wit, the sum of £9,662.11.4, said to be due to the complainants by the said Richard Graves, and Samuel Colleton Graves, his son. Your petitioners further shew unto your Honors, that although process was by the said bill prayed against your petitioners, they were at that time absent from this State, and no process was ever served upon them; but the father of your petitioner, Louisa Catharina Colleton, was at that time in this State, and put in an answer for them, which your petitioners are advised and al-

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lege to have been an irregular *and unauthor-

ized act, and not sanctioned by the rules of this Court; that the said bill of complaint of Davidson & Simpson set forth, amongst other things, that the said Richard Graves and Louisa Carolina, his wife, (the said Richard Graves being then greatly indebted,) by deed bearing date 17th June, 1817, granted to your petitioners, as a marriage portion, so much of their real property in South-Carolina, called Colleton and Fairlawn Baronies, as should be valued at £3,000 sterling, and so many of their negro slaves in said State as should be valued at £3,000 sterling more. Your petitioners further shew unto your Honors that the said Richard Graves, by the answers so put in for himself and for your petitioners, admitted the statement made in the said complainant's bill, as to the deeds under which your petitioners were supposed to claim, and, without further defence, submitted the consideration of their rights to the judgment of the Court; that, at the hearing of the cause, the deed bearing date the 17th June, 1817, was produced, and that, upon a final decree in the Court of Appeals, (a) it was declared that the grant of the £3,000 sterling charged upon the personal estate of the said Richard Graves, by the said deed, was void, because the said deed was a settlement after marriage, and therefore voluntary. Your petitioners further shew unto your Honors that the majority of the learned Judges of the said Appeal Court dwelt and insisted much on the circumstance that there was no agreement prior to the marriage of your petitioners to support the said settlement, and on that ground alone determined against your petitioners' right as to the £3,000 sterling charged on the negro slaves of the said Richard Graves; but your petitioners in fact say, that they have been greatly and grievously injured by these said proceedings: for the said Richard Graves and Louisa Carolina, his wife, previous to the marriage of your petitioners, entered into a solemn agreement with your petitioners, for the settlement of £6,000 sterling, with interest at 5 per cent. per annum, charged on all their

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lands *and negroes in South-Carolina, to the uses of the said marriage, and the same was put into writing and signed by the said Richard Graves and wife, and Samuel Colleton Graves, and your petitioners, and was executed and delivered at Anvers, in the kingdom of the Netherlands, on the fourth of

(a) See the decree, *Riley Ch. 232*.

September, one thousand eight hundred and sixteen. And your petitioners, in fact, say, that the said agreement was an essential condition in the treaty of the said marriage, which was afterwards duly had and solemnized, on the second of October, one thousand eight hundred and sixteen; that, by the said marriage contract, in consideration of the said intended marriage, the said Richard Graves and wife agreed to settle and assure to your petitioners the sum of six thousand pounds sterling, with interest at 5 per cent., to be charged on all their estates in South-Carolina, as in and by the said instrument of writing, in the hands of your petitioners' counsel, and ready to be produced, will more fully appear. Your petitioners further shew unto your Honors, that when the said decree was pronounced against them, the said marriage contract was not brought to the view of the Court, and that the evidence furnished thereby would have entirely altered and changed the said decree in this particular. Your petitioners admit that they are not entitled to say that the instrument of writing hereinbefore mentioned is, as to themselves, newly discovered evidence, but they submit to your Honors a case of still greater hardship, inasmuch as the said evidence, although furnished to their agents and attorneys, was not discovered nor understood until after the hearing and deciding of the said case by the said Court of Appeals; that, owing to the absence of both your petitioners, (who are residents in the kingdom of the Netherlands,) and the little knowledge which your petitioner, Vandersmissen, hath of the English law or language, your petitioners were able to do little more than transmit to, and place in the hands of, their agents and attorneys in this country, their deeds and muniments. That a notarial and authenticated copy of their said marriage contract, in the French language, was amongst the number,

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and was *handed over, as they understand, by their agent, Mr. William Robertson, to Mr. Prioleau, the solicitor of the said Richard Graves, amongst other papers, to be used by him in your petitioners' defence, but was never examined by either of them, nor was the existence of the said contract known to either of them, nor to any person in this country. That when the said answer was put in for them by the said Richard Graves, he took the statement of the complainants' own bill, and submitted their rights, without explanation, to the judgment of the Court, and your petitioners' case was heard in their absence, under the suppression of the most important evidence. Your petitioners further show, that when they were informed of the hearing of the case, and a copy of the decree of the said Appeal Court was sent to them, they were greatly astonished and surprised to find that stated in the evidence which they knew not to be in the facts of the case, and

seeing that the honorable Court set aside their lien of £3,000, charged upon the negroes, merely because there was no ante-nuptial contract of that nature, your petitioners immediately wrote to their agent, and to the counsel employed by him, and directed them to search for the marriage contract hereinbefore mentioned; that in making such search, the said authenticated copy of the said contract was found amongst the papers of Mr. Prioleau, who had been employed to defend their case. Your petitioners well hoped that the complainants in the said case would not insist on a decree founded in mistake, and would willingly yield them the rights to which they are so clearly and justly entitled; but your petitioners are informed that, as a decree has been pronounced, no errors can be corrected without an application to this honorable Court. Your petitioners therefore pray that they may be allowed to take off the file the answer so put in irregularly in their name, and that they may be allowed to prove the marriage contract hereinbefore mentioned, and that the cause may be re-heard, and the rights of your petitioners properly submitted to this honorable Court; or that they may be per-

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*mitted to file a bill of review, for the redress of the errors and grievances hereinbefore stated."(b)

(b) The following affidavits were relied on, to sustain the petition, and were filed therewith:

"Personally appeared William Robertson, who, being duly sworn, depose that he has acted as attorney for Admiral Richard Graves for the last thirty years; that in June or July, 1824, he went with the said Richard Graves to Samuel Prioleau, Esq., to employ him to put in an answer in Equity, and to act as his counsel, in the case of Davidson & Simpson against the said Richard Graves and others, about that time commenced, by bill filed in the Court of Equity of this State. That, to the best of his knowledge and recollection, Baron J. L. D. Vandersmissen, son-in-law of the said Richard Graves, was not at that time in this country, and did not arrive here until November or December of that year, (1824,) when he came here with his wife and the said Richard Graves, who had returned, as his deponent believes, to Europe, in or about July, 1824. That the said J. L. D. Vandersmissen and wife, by power of attorney, executed on 8th April, 1825, appointed this deponent and Samuel Prioleau, Esq., to act as his attorneys in this country; that he does not recollect having received any marriage contract, or copy of a marriage contract, of the said Vandersmissen and wife, from either the said Richard Graves or the said Vandersmissen, nor has he ever seen such marriage contract, or copy thereof, until after the decree of the Appeal Court in February last, in the said case of Davidson & Simpson against Richard Graves and others, when, upon sending a copy of the said Appeal decree to the said Vandersmissen, (then in Brussels,) he received an answer from him, referring to a copy, in the French language, of a marriage contract, executed previous to his marriage, which he states that he left in the possession of this deponent; that this deponent thereupon made search amongst his papers, but could find no such paper or contract; that he then called upon Messrs. Dawson & Cruger, (who had acted as attorneys for Vandersmissen

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*The Chancellor sitting in the Circuit Court for Charleston, before whom the petition was heard, refused the prayer thereof; and the petitioners appealed.

Dunkin, Petigru, for petitioners.
King, contra.

since the retirement of Mr. Prioleau from practice,) to request them to search amongst the papers of Mr. Prioleau for such paper or contract; that they informed him they had just received letters from said Vandersmissen, referring to said contract, and stating that a copy thereof had been left with this deponent; that Mr. L. Cruger, upon searching, found a copy of said contract amongst the papers of Mr. Prioleau, which this deponent thinks must have been left with Mr. Prioleau, amongst other papers, by said Vandersmissen, for this deponent, on his oath, avers that he never before, to the best of his recollection, saw the said copy, or any other copy, of the said marriage contract, which he found, upon examination, to be a notarial copy of a marriage contract, entered into at Anvers, (or Antwerp,) on the 4th September, 1816, between Admiral Graves and wife, and the said Vandersmissen and wife, and Samuel Colleton Graves, for the purpose of settling £6,000 sterling upon the said Vandersmissen and wife, and binding the property of the said Admiral Graves, in South-Carolina, for the payment of the same."

"Personally appeared Lawrence E. Dawson, who, being duly sworn, deposes that he was utterly ignorant of the existence of any contract of marriage between Richard Graves and wife and J. L. D. Vandersmissen and wife, (for whom this deponent, together with his partner, Mr. L. Cruger, have acted as attorneys and solic-

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itors,) entered into *before the marriage of the said Vandersmissen and wife, until after the decision of the case by the Court of Appeals, and until letters were received from said Vandersmissen, subsequently thereto, referring to such marriage settlement, and stating that a copy of the same had been left with Mr. Wm. Robertson: when, upon Mr. Robertson's stating that he could not find such paper, a search was made among the papers of Mr. Prioleau, by Mr. L. Cruger, and a paper in the French language was found by him, which is said to be a notarial copy of a marriage contract, entered into between Admiral Graves and wife and said Vandersmissen and wife, and dated at Anvers, on the 4th September, 1816; but of the existence of said contract or document this deponent was utterly ignorant, nor does he recollect to have ever seen the same, until after the decree of the Appeal Court."

"Personally appeared Lewis Cruger, who, being duly sworn, deposes that, on the retirement of Samuel Prioleau, Esq. from the practice of the Law, he was, together with his partner, Mr. Lawrence E. Dawson, requested by Mr. Prioleau and Mr. William Robertson, attorneys of J. L. D. Vandersmissen, to attend to his defence, in the case of Davidson & Simpson against Admiral Graves and others, in Equity; that this was about the summer or fall of 1825; that the case was then docketed, and he understood from Mr. Prioleau and Mr. Robertson that Mr. Petigru and Mr. Dunkin were also engaged to act with them for said Vandersmissen and for Admiral Graves; that, as an answer was put in by Mr. Prioleau for said Vandersmissen, and as the deeds therein referred to were all ready to be produced in Court, and none others were mentioned or set forth, they never supposed that any others existed, of importance to said Vandersmissen, and therefore were never put on the search for any others, until after the decision

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*In March, 1829, the appeal was heard in Charleston, and the judgment of the Court announced as follows:

COLCOCK, J. The Court are decidedly and unanimously of opinion that the motion in this case should be granted. But, as this is the first case in which this Court has granted an application for a bill of review, and will, of course, be referred to as a precedent, it is deemed important that our reasons should be more fully stated than can now be done. The opinion will therefore be sent to the Clerk of this Court, and, in the meantime, the petitioners are permitted to proceed; if, indeed, any proceedings should be deemed necessary, after this determination is known.

NOTT and JOHNSON, JJs, concurred.

At a subsequent day, the following opinion, stating the reasons of the Court, was filed with the Clerk:

COLCOCK, J. The questions which arise in this case are of the first importance in the administration of the Chancery jurisdiction of the State. After much discussion, our ancestors thought proper to establish this jurisdiction, and there has been a continued effort, on the part of our legislators, to correct, as much as possible, both the abuse of power exercised by those Courts, and the delays which have arisen from the mode of conducting the business in them. Believing, as we do, that such a jurisdiction is essentially necessary to the complete and perfect administration of justice, we have endeavored to co-operate with the Legislature, to restrain within its proper limits this jurisdiction, and so to regulate the practice as to procure the most speedy determination of cases, which is consistent with their mixed, diversified, and oftentimes complex character. In England, a

of the said case by the Court of Appeals, in February last, when, upon sending a copy of said decision to said Vandersmissen, (then in Brussels,) they received letters from said Vandersmissen and his wife, referring them to a marriage contract entered into between Admiral Graves and wife and themselves, previous to their marriage, and dated on the 4th September, 1816, at Anvers, (or Antwerp,) in the Netherlands, an authenticated copy of which, they stated, had been left by said Vandersmissen in the hands of William Robertson, Esq., of this city; that this deponent spoke to Mr. Robertson on the subject, when he assured this deponent that he had searched, and could find no such paper, and that, to the best of his recollection, he had never seen such paper; this deponent then, at his request, searched amongst the papers of Mr. Prioleau, and found a paper or parchment document, written in the French language, (which this deponent does not read,) and upon showing the same to Mr. Robertson and Mr. Petigru, they declared it to be a notarial copy of a marriage contract, such as is above referred to. This deponent further saith, that he never, until that time, knew of the existence of such document or contract."

Chancery suit is the business of a lifetime, and not unfrequently descends, with the property, to the second or third generation. In order to prevent this delay here, the right of appeal is given to a tribunal which sits twice a year, as in the ordinary cases of the Law Courts, the decision of which is final and conclusive of the subject—and hence it has

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been argued that no other re-hearing of a case should be granted in this State.

That it was the intention of the Legislature to prevent the delay resulting from the circuitous course of proceeding in England cannot be doubted, but that they intended to preclude the granting of bills of review, under any circumstances, will not be conceded. In words, they have not done so, and it would be improper to imply such intention, in opposition to the essential benefit resulting from a judicious exercise of the power; nay, I may say, from the absolute necessity of its existence. In the case of *Haskell and Raoul*, (1 McC. Eq. 22,) although we rejected the application, yet the Court say: "We are not to be understood as saying that a bill of review, for newly discovered evidence, (subject to all the conditions and regulations prescribed on those occasions,) may not be granted." We are then to decide whether the present applicants have brought themselves within the reasons and the rules on which such applications have been granted. The case itself, out of which this application has arisen, was one of much importance, both as to the amount of property and the principles involved in it. From the situation of the parties, (most of them being resident abroad,) and the complex nature of their demands, depending, not only on evidence to be obtained in the country in which they lived, but on the construction of deeds drawn and executed according to the forms of other countries, the difficulty in the decision of it was also greatly increased. In this state of things, and in the absence of the applicants, the cause was heard, and an important paper, on which the claim of the applicants (according to the opinion of a majority of the Court) depended, and which was in the possession of one of the former counsel, was not produced at the hearing. On the part of the applicants, it is contended that this was not their fault; that there was no negligence on their part; that their claim is just, legal and equitable; that, although they may not come within the very letter of Lord Bacon's rules, they are clearly within the spirit and meaning of them. On the other

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hand, it is said to be the ordinary case of negligence, where the guilty party sacrifices his private right to the operation of a rule, indispensably necessary to the common good; that, where one has evidence which he will not, or does not, produce at the trial, he is not entitled to a re-hearing.

We would reluctantly depart from a rule,

the wisdom of which is admitted on all hands, and one which we have so often practically applied ourselves. But qui hæret in litera, hæret in cortice, is a maxim which must never be forgotten by those who administer equity.

How difficult is it so to express any rule, as not to exclude cases which are evidently (upon the mere statement of them) within its spirit. The facts in this case are, that the papers were all sent to the counsel formerly engaged in this case. The deed in question was written in the French language, on parchment, folded but not endorsed. The attorney, who very laboriously and with great technical precision made out the abstract of the deeds on which the claim depended, overlooked this deed, and it was not discovered that it was a paper having any relation to the case, until after the decision. The rule laid down by Lord Bacon is in the following words: "No decree shall be reversed, altered or explained, being once under the great seal, but upon bill of review; and no bill of review shall be admitted, except it contain either error in law, appearing in the body of the decree, without farther examination of matter in fact, or some new matter, which hath arisen in time after the decree, and not any new proof, which might have been used when the decree was made; nevertheless, upon new proof that is come to light after the decree was made, which could not possibly have been used at the time when the decree passed, a bill of review may be grounded, by the special license of the Court, and not otherwise;" which ordinance, it is said by Lord Hardwicke, (3 Atk. 26,) has never been departed from. Now, whether we take the words of Lord Bacon, or those of the expositors who followed him, I think the case before us is embraced in the rule, "nevertheless, upon new

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*proof, that is come to light after the decree was made," &c. Now, I take it, that the word "new" may as much apply to the discovery of the proof as to its existence: for *de non apparentibus, et non existentibus eadem est ratio*. Although the proof might exist, yet, if not produced it could not be acted upon; and the learned Chancellor could not have intended, in laying down a general rule, to exclude a case which, in effect, is precisely that stated in the rule: and this seems to have been the idea of that great man, Lord Hardwicke, for he says, "it must appear that the new matter has come materially and substantially to the knowledge of the party, or his agents, which is the same thing, since the time of the decree in the former cause, or since such time as he could have used it to his benefit and advantage in the former cause." *Coop. Plead.* 91; 1 Ves. sen. 434.

Now, it is very clear that the proof in this case came to the knowledge of the agent after the decree, and if the meaning is, new as to discovery, which I think is clear, the case be-

fore us is within the letter of the rule. It is true that the ordinance does say, "or some new matter which hath arisen in time after the decree, and not any new proof which might have been used when the decree was made;" but I confess I cannot see how any circumstances, which could arise after a decree, could be made the ground of a review. I think this language is obscure, and must be considered as qualified and explained by that which immediately follows, and which I have referred to: "Nevertheless, upon new proof that is come to light after the decree was made," &c.

But, if it be conceded that, by the rule, a review can be granted on "some new matter which hath arisen after the decree," yet I think it must also be granted, that it can be obtained "upon new proof that is come to light after the decree," which is the case before us—and for this abundant authority can be produced, independent of the rule itself. In the case of *Patterson v. Slaughter*, Amb. 293, Lord Hardwicke says, "all the bills of review I have ever known, were of new matter,

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to *prove what was put in issue. Lord Effingham's case was so. He claimed under an old entail, and though he afterwards made title under a different entail, yet the issue was as claiming under some old entail generally. In the present case, it is not new matter to prove what was put in issue, but to prove a title that was not in issue: and therefore the defendant could not be entitled to a bill of review."

So, in the case of *Taylor v. Sharp*, (3 P. Wms. 372,) the Chancellor says, "the remedy by bill of review must be either," &c., "or upon some new matter, as a release, receipt, &c., proved to have been discovered since;" and in the case of *Standish v. Radley*, 2 Atk. 177, it was decided, that papers, in the hands of a party to a former cause, though not produced, may be read upon a bill of review, not being discovered until after publication

in the cause. (1 Harrlson, Ch. Pr. 137, 452.) It is, however, contended, that this paper being in the possession of the former attorney, cannot be said to be newly discovered testimony, for that it was his duty to have examined it, and ascertained its contents. But I think neither the rule, nor the reason of the rule, go so far. A man may have possession of a paper, and not know it, and the affidavits are satisfactory to that point. In the most guarded exercise of the power of reviewing cases, it is only necessary to ascertain that no imposition is attempted to be practiced on the Court, as to the knowledge of the existence of the evidence offered. If the paper was not examined, (or was not seen, being among others not thought to be important,) it is a case of newly discovered evidence. It is perhaps difficult to tell how it was overlooked. It is often impossible for one to tell how he loses a paper: for if he had known the when and the how, it would not have been lost. It is a case, as I conceive too, differing widely from those cases which speak of one, having possession of a paper, not being entitled afterwards to use it. Those are cases, where the person having the possession, also had a full knowledge of its contents, and, through a culpable negligence or forgetfulness, fails to produce it, or is instigated by some motive of interest

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or gain in another *way. In this case, there appears to have been all the diligence and attention which could have been required, and more than is ordinarily used, and it is impossible to conceive of any motive which could have induced an intentional withholding of the deed; nor is there the slightest ground to suspect imposition in any way. We are, therefore, unanimously of opinion, that the motion should be granted.

NOTT and JOHNSON, JJ., concurred.
Motion granted.

IN THE COURT OF APPEALS

COLUMBIA—MAY, 1852.

5 Rich. Eq. *531

*LUCY B. REESE v. WYETT HOLMES and Others.

(Columbia. May, 1852.)

[Partition ⇨116.]

Parties and their privies to a record and decree in partition, are concluded, by the decree, from showing an estate in the parties, at the time, greater than, or derived from a different source from, that set out in the proceedings and established by the decree.

[Ed. Note.—Cited in Barnes v. Cunningham, 9 Rich. Eq. 478.]

For other cases, see Partition, Cent. Dig. § 315; Dec. Dig. ⇨116.]

[Judgment ⇨681.]

Bill in Virginia for partition of testator's estate, to which his widow was a party as plaintiff, stated that the widow had renounced all her interests under the will, and that she claimed her dower; and the prayer was, that her dower be allowed her. An order was made for the division of the estate between the "claimants according to law," and the appointment of commissioners to make the division. The commissioners made their report, allotting one-third of the negroes to the widow, and the decree simply confirmed the report. In no part of the record was it stated what estate a widow claiming dower was entitled to; but it appeared, that, by the law of Virginia, a widow, renouncing her interests under the will, and claiming dower, was entitled to one-third of the estate, and, where she got negroes in the division, she took them for life only.—*Held*, that the Court might look into the pleadings and the law to ascertain what estate the widow, the plaintiff in the bill, was entitled to; and that she took, under the decree, an estate for life only in the negroes.—*Held*, further, that she could not show, that as distributee of an infant daughter, legatee under the will, who had died before the division, she was entitled absolutely to a portion of the property divided—no such claim having been stated in the bill, or allowed by the decree.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1202; Dec. Dig. ⇨681.]

[Remainders ⇨17.]

By a Virginia statute, if a husband removes from that State slaves in which his wife has a life estate, without the consent of the remainderman or remainderess, he or she may sue for, recover and possess such slaves during the life of the husband.—*Held*, that, where slaves were, under such circumstances, removed into this State, and the husband of the remainderess did not enforce the forfeiture, and many years elapsed before the death of the tenant for life, the right to enforce the forfeiture and the estate in remainder, did not so coalesce as to bar, under the statute of limitations, the right of the remainderess to the possession of the slaves at the termination of the life estate.

[Ed. Note.—Cited in Kergood v. Davis, 21 S. C. 209.]

For other cases, see Remainders, Cent. Dig. § 16; Dec. Dig. ⇨17.]

[Husband and Wife ⇨11.]

Bill by husband alone for the protection of the wife's remainder in slaves, and decree thereon for the protection of the property, *held*, not to vest the wife's estate in remainder in the husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 56; Dec. Dig. ⇨11.]

[Husband and Wife ⇨69.]

Neither the husband, nor the wife, alone, nor the husband and wife acting jointly, have the power, during the coverture, without the sanction of the Court, to assign the wife's vested remainder in slaves expectant upon the termination of a life estate therein, so as to defeat the right of the wife to the remainder when

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it falls in, should the husband then *be dead. Should the husband be alive when the remainder falls in, and he then have the right to reduce it to possession, his previous assignment will, it seems, hold good.

[Ed. Note.—Cited in Larey v. Beazley, 9 Rich. Eq. 123; Duke v. Palmer, 10 Rich. Eq. 387; Shuler v. Bull, 15 S. C. 431, 432, 433; Trustees v. Bryson, 34 S. C. 411, 13 S. E. 619.]

For other cases, see Husband and Wife, Cent. Dig. § 295; Dec. Dig. ⇨69.]

[Slaves ⇨7.]

Two deeds conveying a large number of slaves, over fifty, in consideration of \$1,000, set aside, under all the circumstances, on the ground of fraud.

[Ed. Note.—Cited in Marthinson v. McCutchen, 84 S. C. 266, 66 S. E. 120; Midland Timber Co. v. Prettyman, 93 S. C. 16, 75 S. E. 1012.]

For other cases, see Slaves, Cent. Dig. §§ 20-29; Dec. Dig. ⇨7.]

[Slaves ⇨5.]

The Court has jurisdiction to decree a specific delivery of slaves in favor of a remainderess against persons, claiming under the life tenant, who had been in possession many years—the life tenancy having lasted fifty years.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. § 14; Dec. Dig. ⇨5.]

[Specific Performance ⇨127.]

On a bill for specific delivery, the defendant may be compelled to account for the value of such of the slaves as have died since the filing of the bill.

[Ed. Note.—Cited in Barr v. Haseldon, 10 Rich. Eq. 69.]

For other cases, see Specific Performance, Cent. Dig. § 407; Dec. Dig. ⇨127.]

This cause was heard at Edgefield, June sittings, 1851, by Chancellor Johnston. The facts, upon which the points adjudicated turned, will sufficiently appear from his decree.

Johnston, Ch. This is a case of unusual importance; not only from the value of the

property in litigation, but from the questions, both of fact and of law, involved in the suit.

Before considering the case, it will be proper to settle who are the parties to be affected by the decree, when it is delivered.

Two of the defendants, E. B. Holloway and Thomas O. Holloway, do not reside, and did not, at the filing of the bill, or since, reside within this State. They have not been served with process, and have not appeared or answered. They have no interest in the property in the hands of the other defendants, upon which the decree is to operate. Under these circumstances, they are not amenable to this Court; nor can its decree affect them. It is, therefore, ordered, that the order pro confesso, entered against them, be rescinded, as improvidently granted; and that the bill be dismissed as to these two defendants.

The plaintiff, being satisfied, by the answers of John Middleton, Francis W. Burt, and B. M. Talbert, that these three other defendants never had possession of any of the property in controversy, (upon leave obtained for that purpose,) entered an order before the hearing, that the bill be dismissed as to them also.

Therefore, the decree to be delivered, is not to have any effect upon the five defendants before named; but must be construed with exclusive reference to the remaining defendants in the cause; and it is so ordered and adjudged.

We now proceed to the case.

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*The plaintiff's claim is briefly this: She is the daughter of one Thomas Williams, a citizen of Brunswick county, Virginia, who died in January, 1787. She avers, that in a division of her father's estate, which was effected, between her mother (the widow of the decedent) and herself, in the county court of Brunswick, about the year 1797,—two female slaves, Jenny and Edie, were assigned to the mother for her life, with remainder to the plaintiff. That these negroes, with their increase, were removed from Virginia to this district, (Edgefield,) about the year 1799, by one Lewis Holloway, who had become the second husband of her mother; and here remained until 1814, when Holloway died. That, upon his death, the plaintiff's mother, who thus became his widow,—and for whose life the negroes were held,—came into the possession of them. That, for certain causes, which rendered such a proceeding necessary for the protection of her remainder in said slaves, and their increase, the plaintiff's husband, James Reese, then alive, filed a bill in the Court of Equity for Edgefield, against Rachel Holloway, her mother, and others, in the year 1819; to which a supplemental bill, for additional causes, and against additional defendants, was superadded, in 1821; and the suit resulted in a decree pronounced in June, 1822; in which decree the Brunswick record of

partition was interpreted to have given the mother only a life tenure in the slaves which she received under it, with remainder to the plaintiff; and, upon the ground of that interpretation, provision was made for the preservation of the remainder of the plaintiff.

That subsequently to that decree, and while the life estate still subsisted, several of the defendants, who had gotten possession under Holloway, or his administrator, obtained deeds from the plaintiff's husband, (which deeds they endeavored to corroborate, by obtaining other deeds from him and the plaintiff conjointly,) by which certain undivided portions in the remainder expectant of the plaintiff were conveyed to them. These deeds, which were obtained in succession from 1824 to 183—, she attacks, upon

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grounds set out in the bill. Finally, *that, after her husband had died, Mrs. Holloway, (upon whose life the remainder was suspended,) died in 1847; and the remainder accrued to the plaintiff. But, then, certain of the defendants obtained from herself, then discover and sui juris, deeds, executed by her, in June, 1848, conveying her whole remainder to them. These deeds she assails for fraud;—and prays that they be set aside; and that the slaves be decreed to her. The bill also prays general relief; and was filed the 23d of April, 1849.

It will be perceived, from this summary statement, that the fundamental questions in the case are, (1) did Mrs. Holloway take the original stock slaves, under the Brunswick record, exclusively as parcel of the estate of Thomas Williams, her first husband? and, if so, (2) what quantity of interest did she take in them? And these questions, I think, must be determined by that record.

If it should appear, that, in the allotment to Mrs. Holloway was included, as has been supposed, not only the share to which she was entitled as widow of Williams, but a distributive share of the share of one or more of his children, who had died; while, at the same time, it appears that her share, as widow, was intended to vest only for her life: the only consequence of that state of her rights must be to limit the plaintiff's claim. The diverse interests of Mrs. Holloway, thus confounded in the property, must now be separated by a partition,—in the same proportions which they bore to each other when the allotment was made; and the confusion of rights took place:—and the remainder, in that part to which the plaintiff's right in remainder properly attaches, should now be decreed to her.

The two questions which I have stated, must be constantly borne in mind, while we examine the Virginia record, where most of the facts, of which there is any evidence, appear.

Thomas Williams died, as I have stated,

and as the pleadings and exhibits in that case show, in January, 1787. He had a competent estate, consisting of land and eight or nine negroes. A few days before his

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death, (December 26, 1786,) he executed *his will: having, at that time, a wife, Rachel, a son, Samuel, and two daughters, Sally and Lucy, (who is the plaintiff here,) for whom he provided, in the will, as follows:

1. "I give and bequeath to my son, Samuel, the land and plantation I now live on, —to him and his heirs forever. But, if he dies before he comes to the age of 21 years, my desire is, that my land be equally divided between my two daughters, Lucy and Sally Williams—they and their heirs, forever.

2. "Item. I give and bequeath to my son, Samuel Williams, one negro girl by the name of Winney, and her increase,—to him and his heirs, forever.

3. "Item. I give and bequeath to my daughter, Lucy, two negroes, Pat and Silla, —them and their increase,—to her and her heirs, forever.

4. "Item. I give and bequeath to my daughter, Sally, one negro, named Jenny, and her increase,—to her and her heirs, forever.

5. "Item. I lend unto my loving wife, Rachel Williams, one-third of the land I now live on, during her natural life, or widowhood;—one negro fellow, Will, during her natural life;—a choice bed and furniture; my grey horse and side-saddle; choice cow and calf; sow and pigs. And after her death, my desire is, that what I have lent my wife, be equally divided among all my children,—to them and their heirs, forever.

6. "Item. My will and desire is, that all my estate, not already disposed of, be equally divided among all my children, Samuel, Lucy and Sally,—to them and their heirs, forever."

One Joseph Lyell proved the will and qualified as executor, the 22d of January, 1787.

The testator's son Samuel, mentioned in the will, it is admitted, happened to die before his father; being an infant at the time, and having neither wife nor issue; and it would appear perfectly plain, (I observe here,) that his legacies and devises, which lapsed by his death, passed, by the terms of the will, to his two sisters, Lucy and Sally, if they both survived the father, or to whichever of the two so survived.

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*By statutory provisions of Virginia, passed in 1785, then of force, it was declared that the operation of wills of real estate should be subject to a "saving to the widows of the testators," of their dower in lands, &c., "according to law:"—which shall not be prejudiced by any devise thereof.(a) With respect to testaments of personalty, it was

(a) Revised Code of 1819, by Leigh, p. 376, sec. 2.

provided,(b) that—"when any widow shall not be satisfied with the provision made for her by the will of her husband, she may, within one year from the time of his death, before the general Court,—or Court having jurisdiction of the probate of the will,—or by deed, duly executed in the presence of two or more credible witnesses, declare, that she will not take, or accept, the provision made for her by such will,—or any part thereof; and renounce all benefit which she might claim by the same will:—and, thereupon, such widow shall be entitled to one-third part of the slaves whereof her husband died possessed,—which she shall hold during her life, and at her death, they, and their increase, shall go to such person, or persons, to whom they would have passed and gone," (under the will, of course, so far as its provisions might extend,) "if such declaration had not been made. And she shall, moreover, be entitled to such share of his other personal estate," (as contra-distinguished from his slaves,) "as if he had died intestate (c) to hold to her as her absolute property. But every widow not making a declaration, within the time aforesaid, shall have no more of her husband's slaves and personal estate, than is given her by his will."

It appears from a minute of Brunswick County Court, where the will had been proved, that, on the 24th of September, 1787, "Rachel Williams, widow of Thomas Williams, deceased, came personally into Court, and declared, that she would not accept, receive, or take, the legacies, devised to her by the will of the said Thomas Williams; and renounced all benefit or advantage therefrom."

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*On the ——— of December following, (December, 1787,) she married Lewis Holloway.

In April, 1790, Lucy Williams, (the present plaintiff,) one of the two daughters of the testator, married John West.

Sally Williams, the other daughter, died unmarried, and intestate, during her infancy. She died, certainly, between the date of her father's will, (December, 1786,) and the proceedings for the partition of his estate which we are now examining; and which were commenced the 9th of December, 1795. But there is nothing from which the precise date of her death, whether occurring before or after that of her father, can be fixed.

On the 9th of December, 1795, as I have stated, Holloway and wife, and West and wife, exhibited their bill against Lyell, the executor, on the chancery side of Brunswick County Court.

(b) Id. 381, sec. 26.

(c) A widow's share of an intestate estate, so far as related to personalty, was one-third, after payment of debts: but, if slaves were included in the third, she should hold them only for life. (See Act of 1785; 1 Revised Code, 382, sec. 29.)

Now, remember the two important questions to be solved by this proceeding; and attend to what the proceeding contains.

It will appear, I think, from an attentive consideration of its contents, that, so far from purporting to distribute any share which Sally may be supposed to have held in the estate,—considered as such,—between the mother and other daughter then in Court, there is no statement, fact or circumstance, disclosed in the whole case, (except that the will formed an exhibit,) indicating that she ever had either share or interest to be distributed. Her name is not mentioned, from beginning to end, more than if she had never existed. The estate, which is proposed as the subject of division, and upon which the Court is called upon to decree, is constantly called the estate of Thomas Williams, alone; and constantly considered and treated throughout, as such; and the interests of the parties in that estate, considered purely as such, are set out, not in technical language, but in unstudied language, which happens to define and discriminate them with unusual distinctness. The mother, as widow of Thomas Williams, claims what is known familiarly in Virginia as dower, or the share real or personal, allowed by statute law, there, to a widow, who renounces her interests under her husband's will. The daughter claims all the balance:—that is to say, every

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right *and thing in the estate, not covered by the mother's limited claim.

Now let us take up the pleadings. The plaintiffs set out by stating the will and death of Thomas Williams;—the probate of the will, and the assumption of the executorship by Lyell, the defendant;—that the plaintiffs verily believe, “that all the debts due from the said estate,—of the said deceased Thomas Williams.”—have been settled;—that the executor refuses to come to a settlement of “the estate;” although (if one was had) “your orators and oratrices charge, that there is no real or just reason why an immediate division of said estate should not take place among them, according to law.” The bill proceeds. “Your orator, Lewis, and your oratrix, Rachel, show, further that she renounced the provision made for her by the decedent aforesaid, in his last will and testament, and resorted to her dower, or share by law, due to her of the said estate.”

“That her share or proportion has not yet been allotted to her—for, though a suit was instituted for that purpose, yet it was not duly or regularly prosecuted:—though your orator, Lewis, and Rachel, are in possession of the land and part of the slaves, your orator, John, and your oratrix, Lucy B., are entitled, by law to all the residue of said decedent's estate after the legal proportion and share of your orator, Lewis, and his wife, are duly assigned and allotted to them.”

The bill then controverts a claim set up by

the executor of Luke Williams, (Thomas' father,) to a negro, Adam, in possession of Thomas at his death: alleging that Adam had been given by Luke to Thomas: and insists that the hire, which the executor, Lyell, exacted from Holloway for that slave, (which hire was secured by Holloway's bond,) was unjust, and unnecessary, from the state of the assets.

Besides the prayers for an account by the executor, and for general relief, (and others not necessary to be noticed,) the plaintiffs pray “that your Worships may decree, that the land, slaves, and other property of the estate of Thomas Williams, be legally and properly divided among your orators and

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ora*trices: that is, the dower of your oratrix, Rachel, be first assigned and allotted to your orator, Lewis, in her right,—the balance of the estate be delivered to your orator, John, and your oratrix, Lucy.”

The plaintiffs also tender what, in Virginia, are called forthcoming bonds; which are there a pre-requisite to the assent of an executor; which, of itself, (to say nothing of the state of the accounts, which showed that the debts were not yet settled,) shows that any possession by the parties, even if it extended to the negroes, Edie and Jenny, (which does not appear,) must have been in subordination to the executor, and cannot be referred to an assent on his part. I make these remarks here, to get that matter off my mind; and design them to apply to certain portions of the defence hereafter to be considered. I am now upon the Virginia record; and I take up that proceeding again, with a view to ascertain its purport.

In the answer of Lyell, the executor, put in the 23d of August, 1796, it is incidentally argued, (and I take notice of this to show how every party to the record understood the rights of a widow who had renounced under a will, as related to slave property,) that if the negro, Adam, had not been given to Thomas Williams, by his deceased father, then that negro belonged to the father's estate, and Thomas was entitled to one-ninth part of his value, as one of the father's distributees, and of this share, Thomas's widow could claim but one-third, (or one twenty-seventh part of the value;) but if the negro was given, and became one of the slaves of Thomas's estate, the widow was entitled to one-third of him; and that for life only.

On the 29th of November, 1796, (West, the husband of Lucy, being then dead, as appears by a suggestion of that fact, at this time, on the record,) the cause was heard, by consent, “upon the bill, answer, and exhibits,” (and, of course, without any evidence of facts not stated in them;) and, “after argument of counsel on both sides, and consideration thereof, it was decreed and ordered by the Court, that the estate of the said decedent (the negro, Adam, excepted)

be divided between the legal claimants, according to law, by Jonathan Fisher." &c..

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"whereby appointed Commissioners for that purpose, and that the said Commissioners make report how they have acted on this decree, in order that it may be made final."

On the 30th of August, 1797, the Commissioners made the following report, in writing, dated 26th December, 1796.

"In obedience to a decree, issued from the Worshipful Court of Brunswick, at November Term, we, the Commissioners, nominated in the said decree, have made the division of all the negroes belonging to the estate of Thomas Williams, deceased, viz: In the first place, we laid off one-third part to Rachel Holloway, (wife to Lewis Holloway,) formerly relict, or widow to the said Thomas Williams, deceased, to wit—Jean, Edie and Will (d)—also, one-third of the hire, &c. The rest and residue of the negroes, hire and rents of the plantation of the said Thomas Williams, deceased, to Lucy Reese, (wife to James Reese,) formerly widow to John West, deceased,) and daughter to the said Thomas Williams, deceased."

"On consideration whereof," says the record, "it was ordered and decreed, that the said report be confirmed; and be made perpetual between the parties."

And here the record ceases, so far as it relates to the partition.

It is manifest that the property, here divided, was claimed by the parties seeking the division, as the estate of Thomas Williams; and no part of it as the estate of any other person; and it was divided as such, according to their claims in it. And the case of *Edgerton v. Muse*, Dud. Eq. 179, effectually concludes every party to the record and judgment of partition, from setting up any right, (though one were proved to have existed,) lying behind that record and judgment. And, therefore, neither Mrs. Holloway, nor the defendants, claiming under her and her husband, (who was, himself, a party,) can aver, that any part of the property allotted to her was parcel of Sally's estate—or was any other than Thomas Williams's estate; or

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that any other *incidents attached to the property received in the division, than such as attached to it as Thomas Williams's, and were impressed by the judgment partitioning it as such.

Suppose that Sally's share had been included in the division, (intentionally by the parties, though the Court was not advertised of their intentions, by the record,) and part, or the whole, of that share had been included in the allotment made to the mother:—and suppose that, after the judgment, Lucy had

taken it into her head that the whole of that share belonged, of right, to herself, and not to her mother:—would she have been allowed to disturb the judgment? Or, suppose she had raked up some claim entitling her to the whole estate,—as, for instance, a deed from the father, or some right to the property superior to that of the testator himself,—and had come into Court with it: averring that the property, which had been divided, partly at her own instance, as the estate of her father, never belonged to him, and thus sought to deprive her mother of it: would not the Court have refused her application? Would it not have regarded the record in the light of mutual conveyances between the parties; and treated it as if the daughter had conveyed so much property to the mother? Would not the judgment, to which the daughter was a party, have been a good bar and estoppel, for the mother, against the new claim of the daughter? Certainly. And if it is a bar and protection to one party, it must be so to all parties; and thus, as among them, and all their privies, the judgment, while it stands, is the exponent and measure of right of all who took or claimed under it.

The principle of *Edgerton v. Muse* is, that the parties to the record are concluded by the record, from averring that any other right existed in them, or any of them, at the time of the proceeding, than the record itself imports.

If any relievable fraud, or mistake, entered into the decree, when it was pronounced, the party affected by it might have been heard, if he had come, within reasonable time, with a direct proceeding to set the judgment aside; but while it stands, I repeat, it is the standard to which every party, taking

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under it, *must resort, for the measure of his rights; and cannot be set aside, or modified, collaterally.

And while here, I may at once observe, that this record silences another rather ingenious argument, much dwelt on in the defence. It was said, that even conceding the record in partition to have annexed the correlative tenures, for life, and remainder, to the slaves allotted to Mrs. Holloway: Yet it sufficiently appeared, that before the judgment, the parties were in possession of the property partitioned, under circumstances raising a presumption of assent on the part of the executor: and thus either West, (f) the first husband, or Reese, the second husband, of Lucy, had actually reduced the remainder intended to be created in his wife's right; and was the legal owner of it, *jure mariti*, when it was created; and that the remainder, when created, enured to him, and not to his wife.

Every fact, assumed as the foundation of this argument, is misconceived. It does not

(d) Will died in the life-time of Mrs. Holloway, and is not in litigation here.

(e) This is the first intimation of their marriage.

(f) West, the first husband of Lucy, who joined her in the proceeding for partition, died pending the suit. Reese married her *pendente lite*, and was her husband at the partition.

appear, that any party was in possession of these negroes, Jenny and Edie. The legal presumption is, that they were in possession of the executor. It does not appear that any party in interest had the custody of any negroes, except upon hire, or for the maintenance of the slaves, for which the executor made compensation. It does not appear that the executor had assented to the possession of the property, as legacies. The contrary appears. It appears that forth-coming bonds had not been given, as required by law, and that the debts had not been fully discharged.

But what I wish to observe, in this connection,—where I am considering the conclusiveness of the decree in partition,—is, that the record concluded both West and Reese, and Mrs. Holloway and Holloway, and all their privies, from averring that they, or any of them, had any legal vested rights in the property, before the decree. Their interests required the decree to perfect and adjust them; and just as the decree did adjust them, do they stand, and in no other position. I

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give it for my *opinion, that, if it had been a fact, indubitable, that West or Reese had such a possession as it contended for, and was the owner of the property, in law, his permitting it to be treated as still unadministered property of Williams's estate, made it so: and subjected it to all the incidents attaching to it as such. His permitting it to be considered as unpartitioned property, laid it liable to all the incidents of the partition, growing out of the rights of the parties, to whom the right of partition belonged. The party entitled to partition with Mrs. Holloway, as the record said, and as the law declared, was Lucy Reese; and no one claiming under that record,—as both plaintiff and defendants here do; or under Reese,—as the defendants, in one aspect of the case, do:—can aver a title either in West, who was a party to the record, or in Reese, who was a party to the record and judgment.

I have said, on the authority of Edgerton v. Muse, Dud. Eq. 179, that no part of the property can be considered as having been allotted to Mrs. Holloway, as distributee of her daughter, Sally Williams. Perhaps it may be more satisfactory to show, that there is no fact, incontrovertibly established in the case, which renders it necessary to conclude that Sally Williams ever took any interest under her father's will:—and, of course, her share, as it is called, could not have been distributed. And if that is gotten over,—and we are compelled to assume that she had a share;—then to show, either that her mother took no interest in it, or, if she took an interest, it was a greater interest than she claimed, or had allotted to her, in the Virginia proceeding.

It will be seen, when I come to explain myself, that if Sally took a share of her father's estate, and left that share, at her death, as her own intestate estate, for distribution;—

it depended altogether upon the juncture of time at which her death (the time of which is entirely conjectural) happened, whether her mother was one of her distributees, or not. If the death occurred at a time when, by the law then of force, the mother was not entitled to a portion of her share, then the partition of 1797, and upon the terms which the plaintiff contends were impressed upon it,

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*was exactly right. If, on the other hand, Sally's death occurred at a time when, by force of law, her mother took an interest in her estate; the law gave her an interest, which would have swelled her claims upon the aggregate estate of the property left by Thomas Williams, to an amount beyond what she actually claimed in the Brunswick proceeding:—a circumstance which renders it improbable that she ever took under Sally,—or she would not have stated her claim at the amount at which the record shews she did state it.

I have expressed myself badly; but what I have to say may, perhaps, explain my meaning. If Sally Williams happened to die (as Samuel is admitted to have done) before her father, all her legacies, as well as his, must have fallen into the residuary clause of the will, and gone to Lucy, the surviving residuary legatee. This clause would have carried to Lucy the wench, Jenny, who was given to Sally; and also, the wench, Edie, who was not specifically disposed of, or even mentioned, in the will. In that case, therefore, there is no ground of pretence, that Sally's death occasioned any increase to her mother's interest. This was clearly perceived by the defendants' counsel. They, therefore, contended, that the death of this child occurred after that of her father: though there is no more evidence that she died after that event than before it.

But, let it be supposed that she survived her father, and thus took, under his will, not only her own original legacies, but an equal share with her sister in the lapsed legacies of Samuel. In this event, she left an estate, at her death, to be disposed of under the law applicable to intestate estates. But, as I shall now proceed to show, it depended, according to the law of Virginia, upon the length of the interval between the death of her father and her own death, whether her mother took an interest in it; and if she took a share, it would so have varied her claims, that she could not have stated them as she did in the Brunswick record.

By the Virginia statute of 1785,(g) it was

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provided, that *personal estates of intestates, where there is no wife or children, "shall be distributed in the same proportions, and to the same persons, as lands are directed to descend, in and by an Act of the General Assembly, entitled an Act to reduce into one the

(g) Revised Code of 1819, p. 382, sec. 29.

several Acts directing the course of descents."

The Act thus referred to, (and, by the reference, giving one rule for the distribution of intestate realty and personalty,) provided (b) (so far as it is necessary to quote it) that "where any person, having title to any real estate of inheritance, shall die intestate, as to such estate, it shall descend and pass in parcenary, to his kindred, male and female, in the following course, that is to say:

1st. To his children, or their descendants, if any there be:

2d. If there be no children, nor their descendants, then to his father:

3d. If there be no father, then to his mother, brothers and sisters, and their descendants, or such of them as there be."

Thus stood the law until 1792; and if Sally died while this rule of distribution was of force, inasmuch as she died in her minority, and without leaving husband, issue, or father, her share of her father's estate, consisting of her own original legacies, and one half of Samuel's lapsed legacies, must have been distributable under the 3d canon of descent, above quoted, between her mother and sister, each taking one-half.

But on the 8th December, 1792, a statute was passed, entitled "an Act to reduce into one the several Acts directing the course of descents," which, after re-enacting the three canons of the prior statute, (of the same title,) which I have already stated, proceeds, in its 5th section, to declare, "that where an infant shall die without issue," (as Sally Williams did,) "having title to any real estate of inheritance, derived by purchase or descent from the father, neither the mother of such infant, nor any issue which she may have by any person, other than the father of such infant, shall succeed to, or enjoy, the

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same, or any part *thereof, if there be living any brother or sister of such infant, on the part of the father, or any brother or sister of the father, or any lineal descendant of either of them; saving, however, to such mother any right of dower, which she may claim in the said estate of inheritance."

This clause is followed by another, providing for the maternal relations, in preference to the father of the infant, when the infant's estate has been acquired from the mother.

Then, on the 13th of the same month, another statute was passed, in the 27th clause of which it is provided, (in cases where there is no wife or child,) that the whole surplus of intestate personal estates, after the payment of debts and funeral expenses, "shall be distributed in the same proportions, and to the same persons, as lands are directed to descend in, and by," the statute of the 8th, just quoted.

The operation of these two statutes was postponed to the 1st October, 1793.(i)

(h) *Idem* 355-6, chap. 96, sec. 2, 3, 4.

(i) Revised Code, 148, chap. 48.

From this statement of the statute law of Virginia, it appears manifest, that if Sally Williams survived her father, and took, by purchase, under his will, her own legacies, and half of Samuel's, and then died before the 1st of October, 1793, her interests, under his will, were equally distributable between her mother and sister; but if she died on or after the 1st of October, 1793, the sister took the whole of it, in exclusion of the mother.

She may well have died between the 1st of October, 1793, and the institution of the Brunswick suit, in 1795—a period exceeding two years. In that event, the state of rights, as between Lucy and her mother, in that partition, would have been just what they would have been had Sally died before her father; which, we have already seen, would have left them precisely as they are stated in that record.

But if Sally died after her father, and before the 1st of October, 1793, (and only in that case,) her mother had an interest in her share of her father's estate, but the pos-

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session of that *interest would not have left the proportion between her rights and those of Lucy, such as they both concurred in stating it, in the Virginia record. The statement there is, that the mother was entitled to have one-third of the property assigned to her, to be held by her by some tenure, (the nature of which tenure is here perfectly immaterial,) and that Lucy was to have the balance, of two-thirds.

Could that statement of claims have been made, if it was intended to include with the mother's share of the original estate, her share of Sally's portion? Could it have been made, if Sally had died at a time when the Act of 1785 operated on the distribution of her estate; casting one-half of it upon the mother and the other upon Lucy? Impossible. The mother must have claimed an interest in far more than one-third of the aggregate estate to be divided; and would certainly have been very far from concurring, as she did, in the statement that Lucy was entitled to two-thirds.

Now, these parties certainly knew, when they filed their bill, the time of Sally Williams's death; and they then recollected it far better than Mrs. Holloway did, when, in her answer to the bill of 1819-21, (a quarter of a century afterwards,) she said loosely, that Sally died in her minority, without pretending to specify the time: or than the plaintiff did, at the filing of her present bill, (more than half a century after the event,) in which she says, as loosely, that her sister died shortly after her father. If this is evidence, it is very loose evidence: and it is the only evidence I can find, from beginning to end, touching the time of Sally's death.

It is certainly very extraordinary that Mrs. Holloway, to whom it was important to assign a date to the death of this daughter,

which would have given herself an interest in her estate, did not undertake to do so in her answer, to which I have referred. Are we to conjecture such a date, when she herself observed a perfect silence?

But if she had assigned a date advantageous to her own interests, that would not have

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sufficed. Surely Mrs. Holloway, *or any one coming in under her, (even if at liberty to dispute the record, and to impregnate the property she took under it with a title different from that which it purports to convey,) must prove the facts upon which that title depends—and the proof must be reasonable and convincing. There is no such proof here, and every presumption must be the other way: because every presumption should be raised to support the record made by the parties, and under which they claim. In that record, the parties entirely disregarded Sally's interests in the estate, and we are to suppose that they did so not without reason; and that their reason was either that she never took any share of the estate, or, if she did, her death cast the whole of it on her surviving sister. They omitted to take notice of her, or her interests, probably because, upon the state of facts which they knew to exist, the same legal inferences arose as if she had never existed, or had never been named in the will, and every thing given by it to her had been given directly to Lucy: inferences corresponding to those which the law would have raised, if Sally died either before her father, or after September, 1793.

This brings us to consider the second question, with a view to the solution of which we are perusing the Virginia proceeding: to wit, Did Mrs. Holloway take a life estate in the negroes allotted to her?

The final order of the Court was a simple confirmation of the report of the Commissioners—and that report merely allotted the property, without specifying the tenure under which it was to be held. But it refers to a previous decree, and purports to be in obedience to it: which decree declares that the property is to be divided, according to law, between the claimants before the Court. This decree is provisional; and intended to be so. But by its terms, it (the decree of November, 1796,) is to become final, and to be the decree in the case, if a suitable return be made by the Commissioners: a return to satisfy the Court that they had made a division in obedience to it. A return having been made which is satisfactory, the return

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is *confirmed; and is made perpetual evidence of the division between the parties.

This is the decree. If there is any thing equivocal in it, are we to stop there, and give it no effect beyond those things that are explicit, and clearly expressed? or are we at liberty to go into the record for its construction?

Is there anything in *Edgerton v. Muse*, to prevent us from resorting to the record for the interpretation of the judgment?

As I am in the habit of saying, there are different minds—minds differently constituted—and there will always be a difference of opinion upon certain classes of subjects, and I shall not be surprised if I am thought to be wrong, when I say that, in my opinion, there is nothing in *Edgerton v. Muse*, to prevent the pleadings being looked into to help out the Virginia decree, and that we are bound to look into them in furtherance of forensic justice.(j)

Edgerton v. Muse says, you shall not look behind the record for the purpose of raking up a right of which the record does not treat or take notice, and bringing that in opposition to the right involved in the record, and decided by it. What is proposed here is not to go behind the record, but into it: not to search for a right not noticed in the record, but to find what right it does notice: not to look for, and bring forward, a right contradictory to that; but to examine the features of the very right recorded in the pleadings; in order that we may not abridge it, but give it that efficacy which we are to suppose the decree in the case, properly understood, intended to give:—to see, in this case, what the nature of those claims were, (as to which, be it remembered, there was no conflict between the parties, but a perfect concurrence,) for the purpose of ascertaining to what law it was the parties, and the Court, had reference, when the one asked, and the other decreed, that the partition to be made should be according to the law applicable to the case stated and agreed on.

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*If the decree of 1797 had adjudged that Rachel Holloway, widow of Thomas Williams, was entitled to that portion of his estate, the subject of partition, to which a widow was by statute entitled, who had renounced under her husband's will, and that Lucy was entitled to all the balance of that estate, and ordered it to be partitioned accordingly; and the Commissioners had made the division they did, and their return of that fact had been confirmed, and made perpetual:—would that have been a decree giving an absolute right, and not a less estate, to Mrs. Holloway, in the negroes allotted to her?

If it would not, then this decree is substantially such a decree as that, if it be properly examined by the record to which it is annexed; if the whole of the record, and not a part of it, be examined; and if it be examined with a view to support, and not to defeat, the rights presented and adjudicated.

Look at what the Court says. It directs the allotment to be made among the claim-

(j) *Henderson v. Kenner*, 1 Rich. 479 et seq.; *Geiger v. Geiger*, Chev. Eq. 162.

ants. The reference is not to the persons, but to the persons as claimants. The allusion is to the claims set up and stated by them. Then the allotment is to be made to these claimants, (the owners of these claims—which are allowed,) according to law—according to the law applicable to the claims thus allowed—with the incidents attached by law to property to be put into their hands, under such claims.

There is hardly a judgment in any Court—very few in this, in which I sit—that does not lean for support upon the pleadings.

When it is necessary to plead a judgment or decree, in bar, you must go behind the formal paper, so called, into the pleadings, to see what right has been adjudicated, and ascertain whether it is the identical right now, again stirred.

And in pleading the bar of a former judgment, the familiar practice—and the necessary practice—is to introduce the plea by a brief, but substantial reference, to the pleadings. And if the record may be resorted to, and explored, for the purpose of defending a right held under the judgment, why may it not be resorted to to qualify, limit or give character to the right so held?

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*I have alluded to the decrees of this Court. No man has more constantly or more earnestly inculcated upon the practitioners before the Court, the necessity of careful and accurate pleadings, orders and decrees, or more vigilantly watched the orders passed by counsel. But (I say it with regret) miserable would be the condition of our citizens, if the indulgence I would extend to this Virginia decree were not allowed to our own, and if bills and answers and exhibits were not allowed to explain and give character to decrees.

When a claim is advanced in a pleading, and not controverted in any other pleading, and the decree allows it, there is a tacit reference by the decree to the nature of the claim set up and admitted, and the claim is allowed, with the attributes and qualities incident to it. This is not so, if the decree expressly limits or modifies these incidents, or annexes any condition to them. But it is so, if the decree simply allows the claim, and especially, if, as this decree may possibly be construed, (though that particular construction is doubtful,) it allows the claim to be enjoyed and held according to law. Thus, if distributees come in for partition of land, and the widow of the intestate comes in with them, in an ex parte proceeding, asking that her dower be laid off to her; and the Court says, "let a division be made according to law, among these parties," it means let the division be made which they have asked for in their record; and if Commissioners lay off a portion to the widow, without saying that they have laid it off as her dower, or for life; and the Court confirms the division;

does the widow take the portion of land laid off in fee? Again, if any one of the distributees is a married woman, and join with her husband in the application, and, under such a decree as I have stated, Commissioners lay off a portion to her and her husband, (a very common case,) and their return, stating that fact, is confirmed; does that land cease to be the wife's inheritance, and become the property of husband and wife, as tenant in the entirety? No. It is still the wife's land; and, as such, though, upon a further proceeding, it be even sold by order of the Court, the

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money arising from the sale in Court is still considered her land, until it be disposed of differently.

Now, look to the Virginia record, keeping these remarks in mind, (without the benefit of which, I repeat, the proceedings of this Court cannot be upheld, but must work an incalculable sacrifice of interests,) and it appears to me quite plain, that the intention of what was done was to give Mrs. Holloway a life estate in the slaves allotted to her.

The case stated by her is one that could not have been stated with any other intention than to make a claim for life of whatever slaves were to be allotted to her.

She had, by her previous renunciation, reduced herself to a condition in which she could claim nothing personal under the will; and no interest in slaves under the law, but for life. And she comes in, and expressly states that she had renounced, and was in that condition; and asks to have allotted to her what the law, in that condition, gave her. She laid the will before the Court, and concurred in the statement, that when her portion, which she called dower, (in the Virginia acceptance embracing slaves,) should be laid off, Lucy was entitled to every other interest in the estate.

Could the Court, or could she, or any party to the suit, mistake her meaning? Did Lyell, the executor, misunderstand her? See what he says in relation to Adam. Her claim is not only stated as a dower or life claim; but she prays for its allowance as such.

Pray, how, but as dower, could she be entitled to any slaves after her renunciation? One negro was given to her by the will, but she had renounced the legacy. I suppose that renunciation reduced it to the condition of a lapsed legacy; and a right sprung up under the residuary clause, the effect of which I have already considered. And if the renunciation reduced that negro to the condition of intestate property, and if the residuary clause could not carry it, because the renunciation occurred after the death of the testator, and it therefore remained intestate; yet, as intestate property of Thomas Wil-

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liams's estate—in which light it was proposed to divide it—whatever right the wid-

ow could claim in it was only for life. Such was the law of Virginia.*(k)*

That negro happened to be included in Mrs. Holloway's allotment by the Commissioners. But how came Edie (who passed to Lucy, as I before explained, as legatee,) to be so allotted? Why, surely, the mother's only claim upon her was a dower claim.

And so of Jenny, and upon the same principles.

I am to construe the Virginia record as it would have been construed the very day it was completed—without regarding the time that has since elapsed, or giving Mrs. Holloway any advantage of her long possession under that record: for it means now what it meant then, and the very question is, whether that possession was the possession of a life tenant or of an absolute owner—and that resolves itself into the question, was a life tenancy with remainder declared by the record, or not? And, in view of that proceeding, I ask what must have been the answer of any party, or of the Court, or of any other person in the world, if they had been asked, as Rachel walked out of Court, with the decree in her pocket, what right she had got in the negroes assigned to her? Why—could there have been two opinions? And yet I am asked to put a construction upon this judgment, repugnant to the understanding of all mankind. Is that a reasonable construction? It might be a reasonable construction of the decree, without a context. But, with the pleadings as a context, it would be unreasonable and shocking. It would make the proceedings of the Court—intended to advance justice and administer the law—in this instance—where its decree on its face professes to apply the existing and well known law—the instrument of trampling it under foot. It would make it the instrument of fraud. What a shocking fraud it would have been upon Lucy, whom her mother had induced to concur in her claim upon the slaves, by representing

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it as a claim for *life, if her mother, after the decree was obtained, had instantly turned round upon her, and asserted an absolute title;—with no better apology than that the Court, in its decree, had not repeated what she, herself, had stated in her bill?

I ask, if after Mrs. Holloway got possession under her assignment, she had, in some short time, attempted to devastate the property, or done any act inconsistent with the claim of Lucy, as remainder, and she had applied to the Brunswick Court for the protection of her rights in the property; is it to be supposed that that Court would have told her she had none? And just as that Court would have construed its decree, I must construe it.

Neither the decree, nor the return of the

Commissioners, nor the order confirming it—neither of them—says that the negroes allotted to Mrs. Holloway were to be held absolutely—any more than they say they are to be held for life. They are silent (to make the most of it) as to the tenure. And yet, because they are equivocal in this respect, I am asked to abstain from ascertaining their true meaning from the record, and to arbitrarily select one, in preference to another, tenure, where there is a perfect silence as to both.

If I had received the written declaration made by Lewis Holloway, on the 20th of December, 1798, after he had reduced his wife's life estate into possession, and became the legal owner of it, there could be no doubt, in this case, in any mind. I refer to his declaration, on the eve of his removing the slaves from Virginia to Edgefield. But, upon the proof offered, I could not admit the paper. I incline, however, to the opinion that it must have been proved before Chancellor DeSaussure, who pronounced his decree in June, 1822, upon the bill of 1819—1821.

Be that as it may, the decree in that case, which binds every party before me, either as parties to it, or as privies to those who were parties, establishes the Virginia decree, and gives it a partial construction. It declares that whatever was taken by Mrs. Holloway under it was for life; except so

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far as any share of *Sally Williams's may have been included. Whether such share did enter into the allotment is not decided, but reserved.

The proceeding upon which that decree was given was a bill by Reese, for the protection of the remainder: and the decree was for the preservation of the property. The Chancellor says, "the proceedings exemplified from the Court in Virginia, show that the property in question came from the estate of Mrs. Reese's father, the first husband of Mrs. Holloway, and was allotted to her for life, consequently, they" (referring to Reese and wife) "have rights which will come into operation at her" (Mrs. Holloway's) "death." This is sufficient; but the Chancellor proceeds: "Again, when Mr. and Mrs. Holloway wanted to migrate to the South, they asked and obtained leave to remove the negroes from Virginia—which, it seems, was necessary. All this goes to establish some rights, in remainder, in complainants."

It was contended in that case, as in this, that Sally Williams's share was included in her mother's allotment: and the Chancellor, without investigating the fact, or its precise effect, replied: let the fact be as stated, still, under the decree by which Mrs. Holloway received the property, a life tenure was created—she took for life; and that

(k) 1 Revised Code of 1819, 382 and 29.

tenure must apply to every part of it, except what might be shown to have been derived from Sally Williams. Take it as you will, Reese and wife have interests, in remainder, in some of the property; and, until the supposed share of Sally is separated, the whole, as one body, must be protected. And he protected it accordingly. (1)

I say this decree establishes the construction of the Brunswick decree, as to the most important question in this case—the tenure under which Mrs. Holloway recovered the slaves allotted to her. The point reserved, I have now examined, and have attempted to show there is nothing in it.

Then, my conclusion is, that Mrs. Holloway's interest in the women, Jenny and Edie, and their increase, was the interest of

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*a tenant for life: to which was attached a remainder expectant, in the plaintiff, Lucy Reese.

Her right to reduce the remainder into possession accrued to her by the death of Mrs. Holloway, which took place the 10th of December, 1847: and she filed her bill the 23d April, 1849.

In my judgment, her bill must be sustained, unless her rights have been extinguished, or barred, in some of the different ways suggested in the answers, and insisted on at the hearing.

In the first place, a bar is insisted upon, which, it is supposed, arose in consequence of the removal of the negroes from Virginia, in 1798 or 1799.

It was replied that such bar, if one took place, was removed by the decree of 1822: and I think so. But, as the point was pressed, I shall proceed to state the bar supposed to exist: and make some observations on it.

There is a Virginia statute, passed in 1792, (m) which went into operation the 1st of October, 1793, (n) and is in the following terms:

1st. "If any person or persons, possessed of a life estate in any slave or slaves, shall remove, or voluntarily permit to be removed, out of this commonwealth, such slave or slaves, or any of their increase, without the consent of him, or her, in reversion or remainder, such person, or persons, shall forfeit every such slave, or slaves, and the full value thereof, unto every such person, or persons, that shall have the reversion or remainder thereof—any law, custom or usage," &c.

2d. "If any female, possessed as aforesaid, shall be married to a husband, who shall remove, or voluntarily permit to be removed, out of this commonwealth, any such slave, or slaves, or any of their increase, without the consent of him, or her, in reversion or remainder; in such case, it shall be lawful

for him, or her, in reversion, or remainder, to sue for, recover and possess such slave or slaves, so removed, for and during the life of the said husband:—who shall, more-

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over, be liable to the action *of the person, or persons, entitled to the reversion, or remainder, thereof, for the full value of the slave, or slaves, so removed."

It was contended that Holloway's removal of the slaves, in 1798 or 1799, was without license of the remaindres, or her husband; that thereupon a right to the life estate vested in her; that this connected itself with her expectant right thus forming one estate; and the permitting a possession, in opposition to that estate, barred her claim here, by the statute of limitations.

The case of *Cole v. Broom*, Dud. 7, quoted in the argument of this point, decides nothing here. That case arose upon the 1st clause of the Virginia statute, the life tenant in that case being a femme sole, and sui juris. My decision is to be made on the 2d clause, which contemplates a life estate existing in a femme covert.

I suppose that the license required for the removal must be the license of the husband of the remaindres, if she be also covert. But, whoever is to give it, the statute does not require any particular formality, by which it is to be given. I take it, that he who does not object (under either clause of the Act) permits: and that, unless the suit—authorized to be brought by the person in remainder, under either clause—be instituted, it is to be presumed that the removal was approved by him. When a removal has taken place, and suit is brought to enforce the penalties imposed, then—a removal being unlawful unless permission has been given, and the permission being a positive, and not a negative fact—the burden must be upon him who wishes to defend himself against the consequences then threatening him for removing the property, to produce proof that he has committed no offence—in other words, he must prove a license. And it may be that the defendants at the bar can now prove an authority for the transfer of the negroes to this State: and have now, at their command, evidence to establish that the life estate never was forfeited—which they now say was forfeited, and became conjoined with the

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remainder—because that *assertion, they suppose, will give effect to the bar of the statute, and so answer their purposes here.

But there is an entire misconception of the nature of the right which an unlawful removal gives, under either clause in the statute on that subject.

The first clause does use the word forfeit—the life tenant shall "forfeit every such slave" "unto the remainder man." Does his title, as life tenant, cease, ipso facto, and eo instanti, upon the removal? Suppose the re-

(l) Rolain v. Darby, 1 McC. Eq. 477.

(m) Revised Code, 431 2, sec. 48, 49.

(n) Revised Code, 140.

remainder man forgives the offence, and does not sue, is he (the remainder man) nevertheless the owner of the life estate? or is it in him, and out of the life tenant, though the property be in possession of the latter? Is not the law notoriously otherwise? Would not a conveyance from a life tenant, under such circumstances, be good to any person in the world, unless avoided by the remainder man? This could not be the case, if the life tenant had no title. The fact is, that the title is in the life tenant, until, by suit, it is taken out of him. It is not void, but voidable. And there can be no life estate title in the remainder man, until he acquires it by suit. The right to acquire it is a chose.

There is still less reason for insisting on a forfeiture, (as transferring title,) under the second clause than under the first. The first does use the word; the second does not. The right of the remainder, here, was emphatically a chose, and nothing more.

But that is not all. If her husband had sued, either with or without her, and recovered the negroes, there are two reasons, in law, why that recovery would not have merged the life estate and remainder: and there are more reasons than these in Equity.

The first reason is, that the interest which he could have recovered from Holloway, under the second clause of the forfeiture Act, was not of such a nature as must, of necessity, have united with his wife's remainder; and, as facts prove, it never could have united in this case.

Holloway was the offender: he had his

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wife's life estate *in him—an estate which would go to his executor (for the term of her life) if he should predecease her. The statute says, that, for his offence he may be deprived of the negroes, for and during his own life, and no longer—"for and during the life of the said husband." Now, if Reese had sued Holloway, and recovered, and got possession of the negroes, for and during Holloway's life, that would have possessed him of a life estate, to be sure, but not of that life estate to which his wife's remainder was annexed. Upon Holloway's death, the negroes would have reverted to his executor, to be administered (as they actually were) for the unexpired life of his wife: of which interest the statute did not deprive him.

And, I may remark here, that as the statute would not have reached the property in the executor's hands, it could not reach it when, by administration, the executor's title was transferred by him to Mrs. Holloway herself. She was in of a new estate, unaffected by the statute, being the unexpired right of her husband, to which the terms of the Virginia statute do not extend. And, as I shall show hereafter, the right to take that from her, by an action against herself, for the mere retention of the slaves beyond the limits of Virginia (if that was an offence against the statute as to the removal of

slaves) was barred; and the right to the life estate confirmed in her, as such, but no more.

The second reason is, that if Reese had got in the life estate by suit, it would have been no better than if he had purchased it. And the case of *Caplinger v. Sullivan*, 2 Hump. R. 584, shows, that where a purchase of the life estate is made by the husband of a remainder, the life estate and remainder do not coalesce, but continue separate estates. If the husband die during the life tenancy, his executor necessarily takes the residue of that estate which is yet to run, and the wife shall have the remainder against the husband's executor, or the husband's assignee, if he has conveyed away the property. In the case I have quoted, the husband had purchased in the life estate, and had ac-

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tual *possession. He then sold and delivered the property (slaves) to Caplinger, for valuable consideration; yet, at law, Ann Sullivan, the remainder, recovered from Caplinger, upon the accrual of her remainder, which happened after her husband's death, and the recovery was sustained in the Court of Errors, upon very full consideration, and reference to authorities. It may be objected, that, in the case quoted, the purchase of the husband was in his own right, and that it may be conceded that a life estate thus held by a husband, will not unite with the remainder of the wife:—there is not an union of rights in the same person:—and it may be contended that, if Reese had sued under the forfeiture Act, and recovered, the suit must have been brought, and the recovery had, in his wife's right; and that such a recovery would have united the life estate and remainder in her, to which united estate the statute of limitations may be applied. I have great doubt whether Equity would so consider the matter—whether, where the husband, by his own act, or by an act in which, (having the control of his wife by coverture,) he joins her name, and gets in the life estate, the Court would allow to such a proceeding an effect to destroy the wife's right by survivorship, and to confer her remainder upon the husband. I think not—unless, upon a proceeding in this Court, the wife was examined, and a full equivalent secured to her.

I may be going out of my way here, when I refer to what has been held upon points nearly analogous. In *Hall v. Hugonin*, (14 Sim. 595,) (o) where stock was standing in the names of trustees, upon trust for A., for life, with remainder to B., a married woman, and A. assigned his life interest to the remainder, Sir Lancelot Shadwell, upon her consent, ordered the fund to be transferred to her husband. This was supposed to be an important practical qualification of *Purdew v. Jackson*, (hereafter to be mentioned,) in

(o) See *McQueen on Husb. and W.*, 35 Law Lib. 12, 54, 64.

which the protection due to the reversionary interests of the wife was well considered.

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And it *was thought by some, that the effect of the ruling in *Hall v. Hugonin* was, that if the prior interests were assigned to the wife, so as, in effect, to make her interest a present one, the husband might then reduce the fund into possession, or might, by assigning it, enable his assignee to do so. "The decision, however, of the Lord Chancellor, in *Whittle v. Henning*, shews," says Mr. McQueen, "that this opinion was erroneous." (p) (See that case, commented on by McQueen and by Bell.)

These observations are, however, unnecessary here; and are only made that they may be remembered when we come to consider other points of the case, to which they have a stricter application. There is no necessity for them here, where the inquiry relates to the bar of the statute: because, manifestly, if the position contended for be sustained, and any act or omission of Reese be allowed, by the Court, the effect of coupling the life estate and remainder, so as to destroy the wife's remainder, then, the very right upon which she comes into Court here is extinguished, and there is no need of the statute of limitations to bar it.

If the laches of her husband to enforce the forfeiture, had not the effect to extinguish the remainder, then it subsists, and is not barred.

But though the remarks which I have made were not strictly called for here, yet, if they be borne in mind, they will serve to meet another point in the case, yet to be touched, relating to certain deeds executed by Reese, and Reese and wife.

In concluding upon the statutory bar, the better opinion is, that no bar can arise in consequence of a non-enforcement of the forfeiture, even under the first clause: (q) that the statute confers a privilege, for the protection of the remainder man and the preservation of his estate;—which it would be a violation of its true intent, to turn against him for the destruction of his interests. The right to exact the forfeiture

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may be barred *by a failure to exact it within four years. But the effect of that bar is simply to confirm the life estate in the life tenant, leaving the relations of life tenancy and remainder, and of the respective owners, just as they were before. It would be very strange, if the indulgence of a remainder man to take away the life tenant's estate, should have the effect of transferring his own to him. This would be rewarding him for his offence: and such a construction cannot flow from a true conception of the spirit of the statute, which proposes to pun-

ish, and not reward its violators. I leave this point.

Then it is said, that the decree of 1822 vested the remainder of the plaintiff here, in Reese, the plaintiff there.

That decree I have considered to have concluded the defendants in that case; and to have concluded the defendants here, who are all either the same persons, or privies to them. But how can it conclude this plaintiff? If she was no party, the decree does not bind her, as between herself and husband. If she was a party, (one of the "complainants" spoken of in that case,) her right was established and declared to be in her: and, as the surviving plaintiff, she is entitled to the benefit of the decree, as in *Edgerton v. Muse*.

We come now to consider the series of deeds, executed after the decree of 1822, and between the years 1824 and 183—, (during the existence of the life estate,) some of them by Reese alone, and others by Reese and wife. They are exhibited in the answers; and my notes of evidence will show that some of the deeds, in which husband and wife joined, were not proved. I do not think it necessary, however, to discriminate, because, in my opinion, none of the deeds, of either class, were effectual assignments of the plaintiff's expectancy.

These instruments may be considered in the light of:

1st. Assignments of Reese, the husband alone.

2d. Assignments of Mrs. Reese, the wife, alone: (though, during the coverture, she made none such.)

3d. Assignments by husband and wife, conjointly.

The power of Reese to convey, must here

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arise from his *having reduced, *jure mariti*, the expectancy of his wife, so as to make it his, thus destroying her right of survivorship: or must consist in the right of a husband to assign such expectancy.

I have already remarked upon the various ways in which it has been suggested that he might have acquired a property in the expectancy:—such as, that he was in possession when it was created; that he reduced it by refusing to sue for the life estate, (that is, that the non-reduction of the life estate was a reduction of both it and the remainder, arising in virtue of an union of the two, effected by not bringing them together;) and lastly, that the decree of 1822 gave him the expectancy.

I do not think it necessary to add anything to what I have said upon any one of these sources of property in Reese, but the last—the decree of 1822.

If Mrs. Reese was a party plaintiff, as I have observed, that decree establishes her right, claimed here. But if she was no party, and Reese, acting by himself, got to him-

(p) *Bell on Husb. and W.*, citing *Whittle v. Henning*, p. 91.

(q) 7 *Dana*, Ky. Rep. 272.

self a decree, entitling him to her reversionary rights, at a time when he was not entitled to reduce them; will it bear argument, that no such under handed proceeding will be allowed, in this Court, (and especially when its decree is attempted to be made the instrument,) to deprive her of her right by survivorship?^(r) If a husband, while his wife's hands are tied by her coverture, and while she is entirely under his control, be allowed, of his own accord, and solely by his own act, to anticipate his rights over his wife's property, and deprive her of her rights in it, then the profession of this Court, that it protects the rights and interests of married women, is a mockery. Where a husband desires to assign, or obtain to himself, his wife's expectant separate estate, or to get any privilege over it, he must make her a party in Court, and she must be examined, and the object of the transaction must be shown to be advantageous to her;

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or it will not *be allowed.^(s) So the case must stand as between Reese and his wife. These defendants, taking Reese's conveyance, which can be supported only by the decree referred to, must take notice of it, and of its imperfections, and can no more insist upon it, as against Mrs. Reese, than Reese himself.

The true question is now at last reached; and it is this:

Had Reese, the husband, who died before his wife's remainder fell in, any power to assign it away for her?

A husband, if he survives the actual accrual of his wife's expectant personal estate, may reduce it into his possession, and thereby render it his own property.

He may assign the expectancy before he has the power of reduction; but the assignment will only be good to the assignee, provided the husband lives until the accrual happens, and is then in a situation enabling him (if he had not assigned) to reduce the property. His assignment will not operate to transfer the property, until he comes into that situation.

There are other doctrines in relation to assignments by husbands, who, after an assignment, come into a situation to reduce; but it is not necessary to notice them here; because Reese did not live until the expectancy fell in; and therefore never attained the power of reduction.

The positions laid down are sustained by the elaborately considered cases of *Purdew v. Jackson*, (1 Russ. 1.) and *Honner v. Morton*, (3 Russ. 65,) which were commented on and approved in our own case, of *Matheny v. Guess*, (2 Hill Eq. 66-7.)

(r) *Bell on Prop. of Husb. and Wife*, book 3, chap. 2, sec. 3, letter g, and particularly the case of *Whittle v. Henning*, p. 91.

(s) *Calhoun v. Calhoun*, 2 Strob. Eq. 236 [49 Am. Dec. 667]; s. c. *Rich. Eq. Cas.* 36.

The inefficacy of a husband's assignment, made before he acquired the right to reduce, and who did not live to acquire that right, is also ruled in *Caplinger v. Sullivan*, (2 Humphrey's Rep. 548,) before mentioned; in which the cases of *Purdew v. Jackson* and *Honner v. Morton* were also referred to. See also *Browning v. Headly*, (2 Robinson's Rep. 370-2 and passim.)

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*Indeed, whatever authority may, at any time, be supposed to have existed to the contrary, this is the settled doctrine. What is loosely said in *Terry v. Brunson*, 1 Rich. Eq. 88, is inaccurate in words, but not in meaning. The words vested and contingent were intended in the sense of accrued and yet to accrue.

But it was argued that the effect of Reese's deeds to the defendants, (who were in of the estate,) made a case substantially the same as if the life tenants had first surrendered the life estate to him—(which, it was contended, would have produced a merger of estates, and enabled him to reduce the remainder,)—and had then taken his conveyance of all interests in the property.

In the first place, I do not agree that their surrender would have given him any right extending beyond the life estate surrendered. He would have become the owner of it in his own right; and that right would not have united with the remainder of his wife; nor enabled him to anticipate the proper time for its reduction.

In the next place, any contrivance, on his part, to circumvent or destroy, by indirection, his wife's right of survivorship, would be discountenanced in this jurisdiction; and any deeds obtained from him, by those whom the transaction itself must have advertised of the fraud, could not be allowed to confer any benefit on them to her prejudice.

In the last place, the deeds, which Reese executed, did not, in terms, unite the life estate with the remainder. They did not purport to convey to the defendants, respectively, the remainder in that part of the property in their hands, respectively, but to convey to each grantee one undivided sixth part of the estate in remainder.

The property conveyed did not, therefore, come in apposition with the property in the hands of the grantee;—the remainder with the life estate. The conveyances enabled each grantee to claim the remainder, carried

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to him by his deed, out of the whole *body of negroes, (indeed that was exactly his claim and remedy,) or out of those in the hands of others, as well as out of those in his own hands; and he must do so, if what were in his hands amounted to less than one-sixth of the whole gang. The supposed merger, therefore, never took place; and its legal consequences, contended for, are merely imaginary.

All these observations apply equally to those deeds which Reese executed with his wife, so far as relates to their frame, and to his power to impart efficacy to them. These deeds are duplicates of his own deeds.

This brings us to the consideration of them. I proposed to consider them in reference to the power of the wife alone; and, again, in reference to the power of husband and wife acting conjointly.

2. Now, if Mrs. Reese had executed deeds by herself, while under coverture, the cases of *Ewing v. Smith*, 3 Des. 417 [5 Am. Dec. 557], *Magwood v. Johnston*, 1 Hill, Eq. 228, and *Reid v. Lamar*, 1 Strob. Eq. 27, and many other cases in this State, declare the deeds would have been null. A married woman can make no contract, or conveyance, binding her separate property, whether enjoyable at the time or expectant, further than the instrument, creating her interest in it, enables her:—excepting, of course, her inheritance, or her dower, in lands, which she has statutory authority to convey. The case last mentioned, *Reid v. Lamar*, attempts to show that this doctrine was not without authority in England, prior to our separation from her.

3. It would seem, upon principle, that if deeds executed by a wife, for the transfer of her separate estate, as to which she has an equity against the husband's right of control, are void; those executed by her with him should be doubly void. And whatever may be thought of our doctrine, as applied to her separate property, not reversionary; there is no doubt that the doctrine is true, and upon the best authority, everywhere, in relation to property reversionary at the time

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of the conveyance: *and all the cases treat the deed of husband and wife, in such a transaction as that, as the deed of the husband alone. He shall not be allowed to anticipate and destroy her expectancy, by an act done by her, in conjunction with himself, and under his legal control. He shall not, by any contrivance,—either by accepting a surrender of the life estate to himself, or otherwise,—obtain the advantage of an anticipated enjoyment of the remainder, or the power of disposing of it for his own benefit; as Reese attempted to dispose of this. If a disposition is to be made of it, it must be for the wife's benefit; and, to establish that, she must be brought before the Court that protects her interests, and examined: and then, only for her benefit, can the transfer be made.(1)

The doctrine loosely expressed (and in very ungrammatical terms) by me, in *Terry v. Brunson*, 1 Rich. Eq. 83, 89, is well supported; that the reversionary interests of the wife

will survive to her against the husband's assignment, if he dies while those interests remain reversionary; and that the very ground upon which Equity takes notice of her interests, in such cases, obliges the Court to protect them against the assignment of the husband, though made with her concurrence, and for a valuable consideration received by the husband.

Prof. Story, speaking of the favorable light in which reversionary choses in action, and other reversionary equitable interests of the wife, in personal chattels, are regarded, says: (a) "no assignment by the husband, even with her consent, and joining in the assignment, will exclude her right of survivorship, in such cases. The assignment is not, and cannot, from the nature of the thing, amount to a reduction into possession of such reversionary interests: and her consent, during the coverture, to the assignment, is not an act obligatory upon her." He proceeds with a remark which may be liable to modifications;

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but which it is not necessary to consider. His observation is, that "in such cases, the wife's consent in Court, to the transfer of such reversionary interests to, or by her husband, will not be allowed."

In *Hornshy v. Lee*, 2 Mad. 16, the wife's interest assigned was a contingent reversionary interest in a fund dependent on the death of her mother. Husband and wife joined in an assignment of it, during the mother's life. The husband died in the life time of the mother. On the death of the mother, a contest for the fund arose between the remainder and the assignee; and the former prevailed.

Purdew v. Jackson, (which is cited, as I have stated, in *Matheny v. Guess*.) was heard by the same Judge who had previously decided *Hornshy v. Lee*, and the circumstances of his decision in that case rendering it proper, he, on this latter occasion, went into a re-investigation of the whole subject.

The case was twice argued and elaborately considered, and it was ruled, that where husband and wife, by deed, executed by both, assign to a purchaser, for valuable consideration, a moiety of a share of an ascertained fund, in which the wife had a vested interest in remainder, expectant upon the death of a tenant for life of that fund, and both the wife and tenant for life outlived the husband, the wife is entitled, by right of survivorship, to claim the whole of her share of the fund against the special assignee for valuable consideration. The Master of the Rolls closed his elaborate examination of authorities with the annunciation of his opinion, that all assignments made by the husband (the wife's joinder making no difference) "of the wife's outstanding personal chattels, which are not, or cannot be, then reduced

(1) [*Calhoun v. Calhoun*] 2 Strob. Eq. 236 [49 Am. Dec. 667; 1d.] Rich. Eq. Cas. 36; *Whittle v. Henning*, cited by Bell on Husband and Wife, 91; and see *Bonar v. Mullins*, 4 Rich. Eq. 83, affirming *Whittle v. Henning*.

(a) 2 Story Eq. § 1413.

into possession—whether the assignment be in bankruptcy, or under the insolvent Acts, or to trustees for the payment of debts, or to a purchaser for valuable consideration—pass only the interest which the husband has, subject to the wife's legal right by survivorship."

Sir Thomas Plumer's decision, in *Purdew*

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v. Jackson, was *made in February, and in the May following came on the case of *Honnor v. Morton*, before Lord Lyndhurst. There the wife had a vested interest in remainder, in the residuary estate of a testator, expectant on the death of a tenant for life. Husband and wife joined in assigning her interest in a sum of stock, part of the estate, to a purchaser for value. Husband died, before the residuary estate fell into possession. The wife, by her bill, prayed that the stock be transferred to her; which was opposed by the assignee. The Lord Chancellor decreed the transfer to the wife. He commented on the authorities; and said there was no one distinct decision at variance with the decision of Sir Thomas Plumer; and concluded by saying—"after considering the question in all its bearings, and the authorities and principles, on the one side and on the other, these are the reasons which lead me to the conclusion, that the judgment of the Master of the Rolls, in *Purdew v. Jackson*, was right; and that the husband, dying while the wife's interest continued reversionary, has no power to make an assignment of property of this description, which shall be valid against the wife surviving."

In *Watson v. Dennis*, 2 Russ. 90, a case precisely similar to *Honnor v. Morton*, Sir John Leach expressed his full assent to that case, and the case of *Purdew v. Jackson*.

It appears to me, that these cases warrant Mr. Bell, who has collected them, in his treatise on the Law of Property of Husband and Wife, (Book 3, chap. 2, sec. 3, division e.—) in the observation he makes on them:—that they have conclusively established, that where it has not been possible for the husband's assignee to reduce into possession the wife's expectant interest, before the husband's death, entitling the reversioner to possession, the wife's right by survivorship will prevail over the assignee's right by conveyance; and that neither the fact of the husband's having made the assignment, (and, I will add, nor the wife's joining in it,) nor of his having received the value of the chose as a consideration for the assignment, will

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operate as *a virtual reduction by him, into possession, so as to defeat the right by survivorship.

I say nothing of the inconsiderable value paid for the conveyance of a very valuable and constantly increasing property, incumbered only by the life estate of a woman who had three children in 1786, and who must

have been advanced in years when these conveyances were made; nor of the relation of life tenant and remainder, existing between the contracting parties; I rely solely on the legal incapacity of one of the grantees to bind herself, and the want of legal power of the other over the property; and on that ground, hold the deeds to be inefficacious.

I am not sure whether the counsel intended some observations, addressed to the Court, to apply to these deeds: when it was contended that the transaction should be sustained as a compromise. To say nothing of there being no distinct transaction intended to compose the whole right, but a mere succession of very advantageous purchases, from an improvident husband, in derogation of his wife's rights—(rights peculiarly favored in this Court, which, in creating, certainly intended to protect them)—it would be very absurd, if the Court should hold the husband to have more power to compromise away his wife's property, than to make a bona fide sale of it; or that the wife had more capacity to assent to the one mode of depriving herself of it than to the other.

All the different grounds which I have examined having failed, in my opinion, to bar or extinguish the plaintiff's right by survivorship: her remainder accrued to her on the death of her mother in December, 1847, and she became the owner of the slaves.

She was then discoverd, and so remains. But then a transaction took place, which is supposed to have transferred all her rights from her to Wyatt Holmes and John Jones, two of the defendants.

On the 9th of June, 1848, these parties visited the plaintiff, then living in great destitution, in the skirts of Columbus, Geor-

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*gia, and obtained a deed conveying to them the whole stock of slaves, "which slaves," it is recited, "were in the hands of Rachel Holloway, as a life estate; and also have been the subject of litigation in the Court of Equity, (v) in Edgefield district, S. C., between James Reese, now deceased, against Rachel Holloway, now deceased, and others, and by having reference to the Commissioner's office, it will fully appear, that said writ was filed the 1st Monday in June, 1821." The conveyance was for a consideration of one thousand, (accidentally omitting the word dollars.) It appears that the thousand dollars consisted of \$500 paid by John Jones in cash, and Holmes' note (as good as cash) for \$500. It contains full warranties.

This deed is exhibited in the answers.

On the 19th of the same month, (June, 1848,) Holmes returned again, and got another deed to himself and Jones, more perfectly reciting the consideration, and more perfectly embracing, with the twenty negroes,

(v) At which time they amounted to twenty. The twenty, with the increase from the date of that suit, were conveyed in this deed.

for which suit was brought in 1821, their increase, "whether heretofore born, or hereafter to be born." In referring to the suit of 1821, it is described to have been brought "by the said James Reese, and me, the said Lucy B. Reese, as plaintiffs." It also contains full warranties, and in all respects except those named, has the same legal effect as the previous deed of the 9th of the same month, and is exhibited.

The stock of negroes thus sold were twenty in 1821, with the increase of the twenty-seven years which had intervened; and from the answers, must have been between 50 and 100, more approximating the latter number. Now, if Mrs. Reese had, without any other circumstances, sold such a property as that for \$1,000, the inference that she was either imbecile, or imposed upon, would be too strong, in any rightly constituted mind, to permit the transaction to pass off without the deepest reprehension, unless defended and explained by plenary—very plenary—proof of fairness and open dealing. I am not in-

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sensible to the value of *contracts. I am not less sensible of the sanctity of property rights. This Court, above all things, esteems fair dealing. It will not allow a contract to be impugned if fair; nor allow it to stand if unfair. Nor will it allow any person to be stripped of his rights, in his property, by a contract, *prima facie* unconscientious, like this—unless it be proved to have been the purely voluntary act of the party against whom it operates, deliberately performed upon full information, with a full understanding of his rights, and without misrepresentation, concealment, or other circumstances tending to surprise him, impose upon him, or take advantage of any mistake under which he may labor.

Now, I think, the defendants who took these deeds, have not upheld them by the clear and indubitable proof of fairness, required in such cases—cases where the transaction itself, stands, *prima facie*, colored with the imputation of fraud.

But, when I consider the condition of the woman—destitute, ignorant, deaf, bed-ridden, bowed down with age: that she had not the advantage of proper advice or counsel—the impression of either utter imbecility, or imposition, of which the transaction raises the presumption, is strengthened. The difference among the witnesses is decided, not only by inherent evidence of mistake, arising from the gross disproportion between price and property, but by this condition of the plaintiff, as to which there is a strong preponderance of evidence.

The nature of her right required good advice: and she had none. Did she know—was she made to understand—or is there proof from which we must infer that she did understand, that her mother's death gave her this valuable property? Was its value and

condition explained to her? Did the life-tenants offer her an unconditional surrender of it? Was she aware of the invalidity of her husband's deeds or her own? Were those deeds given up, and she told that she was free? Was she told that, as "widow of James Reese," who is stated in the first deed to have brought the suit, she was not restricted to a widow's rights in the property, treating it as his, under the decree of 1822; or what quan-

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tity of right she took under that *judgment, she being considered a party to it, as stated in the second deed? Did not the reference to the suit serve to bewilder, instead of enlighten her, in regard to her rights? She was entitled to the whole remainder, and the deeds, to which the defendants tenaciously held on, were no incumbrances on her right; and if they did not wish to take advantage of her, why did they still raise a pretension under those deeds? If they wished to buy her remainder, it would have been open and fair dealing to call it what it was, and let her understand that it was her remainder that she was selling and conveying away, under the specious but deceptive description of "all her right, title and interest."

Again, I cannot believe that, if the deeds were read to her, she heard, at least so as to understand them. As to the fact of her mother's death, if it was stated before the execution of the instrument, it is clear to my mind she cannot have heard it, or did not understand its effects; if she had this information and knowledge, her conduct is unaccountable. Why should she, in her necessitous condition, voluntarily give her property away from herself and children, to strangers, to whom there is no reason to believe she sustained any friendly relations?

Then, again, as to the second deed, which, it is said, was a fair confirmation of her first: it must be observed, that a confirmation is not effectual until a party is released from prior obligations, and made free to confirm or not confirm. The first deed purported to be effectual and binding on her; was that given back?

I have said nothing of the relation of life tenant and remainder, which, if she was not made aware of her mother's death, she still must have supposed to exist; and the same consequences attended the transaction, as if Mrs. Holloway was still alive. These consequences are stated with great power by Chancellor Harper, in *Good v. Harper*, 10 H. Eq. 42. Indeed, the mere death of Mrs. Holloway did not terminate that relation as

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*between the defendants and the plaintiff; and nothing could but a fair execution of the trust, implied in the relation, by a surrender of the property.

I had almost omitted to notice these deeds in the light of a compromise; in which light, it was argued, they were entitled to special

favor. But, independently of the want of sufficient evidence that they were so intended, and apart from the fact that, on their face, they do not purport to be such—the conflicting rights not being stated or described—they are still obnoxious to the charge of unfairness, and a want of deliberation; and are, therefore, not the well understood act which a compromise must be.

The plaintiff is entitled to have these deeds surrendered up and cancelled, upon the terms to which she has consented in the bill and at the hearing, i. e., that the note of Holmes, which was tendered in Court, be delivered to him; and that the amount of \$500, paid by Jones, with interest, be discounted out of the hire of the slaves.

The last point made in the case was, that this is not a fit case for the exercise of the jurisdiction established, generally, in *Young v. Burton*, McM. Eq. 255.

It was proved, in this case, that the defendants are of ability to answer, in damages, at law, for the full value of the slaves and their hire; and it was insisted, that the very principle upon which the jurisdiction to compel a specific delivery of slaves was established, would be trampled on, if a delivery were decreed in this case. It was argued, that associations have grown up between the defendants and the slaves, in the long course of years during which they have been in possession—associations of the very character which induced the Court to assume the exercise of its power, in the cases in which it has exercised it; while, on the other hand, if such sympathies ever existed in the breast of the plaintiff, they must, long ago, have either died out, or become much subdued; and probably have no counterpart among the slaves, or any of them.

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*It was at my instance that such topics as these were reserved in the judgment given in *Young v. Burton*, and again in *Simms v. Shelton*, 2 Strob. Eq. 221. But it is obvious that attachments must spring up in all cases of life tenancy; and if these are allowed to obstruct the enjoyment of the remainderman, it might as well be declared, at once, that no remainderman is entitled to a specific delivery. He, and his feelings and rights, are to be postponed to the feelings of the life tenant; and the jurisdiction becomes valueless to him.

The defendants are no longer the owners of the slaves. The plaintiff is. She desires the use and enjoyment of them. That is implied in her bill. In what respect is the plaintiff less entitled, than if she had purchased the slaves, for her own use, from the defendants, and they had afterwards repented and refused to deliver? Yet in that case, it is said, a delivery would be decreed; and such a case is frequently put as an illustration of the value of the jurisdiction.

Besides, this plaintiff is demanding a stock of negroes once belonging to her father, and given by him to her, in the last moments of his life. She may possibly have no knowledge of the negroes now living. But it is one of the best attributes of our nature, that we value every thing that we can associate with the memories of departed parents; and, perhaps, the longer we have lost them, the dearer do these relics become to us.

It is a circumstance, too, to be noticed, that *Horry v. Glover*, 2 Hill Eq. 515, one of the cases in which this jurisdiction was exercised, was a case of remainder-man against life tenants: and perhaps the feature of implied trust, existing in all such cases, may help to the jurisdiction, instead of obstructing it.

If, however, the impediment suggested were allowed to prevent a decree for delivery in this case, would it follow that the bill should be dismissed? A general jurisdiction having been established, giving the plaintiff

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a right to come here: if an impediment be shown to the exercise of jurisdiction in one form, may not the Court retain the bill, and give relief in another?

It is decreed, that the defendants, John Jones and Wyett Holmes, deliver up the deeds, executed by the plaintiff to them, or the 9th and 19th of June, 1848, and mentioned in the pleadings, and that the same be wholly set aside and cancelled; and that the note of Wyett Holmes, also mentioned in the pleadings, and which was tendered in Court, be cancelled and delivered to him.

That the defendants (with the exception of those as to whom the bill has been dismissed) do, respectively, deliver to the plaintiff such of the stock of negroes, Jenny and Edie, and their increase, as they were in possession of at the filing of this bill, and as are now alive, (including all increase since the filing of the bill, that are now alive,) and account for the hire of the same, since the death of Rachel Holloway, for such time as they have, respectively, had the possession of the same.

That they do, respectively, account for the value of such slaves, of said stock, as they may have had the possession of, and alienated during the life of said Rachel, in all cases where the slaves so alienated survived the said Rachel; and that they be charged with interest upon the value of said slaves, from the death of said Rachel.

That they do, respectively, account for the value of such of said stock of negroes as have died in their possession since the filing of the bill; with hire for such portion of time, between the death of said Rachel and the death of said slaves, respectively, as they had them in possession; and interest on their value afterwards. (cc)

That they do, respectively, account for the

(cc) [*Fraser v. McClenaghan*] 2 Strob. Eq. 229; [*Watson v. Kennedy*] 3 Id. 1.

value of such of said stock of negroes as they alienated between the death of said Rachel and filing of the bill; with hire for such portion of said time as they had possession; and interest after the alienation.

That the sum of five hundred dollars, paid

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by John Jones, *as in the pleadings mentioned, with interest on the same from the time of said payment, be set off (as consented by the plaintiff) against such sum as may be chargeable to said John, on said accounting; and, if there be a balance in his favor, that the same be allowed to him.

That the Commissioner do inquire the names and value of such slaves as may have died in the possession of any of said defendants, respectively, between the death of said Rachel and the filing of the bill, and report the same to the Court, for its judgment, (which is hereby reserved,) whether the value of said slaves should be accounted for, and, if so, whether with or without hire or interest.

It is further ordered, that the matters of account, as aforesaid, be referred to the Commissioner, to report thereon; with leave to report any special matter.

And that he do inquire and report the names, ages and condition and value of the said stock of negroes, and which of them the several defendants are, by the foregoing decree, bound to deliver; and for which of them they are bound to account as aforesaid.

Also, that the parties be at liberty to apply for any further orders, necessary to carry this decree into effect, or that may become necessary in the cause.

Also, ordered, that all questions touching the decree, proper to be made between the defendants, (which questions have not been heard,) be reserved for hearing; and also all questions in this case, not hereby decided and embraced in the foregoing decree.

Ordered, that the defendants pay the cost of this suit.

The defendants, except those as to whom the bill was dismissed, appealed, on the grounds:

Because, from the whole case made by the pleadings, and evidence on both sides, the plaintiff was not, by the rules of Law and Equity applicable to the case, and the principles on which this Court exercises jurisdiction,

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entitled to any relief in *this Court, and the plaintiff's bill should therefore have been dismissed; and they endeavored to maintain,

1. That the marital rights of John West, the plaintiff's first husband, attached upon the stock negroes, Jenny and Edie, mentioned in the bill.

2. That the marital rights of James Reese, plaintiff's second husband, attached to said negroes while they were in Virginia, and before their removal to this State.

3. That the negro woman, Jenny, having

been bequeathed to Sally Williams, the plaintiff's sister, was not, in the partition had under the Virginia proceedings, in the Court of Brunswick County, assigned to Rachel Williams for life only, but in fee absolutely; and that the record of said proceeds, by a proper construction, conferred upon Rachel Holloway an absolute title to the said negroes, Jenny and her child, Edie.

4. That Rachel Holloway, being at the commencement, and continuing until the termination of the proceedings in Court, in Brunswick County, Virginia, a married woman, was not bound or concluded by any erroneous statements or omissions of fact in the bill there filed, or the proceedings had under it.

5. That the marital rights of James Reese, supposing them not to have attached in Virginia, had attached here, to the said Jenny and Edie, and their increase, at the time he executed the deeds to the defendants, respectively, as set forth in their answers:—and, to sustain this view, the defendants relied upon the forfeiture, by Rachel Holloway, of her life estate.

6. That the plaintiff was barred by the statute of limitations, which commenced to run as early, at least, as 1819.

7. That the deeds made by James Reese, and by him and wife, were good and valid transfers to the defendants, of the slaves in question, and formed a legal and equitable bar to the plaintiff's right of recovery.

8. That the deeds executed by the plaintiff to the defendants, Holmes and Jones, in June, 1848, were valid, and should have been sustained by the Court, as in bar of the plaintiff's right of recovery.

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*9. That the plaintiff's claim is ancient and stale, and rests by the decree of the Court upon facts doubtful, obscure, and imperfectly proved, and upon old records of equivocal construction, and therefore should have been rejected, and her bill dismissed, and that the deeds of James Reese and wife should have been upheld and sustained by the Court, as a family compromise of doubtful rights.

10. That the plaintiff having become sui juris by the death of her husband, Reese, in 1837, and having then full knowledge that the defendants held the possession of the negroes as absolute owners, and not as trustees for her in remainder, was barred of her right to recover by the statute of limitations, previous to the death of her mother, Rachel Holloway, in 1847.

11. That the decree is erroneous, in referring for support, in the decision of a question of fact, to the character of the contents of a paper not received in evidence, but rejected by the Court, upon the hearing of the cause.

12. That the decree is erroneous, in holding the defendants accountable for the value

of the negroes sued for, and which were in the possession of the defendants at the filing of the bill, but have died since, during the pending of the suit.

13. That the decree is erroneous, in ordering the specific delivery of the slaves; and it was submitted, that under the circumstances of this case, the Court had no jurisdiction to grant the relief prayed for; and that the plaintiff, if she had any rights, should have asserted them in another jurisdiction, where she had a plain and adequate remedy.

Bauskett, Griffin, Carroll, for defendant .
Snead, Miller, for plaintiff.

PER CURIAM. We concur in the decree; and it is ordered, that the same be affirmed; and that the appeal be dismissed.

JOHNSTON, DUNKIN and DARGAN, CC.,
concurring.

WARDLAW, Ch., having been of counsel,
did not hear the appeal.

Decree affirmed.

